State of West Virginia
Supreme Court of Appeals

State of West Virginia,
Plaintiff Below, Respondent

vs.) No. 11-0468 (Jefferson County 09-F-78**)**

R.T., Defendant Below,
Petitioner

FILED
February 14, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner R.T.[1] appeals the circuit court's order sentencing him to an effective sentence of not less than twenty nor more than fifty-five years of incarceration for five counts of sexual abuse by a parent, guardian, or custodian, and also a single count of sexual assault in the second degree following a jury trial. The appeal was timely perfected by counsel, with the entire record from the circuit court accompanying the petition. The State has filed a response.

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 matter 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 of Appellate Procedure.

The petitioner challenges his conviction, arguing that the verdict reached was inconsistent with the evidence and was an improper compromise amongst the jurors, that the jury was coerced into reaching a compromised verdict due to the circuit court's numerous references to time, that a witness's testimony violated a pretrial order, and that the State's failure to reveal an attempt to record a conversation between him and the victim created a violation of his due process rights per the holding in *Brady v. Maryland*, 373 U.S. 83 (1963). "A criminal defendant challenging the sufficiency of the evidence to support a conviction

[1]In keeping with the Court's policy of protecting the identity of minor children and victims of sexual crimes, the petitioner herein will be referred to by his initials throughout.

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." Syl. Pt. 3, in part, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

To begin, petitioner asserts that the evidence against him was insufficient to support his conviction and constitutes an impermissible compromise by the jury. Petitioner was originally indicted on twenty counts of sexual abuse by a parent, guardian, or custodian, and also a single count of sexual assault in the second degree. Because the jury acquitted him of fifteen counts of sexual abuse by a parent, guardian, or custodian, and because the evidence the jury relied upon in convicting him of the five counts of this crime is the same it relied upon in acquitting him, petitioner argues that an impermissible compromise must have occurred. Petitioner cites a lack of physical evidence of his crimes and argues that guilt or innocence was determined on witness credibility alone. In essence, petitioner is arguing that, because of the nature of the crimes and the evidence presented, the jury was only entitled to convict him of all counts or none of the counts. Simply put, there is no basis in the law for this argument, and petitioner cites no authority to support this assignment of error.

As stated above, issues of credibility are for the jury to decide. This Court has held that "[t]he jury is the trier of the facts and in performing that duty it is the sole judge as to the weight of the evidence and the credibility of the witnesses." Syl. Pt. 2, *State v. Bailey*, 151 W.Va. 796, 155 S.E.2d 850 (1967). The record clearly illustrates that the jury heard testimony from the victim of petitioner's crimes, who testified that petitioner sexually abused her over a period of several years by performing oral sex on her over ten times, forcing her to perform oral sex on him at least twice, and touching her breasts "about three or four times a month." The jury also heard evidence from the victim as to an incident in which petitioner raped her by penetrating her vagina with his penis when she was only fourteen years old. Lastly, the jury heard evidence from the victim's sister who testified to having interrupted the petitioner and her sister in the bedroom one afternoon, with petitioner's pants undone. The victim's sister further testified to having a family meeting after this incident, during which petitioner stated that "it" would not happen again, which she understood to mean incidents of molesting her sister.

West Virginia Code § 61-8D-5(a) states that "if any parent, guardian or custodian of or other person in a position of trust in relation to a child under his or her care, custody or control, shall engage in or attempt to engage in sexual exploitation of, or in sexual

intercourse, sexual intrusion or sexual contact with, a child under his or her care, custody or control, . . . then such parent, guardian, custodian or person in a position of trust shall be guilty of a felony." The record below clearly established that petitioner committed a pattern of continued sexual abuse of his step-daughter over a period of several years by engaging in the conduct outlined above. As such, the evidence was sufficient to support his conviction on the five counts of sexual abuse by a parent, guardian, or custodian based upon the victim's testimony alone. Further, West Virginia Code § 61-8B-4(a)(1) states that "[a] person is guilty of sexual assault in the second degree when . . . [s]uch person engages in sexual intercourse or sexual intrusion with another person without the person's consent, and the lack of consent results from forcible compulsion." The victim in this matter testified as to petitioner forcibly having sexual intercourse with her despite her objection when she was fourteen years old. As such, the evidence below was sufficient to support petitioner's conviction on this count as well. Despite petitioner's contention that an impermissible compromise occurred, this Court does not recognize such a claim simply because petitioner was not convicted of all the counts with which he was charged. Again, these credibility determinations are for the jury to decide, and the same will be set aside on appeal "only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt." Syl. Pt. 3, in part, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995). Because the evidence was sufficient to support the petitioner's conviction, the jury's decision to acquit the petitioner of the remaining fifteen counts does not void the convictions.

Petitioner next argues that jury was impermissibly coerced into reaching a compromised verdict due to the circuit court's numerous references to time. Petitioner cites to several comments from the circuit court related to the amount of time the trial was taking as the basis for this argument, though as the State has pointed out, what was originally intended to be a two-day trial eventually spread over the course of three calendar weeks due to an emergency surgery petitioner's counsel required. While it is true that the circuit court did make multiple references to the fact that the trial had gone on longer than anticipated, the record is devoid of any evidence that the jury was coerced into compromising its verdict in order to ensure that they would be able to follow through with their Memorial Day plans as petitioner alleges. Again, petitioner cites no authority in support of this assignment of error, and the Court finds the same to be without merit.

Petitioner next alleges that the victim inappropriately made reference to statements made by her deceased mother in violation of a pretrial order expressly forbidding any witnesses to mention any statement attributed to the mother. Petitioner argues, again without citing any authority, that the remarks were potentially inflammatory to the jury and prejudiced him. At trial, petitioner objected to the statement and immediately moved for a mistrial. Instead, the circuit court gave a curative instruction to the jury to disregard the statement as objectionable hearsay. The Court finds this to be the appropriate remedy, given

our prior holding wherein we stated that "'[o]rdinarily 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.' Syllabus Point 7, *State v. Arnold*, 159 W.Va. 158, 219 S.E.2d 922 (1973); Syllabus Point 18, *State v. Hamric*, 151 W.Va. 1, 151 S.E.2d 252 (1966)." Syl. Pt. 5, *State v. Gwinn*, 169 W.Va. 456, 288 S.E.2d 533 (1982). In the present matter, the victim was asked why she did not go to the police and responded that "[her] mother had also said that it was a family issue and that we could resolve it inside the home." The Court finds that the curative instruction was sufficient to remedy this objectionable testimony, and the same does not constitute reversible error on appeal.

Lastly, petitioner argues that a *Brady* violation occurred because the State failed to provide him with the recording device that a state trooper attempted to use to record a telephone conversation between him and the victim. The record indicates that the trooper attempted to record a telephone conversation, but was unfamiliar with the device and was not able to make such recording, nor was he able to hear the entirety of the conversation while the victim spoke over the telephone. As such, he did not include the attempt in any report because he was unable to hear both sides of the conversation and because no recording was made. To begin, petitioner has waived his right to appeal this issue because he failed to preserve it during trial. "To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect." Syl. Pt. 2, *State ex rel. Cooper v. Caperton*, 196 W.Va. 208, 470 S.E.2d 162 (1996). The record shows that during trial, petitioner's counsel found the issue to be resolved based upon the fact that there was no recording to disclose. Further, even if the issue were reviewed on the merits, it is clear that petitioner has no valid claim.

This Court has held that, in order to show a due process violation of this nature, the party must show that: "(1) the evidence at issue must be favorable to the defendant as exculpatory or impeachment evidence; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must have been material, i.e., it must have prejudiced the defense at trial." Syl. Pt. 2, in part, *State v. Youngblood*, 221W.Va. 20, 650 S.E.2d 119 (2007). Simply put, petitioner cannot satisfy any of these elements because there was no evidence at issue. The testimony below established that the trooper made no recording, so there is no conceivable way that petitioner could argue that any of the above elements can be met. Further, the trooper could not hear both sides of the conversation, so he was precluded from even memorializing the conversation in a report. For these reasons, we find that no violation of petitioner's due process rights occurred by the State's failure to inform petitioner of this failed attempt to record a telephone conversation with him.

For the foregoing reasons, we find no error in the decision of the circuit court and the

sentencing order is hereby affirmed.

Affirmed.

ISSUED: February 14, 2012

CONCURRED IN BY:

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