State of West Virginia
Supreme Court of Appeals

State of West Virginia
Plaintiff below, Respondent

vs.) No. 11-0419 (Tyler County 10-MAP-1&2)

Donald Ray Rice, Jr.
Defendant below, Petitioner

FILED
September 13, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner appeals the Circuit Court of Tyler County's denial of his appeal from his conviction in magistrate court of one count of second offense domestic battery and fleeing an officer. Petitioner was sentenced to two ninety day jail terms for these offenses, which were ordered to run concurrently. The appeal was timely perfected by counsel, with the complete record from the circuit court accompanying the petition.

This Court has considered the petition 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 petition and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review 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.

The petitioner challenges the circuit court's order denying the appeal of his magistrate court conviction, arguing that the evidence was insufficient to support a conviction for either offense with which he was charged. "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*." Syl. Pt. 4, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996). Further, this Court has held that "[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995). As for the petitioner's specific sufficiency of the evidence claims, this Court has held that "[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). "The 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, *Id*.

To begin, petitioner argues that there was no evidence introduced at trial that shows that Melanie Rice, the alleged victim, was subjected to domestic battery. He argues that the prosecution's eyewitnesses did not identify her as the victim in court, and that they did not identify him as the perpetrator to the extent that he could be found guilty beyond a reasonable doubt. Petitioner also argues that the victim herself testified that he did not make physical contact with her. He also argues that even if he had made physical contact with the victim, such contact would have to be viewed subjectively from the victim's perspective in order to determine if it constitutes insulting or provoking physical contact. Petitioner's argument fails to accurately represent both the evidence presented at trial and the elements of domestic battery. Two eyewitnesses identified the petitioner, in open court, as the individual they witnessed striking the victim. Robert Tippins testified that he saw the victim on his way into the courtroom, and specifically identified petitioner at trial as the individual he witnessed perpetrate the battery in the presence of the jury. Further, witness Brandi Day testified that she would recognize the perpetrator if she saw him again and then specifically identified the petitioner as the perpetrator.

As for the victim's testimony, it is unnecessary for her to have testified to her subjective perception of the physical contact because the statute at issue does not require such an analysis. Specifically, the statute under which petitioner was convicted states that "[a]ny person who unlawfully and intentionally makes physical contact of an insulting or provoking nature with his or her family or household member or unlawfully and intentionally causes physical harm to his or her family or household member, is guilty of a misdemeanor." W. Va. Code § 61-2-28(a). We have not held that the determination of what constitutes insulting or provoking contact must be made subjectively from the victim's perspective. Further, while it is true that the victim testified that no physical contact was made, two other

eyewitnesses provided conflicting testimony. The jury is to make such credibility judgments, not an appellate court. As such, we conclude that there was sufficient evidence to support the petitioner's conviction for domestic battery.

Petitioner next argues that there was insufficient evidence to support his conviction for fleeing an officer. Petitioner argues that he cannot be found guilty of this crime because the officer in question did not clearly state that he was attempting to arrest the petitioner, and further because it was not established that the petitioner even heard the officer or knew he was in the home. West Virginia Code § 61-5-17(d) states that "[a]ny person who intentionally flees or attempts to flee by any means other than the use of a vehicle from any law-enforcement officer, probation officer or parole officer acting in his or her official capacity who is attempting to make a lawful arrest of the person, and who knows or reasonably believes that the officer is attempting to arrest him or her, is guilty of a misdemeanor." The testimony of Deputy Joseph Richardson established that he saw the petitioner when he entered the dwelling, noticed petitioner was headed for the back door and called out for him to stop. The petitioner exited the home despite this order, and Deputy Richardson confirmed that the man he saw fleeing the scene was in fact the petitioner. Based upon our prior precedent, this is sufficient to satisfy the elements of fleeing an officer.

In *State v. Pannell*, we upheld a conviction for fleeing an officer based solely on the defendant having exited a vehicle and run on foot after observing a patrol car turn around to follow him. The officer noticed two men in a vehicle matching the description of armed robbery suspects and turned to engage them; by the time the officer reached the car, the defendant was nowhere in sight. *State v. Pannell*, 225 W.Va. 743, 746, 696 S.E.2d 45, 48 (2010). In that case, the officer did not engage his lights and sirens, nor did he provide any verbal directions to the defendant or otherwise indicate that he intended to arrest him. However, we held that as soon as the defendant exited and abandoned his vehicle, after having observed the officer turn around, the defendant was engaged in fleeing within the meaning of West Virginia Code § 61-5-17(d). *Id*. at 752, 54. As such, the record in the present matter clearly establishes that the jury was presented with sufficient evidence so that any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

For the foregoing reasons, we find no error in the decision of the circuit court and the conviction is hereby affirmed.

Affirmed.

ISSUED: September 13, 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