STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 11-0436 (Cabell County 06-F-129)

Cherylethia Holmes, a/k/a/ Bunny Holmes,
Defendant Below, Petitioner

FILED
November 10, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Cherylethia "Bunny" Holmes appeals her conviction for First Degree Murder as an Accessory Before the Fact. Respondent State of West Virginia has filed a response brief.

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. 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.

Petitioner, who is from Detroit, sold illegal drugs from her house in Huntington. The murder victim, Wendy Morgan, used a room in petitioner's house for purposes of drug use and prostitution. Witnesses testified that Morgan stole drugs and money from petitioner's house and, in retaliation, petitioner ordered that Morgan be killed. The State presented evidence that approximately one month after the theft, Morgan was shot and killed by Cedeal Harper and Rafelle Harris. Harper and Harris were involved with petitioner in the illegal drug operation. Petitioner testified in her own defense and, while she admitted selling drugs, she denied ordering that Morgan be killed.

The jury found petitioner guilty of First Degree Murder as an Accessory Before the Fact with a recommendation of mercy. She was sentenced to life in prison with the possibility of parole.

I.

In her first assignment of error, petitioner asserts that the circuit court abused its discretion when it failed to declare a mistrial after one of the State's witnesses gave opinion testimony that petitioner had ordered other murders. State's witness Larry Clark was one of petitioner's drug customers. Clark testified that he witnessed petitioner tell Cedeal Harper and some of petitioner's other associates that Wendy Morgan had stolen drugs and they "had better do something with that [expletive]." Clark also testified that petitioner offered him $1,500 to have Morgan killed. During cross-examination, defense counsel elicited that Clark was a drug addict and might be considered by others to be a "crackhead." The following exchange then occurred:

> Q [defense counsel]. So, this big drug dealer from Detroit is going to offer a crackhead Fifteen Hundred Dollars for him to kill somebody?
>
> A [Clark]. Apparently she has offered a lot of people money to kill people, you know.
>
> Q. Have you been told to say that here?
>
> A. No, I am telling you that I know what happened; that I was there. I have no doubt in my mind she ordered that woman's murder, and I have no doubt in my mind that she ordered four other kids' in this town.

The court granted a motion to strike this answer and instructed, "[t]he jury will disregard those statements. Just don't make any statements like that. The jury will disregard that answer." Defense counsel then requested a bench conference and moved for a mistrial. The court denied the motion for mistrial, finding that this exchange did not meet the manifest necessity test. The court further instructed the jury:

> Okay. Ladies and Gentlemen of the jury, the last answer the witness gave was not really responsive to the question that was asked. And, so, you are to disregard the answer that he gave to that last question. You are not to bring it up in the discussions. You are to totally forget the answer that he volunteered in that matter, and I have instructed him just to answer the questions that's asked by the attorneys and not to volunteer anything.
>
> So, the statement that he made was purely an opinion. I don't know if all of you even caught what it was said, but you are – it's an opinion without any basis whatsoever. And you are totally to disregard that part of the answer.

Petitioner argues that she was on trial only for the murder of Wendy Morgan, not for the "four kids" alleged to have been killed in a separate incident. Petitioner argues that there was no possibility that the jury could be impartial and disregard such testimony. The State argues that the testimony was invited by defense counsel's questions. Defense counsel had asked the witness if petitioner would offer him money to kill "somebody[,]" and then counsel challenged the witness's response to that question. The State argues that the witness was giving an example of an instance where he believed that petitioner had shown herself to be a person who would offer money to kill "somebody." "Where inadmissible evidence is introduced solely as a result of the rigorous examination of the complaining party, the error is deemed invited error." *State v. Crabtree*, 198 W.Va. 620, 627, 482 S.E.2d 605, 612 (1996) (citations omitted). The State argues that even if the testimony was not invited by the defense, then the curative instructions were sufficient such that the trial court did not err by refusing to grant a mistrial.

We consider the appeal of the denial of a motion for mistrial under an abuse of discretion standard. "The decision to declare a mistrial, discharge the jury, and order a new trial in a criminal case is a matter within the sound discretion of the trial court." Syl. Pt. 8, *State v. Davis*, 182 W.Va. 482, 388 S.E.2d 508 (1989). "A trial court is empowered to exercise this discretion only when there is a 'manifest necessity' for discharging the jury before it has rendered its verdict. W.Va. Code § 62-3-7 (1977 Replacement Vol.)." *State v. Williams*, 172 W.Va. 295, 304, 305 S.E.2d 251, 260 (1983). Moreover, the circuit court gave a curative instruction. "Ordinarily where objections to questions or evidence by a party are sustained by the trial court during the trial and the jury instructed not to consider such matter, it will not constitute reversible error." Syl. Pt. 18, *State v. Hamric*, 151 W.Va. 1, 151 S.E.2d 252 (1966). Upon a consideration of the record, the parties' arguments, and the standard of review, we conclude that the circuit court did not abuse its discretion in denying the motion and giving the curative instruction.

II.

In her second assignment of error, petitioner argues that the circuit court erred by denying her motion for change of venue. Petitioner argues that her case generated extensive publicity in Cabell County and, through the presentation of polling data, she met her burden of showing good cause to change the venue. The State responds that the circuit court excused any potential juror who had a possible preconceived notion of guilt and the court was still able to seat a jury. We apply an abuse of discretion standard of review to appeals of orders denying a criminal defendant's motion for change of venue. Syl. Pt. 2, *State v. Wooldridge*, 129 W.Va. 448, 40 S.E.2d 899 (1946); Syl. Pt. 6, *State v. Black*, 227 W.Va. 297, 708 S.E.2d 491 (2010). Upon a review of the record and arguments of the parties, we find no abuse of discretion in the court's denial of petitioner's motion for a change of venue.

III.

In her third assignment of error, petitioner argues that the circuit judge made a comment that exhibited bias and prejudice. During the sentencing hearing, the judge commented that Huntington has had a lot of problems with drugs coming from Detroit; that the judge has had quite a few Detroit drug dealers in his court; that drug dealers call it "Moneyton" because they can receive more money for their drugs in Huntington; and that the judge wished that the drug dealers would stay out. The State responds that this comment was not objected to, thus error, if any, was waived. The State also argues that the statement was made during the sentencing hearing, after the jury had already found petitioner guilty and had already recommended mercy. Finally, the State argues that the comment was not inappropriate.

Because there was no objection below, this issue is considered under a plain error standard of review. "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). We have held that "[a] criminal defendant is entitled to an impartial and neutral judge. In a criminal trial, when a judge's conduct in questioning witnesses or making comments evidences a lack of impartiality and neutrality, or when a judge otherwise discloses that the judge has abandoned his role of impartiality and neutrality as imposed by the Sixth Amendment of the United States Constitution, we will reverse and remand the case for a new trial." Syl. Pt. 7, *State v. Thompson*, 220 W.Va. 398, 647 S.E.2d 834 (2007).

Upon a review of the judge's statement, we find no error. We do not believe that the comment was inappropriate but, even if it was, it did not affect petitioner's substantial rights or seriously affect the fairness, integrity, or public reputation of the judicial proceedings. The jury determined the sentence when it recommended mercy, and the comment was made after the jury had already rendered its verdict.

IV.

In her fourth and final assignment of error, petitioner argues that the circuit court abused its discretion when, over a defense objection, it allowed hearsay statements regarding the victim's state of mind in the days and weeks before she was killed. Specifically, the court permitted the State to present testimony from Wendy Morgan's mother, aunt, and a friend that Morgan was in fear for her life because petitioner was going to have her killed for stealing. The circuit court allowed the evidence pursuant to Rule 803(3) of the West Virginia Rules of Evidence, which pertains to the declarant's then existing mental, emotional, or physical condition. The court concluded that the statements could be used to show

petitioner's motive. However, petitioner argues that evidence of the victim's state of mind was completely irrelevant to whether petitioner ordered the killing. The State argues that there is no error because the victim's state of mind was relevant to the issue of the petitioner's motive, but, even if it was error, it was harmless in light of other, extensive evidence at trial on these same issues.

Upon a review of the record and the parties' arguments, we conclude that even if it was error to admit this testimony, it was harmless error. The test for harmless error is as follows:

> Where improper evidence of a nonconstitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury.

Syl. Pt. 2, *State v. Atkins*, 163 W.Va. 502, 261 S.E.2d 55 (1979). Moreover, we have held that "[a]n error in admitting hearsay evidence is harmless where the same fact is proved by an eyewitness or other evidence clearly establishes the defendant's guilt." Syl. Pt. 4, *State v. Helmick*, 201 W.Va. 163, 495 S.E.2d 262 (1997). Multiple other witnesses testified about petitioner's motive and order to have Morgan killed.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: November 10, 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