STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 11-0417 and 11-0794 (Wood County 10-F-8)

Shawn J. Bailey,
Defendant Below, Petitioner

FILED
March 9, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Shawn Bailey, by counsel, Michele Rusen, appeals his convictions on three counts of first degree sexual abuse and one count of sexual abuse by a custodian. Respondent State of West Virginia, by counsel, Michele Duncan Bishop, has filed a response brief.

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 substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

In January of 2010, petitioner (defendant below), Shawn Bailey, was indicted on three counts of first degree sexual abuse in violation of West Virginia Code §61-8B-12 and one count of sexual abuse by a custodian in violation of West Virginia Code §61-8D-5. Following a two-day trial, the jury found petitioner guilty on all four counts. The charges arose from incidents involving petitioner's fourteen-year-old female cousin, A.N.M.[1] ("the victim").

Facts

On the evening of April 30, 2009, the victim was in the care of petitioner and his wife at their home with the permission of the victim's mother, who was at work. The victim testified at trial that

[1] The Court uses only initials to protect the privacy of the minor child.

on the night in question, she accepted the invitation of petitioner, who had been drinking beer that evening,[2] to walk with him in a field to the rear of petitioner's house.

The victim's trial testimony reflects that during this walk and at petitioner's suggestion, she undressed to her underwear and a tank top while petitioner undressed to his underwear.[3] She further testified that they began to "slow dance" during which petitioner was "grabbing [the victim's] butt" and pulling her to him which caused her to feel "[h]is privates[4] and it was hard on my like hip bone." The victim further testified that petitioner asked her to lean over and touch her toes at which point petitioner held her hips and rubbed her genitals with his hand in a wiping motion. The victim testified that during their walk, they discussed her concern that she was fat to which petitioner responded that "he was fat somewhere" and attempted to pull her hand toward him "down low"—below his waist but above his knees. When asked at trial why she did what petitioner asked that evening, the victim responded "because I trusted him. . . . [h]e's my cousin."

The victim testified that although petitioner told her not to tell anyone what happened because he could "get in trouble," she told her best friend the next day. The victim's mother eventually learned of the incident[5] and made a complaint with the Wood County Sheriff's Department. An investigation ensued that resulted in criminal charges being brought against petitioner.

At trial, petitioner's wife testified that she was in their home on the evening in question tending to household chores, including cleaning the kitchen after dinner and seeing that their four children[6] were ready for bed. She also testified that petitioner and the victim never left their yard for any period of time; that she saw petitioner and the victim sitting in their back yard; and that by 11:00 p.m. everyone was inside the house. Petitioner's wife further testified that she would never have stayed with petitioner if she thought he had done these things to the victim.

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[2] Petitioner's wife estimated that petitioner consumed maybe six or seven beers that evening, although she was aware that petitioner had told a deputy sheriff that he thought he had consumed four or five beers that evening.

[3] Petitioner contends that there were discrepancies between the victim's trial testimony and her testimony at a preliminary hearing as to whether petitioner was wearing "boxers" or whether he was completely naked.

[4]The victim testified that by "privates" she meant the "part on the body on a man that he uses to go [to] the bathroom."

[5] It appears from the record that it was the victim's older sister who informed their mother of the incident.

[6] The four children are petitioner's two minor daughters from a prior relationship and his two minor sons by his wife.

The jury returned a verdict finding petitioner guilty of three counts of first degree sexual abuse and one count of sexual abuse by a custodian. The trial court denied petitioner's motion for a new trial by order entered September 2, 2010, which is the subject of Case No. 11-0417. The trial court sentenced petitioner to three concurrent terms of one to five years in prison on the three convictions of first degree sexual abuse and to a consecutive term of ten to twenty-five years in prison for the sexual abuse by a custodian conviction. The trial court suspended the sentences and placed petitioner on probation for three years, the first of which is to be served on home confinement, followed by supervised release for an additional twenty years.

Following sentencing, petitioner renewed his motion for a new trial on the basis that assistant prosecutor Joseph Troisi, who prosecuted him, had previously represented Melissa S., the mother of petitioner's two minor daughters, in her unsuccessful appeal in an abuse and neglect proceeding five years earlier (petitioner states that he was the non-abusing parent in that proceeding). Petitioner argued that assistant prosecutor Troisi should have brought this conflict to his and the trial court's attention. Petitioner's counsel states that while she represented petitioner in that same proceeding, given the passage of time, she did not recall assistant prosecutor Troisi's involvement until after sentencing. Petitioner states that during his prosecution, a motion to modify custody was filed by Melissa S., who stood to benefit if petitioner were convicted of the instant crimes.

A hearing was held on petitioner's renewed and amended motion for a new trial. The trial court noted that the victim in the case-at-bar was not a party to the earlier custody matter; that it did not see where assistant prosecutor Troisi could have obtained any evidence that would be used detrimentally in the prosecution of petitioner; that there was no evidence of animosity, financial interest, kinship, or close friendship that would call into question the objectivity and impartiality of assistant prosecutor Troisi in his duties as an assistant prosecutor; and that prosecutorial duties are very different from those of an appellate counsel in an abuse and neglect (custody) proceeding. The trial court denied the motion for a new trial by order entered April 15, 2011, which prompted the second petition for appeal in this matter, Case No. 11-0794.

Alleged Prosecutorial Misconduct

Petitioner states that during rebuttal closing argument, assistant prosecutor Troisi argued as follows:

> One can also reasonably sympathize with [the victim]. I do not ask you for sympathy for [the victim]. Quite frankly, I do not ask you for sympathy for [the victim]. Quite frankly, [the victim] does not need your sympathy. On her behalf, however, I not only ask you, I demand from you, to do justice. Not one jot more but not one jot less.
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> You hear it, sometimes it is very loud. The country is a mess, were [sic] going to ruin, families are falling apart, our culture is falling apart, our values are falling apart,

> the courts fail us, the system is broke, it doesn't work. Ladies and gentlemen, here and now you are the system. The Court does not have the power to do justice for [the victim] in this case, nor do I, nor does defense counsel. The power to do justice or not is with you. If [the victim's] telling the truth Mr. Bailey is guilty. The evidence overwhelmingly supports one conclusion. [The victim] told us the truth.

Petitioner asserts that these remarks came at the end of the State's rebuttal argument making it impossible for him to meaningfully respond and that an objection would likely have been of little consequence. Petitioner concedes that the remarks were not extensive, but he contends that they were nonetheless persuasive. Relying upon syllabus point 7 of *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996), petitioner argues that because his counsel did not object to these comments, it is plain error warranting a reversal of his convictions because the comments were designed to inflame, prejudice, or mislead the jury by focusing on matters outside the evidence.

"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." Syl. Pt. 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995). "To affect substantial rights means the error was prejudicial. It must have affected the outcome of the proceedings in the circuit court, and the defendant rather than the prosecutor bears the burden of persuasion with respect to prejudice." *Id.* at Syl. Pt. 9, in part. Here, petitioner did not show any of the factors necessary to establish plain error. Further, this Court agrees with the State that the comments were brief, isolated, and emphasized the jury's duty to evaluate the victim's credibility. Having reviewed the record and the briefs on appeal, this Court finds that petitioner has not met his burden of establishing plain error.

Alleged Disqualification of Prosecutor

Petitioner asserts that because Melissa S. stood to regain custody of their two daughters if petitioner were convicted in the case-at-bar, her interest was adverse to his, which should have disqualified assistant prosecutor Troisi from prosecuting petitioner's case. Petitioner argues that when assistant prosecutor Troisi served as appellate counsel for Melissa S., he was privy to information concerning petitioner. Petitioner contends that there were other attorneys in the Prosecutor's Office available to prosecute his case. Petitioner asserts that the trial court erred by denying his motion for a new trial on the basis that assistant prosecutor Troisi's participation created an appearance of impropriety that reduced confidence in the judicial system.

"'Prosecutorial disqualification can be divided into two major categories. The first is where the prosecutor has had some attorney-client relationship with the parties involved whereby he obtained privileged information that may be adverse to the defendant's interest in regard to the pending criminal charges. A second category is where the prosecutor has some direct personal interest arising from animosity, a financial interest, kinship, or close friendship such that his objectivity and impartiality are called into question.' Syllabus Point 1, *Nicholas v. Sammons*, 178

W.Va. 631, 363 S.E.2d 516 (1987)." Syl. Pt. 2, *State v. Keenan*, 213 W.Va. 557, 584 S.E.2d 191 (2003) (per curiam).

Petitioner has made no showing that assistant prosecutor Troisi either acquired privileged information that was adverse to petitioner's interests in the case-at-bar or had any direct personal interest such as described in *Keenan.* Further, it is unclear from the record and the briefs before this Court whether assistant prosecutor Troisi was even aware that he had a client five years earlier (Melissa S.) who might have had an interest in the criminal proceedings.[7] "[W]hether a trial court should disqualify a prosecutor, or his office, from prosecuting a criminal defendant is reviewed under an abuse of discretion standard." *Id*. at 561, 584 S.E.2d at 195 (citation omitted). Based upon the record and arguments before this Court, we find that the trial court did not abuse its discretion in this regard.

Alleged Ineffective Assistance of Counsel

Petitioner asserts that his trial counsel ineffectively represented him to the extent that counsel failed to preserve error by contemporaneously objecting to prosecutorial misconduct during closing argument and by failing to discover the basis for the disqualification of assistant prosecutor Troisi. While petitioner's appellate counsel, who also served as his trial counsel, claims that she was ineffective, her opinion is not a substitute for a judicial proceeding to evaluate her effectiveness as petitioner's legal counsel. Although petitioner asserts that the trial court ruled on this issue, the record reflects the trial judge's statement that the ineffective assistance of counsel claim "is **not** an issue we deal with today . . . ." (Emphasis added). Although the trial judge also stated, "I don't believe *from what we have before us* it, in any way, changed the outcome of the case . . ." (emphasis added), this comment reflects that such claims are more appropriate for a post-conviction habeas proceeding where the issue can be thoroughly explored and ruled upon.

Our ability to review a claim of ineffective assistance of counsel is very limited on direct appeal. As we have previously stated, such a claim is more appropriately developed in a petition for writ of habeas corpus. Syl. Pt. 11, *State v. Garrett*, 195 W.Va. 630, 466 S.E.2d 481 (1995); Syl. Pt. 10, *State v. Triplett*, 187 W.Va. 760, 421 S.E.2d 511 (1992). Accordingly, we decline to rule on any claims of ineffective assistance of counsel in the context of this direct appeal. If petitioner desires, he may pursue a petition for writ of post-conviction habeas corpus. We express no opinion on the merits of petitioner's ineffective assistance claims or of any habeas petition.

Alleged Evidentiary Error

[7] While petitioner also suggests that assistant prosecutor Troisi failed to use reasonable efforts to investigate whether conflicts of interest were present, it is unclear from the record whether a review of either the records in the Prosecutor's Office or assistant prosecutor Troisi's private records would have revealed a connection between petitioner and Melissa S. particularly where, as the State represents, petitioner and Melissa S. do not share the same last name.

Petitioner asserts that the trial court erroneously refused to allow him to elicit relevant evidence that the victim was suspended from school for an altercation on the same day that she gave her statement concerning petitioner to the Wood County Sheriff's Department. Petitioner contends that such evidence would have impacted the victim's credibility and that the trial court's erroneous ruling was compounded by assistant prosecutor Troisi's closing argument that the defense had offered no reason for the jury to believe that the victim was lying.

The State asserts that while petitioner argued below that the victim reported that she had been sexually abused as perhaps a means of drawing attention away from, or providing an excuse for, her suspension from school, the victim's best friend testified at trial that the victim told her about the sexual abuse the day after it happened, which was weeks before the school altercation. The State also asserts that to the extent petitioner wanted to admit evidence concerning the school suspension to show that the victim was the "sort of girl" who would act in a certain way, such character evidence is not admissible under Rule 404(a) of the West Virginia Rules of Evidence for the purpose of proving that a person acted in conformity therewith on a particular occasion.

"The West Virginia Rules of Evidence . . . allocate significant discretion to the trial court in making evidentiary . . . rulings. Thus, rulings on the admissibility of evidence . . . are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary . . . rulings of the circuit court under an abuse of discretion standard. (Citations omitted)." Syl. Pt. 7, *State v. McCartney*, — W.Va. —, 719 S.E.2d 785 (2011). The record reflects that the trial court considered the arguments of counsel on this issue and its conclusion that the evidence was not relevant and that the probative value of such evidence, if any, was outweighed by its prejudicial effect. Rule 403, W.V.R.E. This Court agrees and finds no abuse of discretion in this evidentiary ruling.

Sufficiency of the Evidence

Petitioner asserts that a careful review of the evidence at trial reflects the inconsistent and confusing testimony of the victim, which makes her trial testimony inherently unreliable and insufficient to allow his convictions to stand.[8] The State argues that defense counsel repeatedly attacked the victim's trial testimony on minor inconsistencies that the victim adequately explained.

This Court has held that "'[t]he function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.' Syl. pt. 1, *State v. Guthrie*,

[8] In petitioner's brief filed in Case No. 11-0417, he raised as an issue that the trial court erred in allowing the State to lead the victim during redirect examination. Because petitioner does not set forth any argument on this issue, we do not address the same.

194 W.Va. 657, 461 S.E.2d 163 (1995)." Syl. Pt. 1, *State v. McFarland*, No. 101413, 2011 WL 5902232 (W.Va. Nov. 23, 2011). This Court has also held:

> 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 assessments 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. To the extent that our prior cases are inconsistent, they are expressly overruled. Syl. pt. 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Syl. Pt. 2, *McFarland*, No. 101413, 2011 WL 5902232. Having applied this standard of review to the evidence adduced at trial, we believe there was sufficient evidence to support petitioner's convictions.[9]

For all of the foregoing reasons, we affirm.

Affirmed.

ISSUED: March 9, 2012

CONCURRED IN BY:

Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum dissents because the assistant prosecutor's closing argument constituted prejudicial error and because the assistant prosecutor should have been disqualified and a new trial granted.

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[9] Petitioner also argues that based upon the cumulative alleged errors discussed in his briefs filed with this Court, his convictions and sentencing should be reversed. Because we have found no error in this case as alleged by petitioner, we decline to address his claim of cumulative error.