

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**State of West Virginia,
Plaintiff Below, Respondent**

vs) No. 11-0503 (Mercer County 10-F-17)

**Ray Bryant Cheatwood,
Defendant Below, Petitioner**

FILED

April 16, 2012

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

MEMORANDUM DECISION

Petitioner Ray Bryant Cheatwood, by counsel Henry L. Harvey, appeals the Mercer County Circuit Court order dated November 23, 2010, which sentenced him to one to ten years on one count of grand larceny. This appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The State, by counsel Scott Johnson, has filed its response.

This Court has considered the parties' briefs and the appendix on appeal. 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 January 31, 2012. The facts and legal arguments are adequately presented in the parties' written briefs and the appendix 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 appendix 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.

Petitioner appeals his grand larceny conviction. In late fall of 2009, petitioner was doing some repair work and/or yard work for his elderly aunt. Petitioner claims that he found a diamond ring outside of her home that he thought was fake; however, he took the ring to a pawn shop to sell it. The victim claims that the ring was in a jewelry box when it disappeared. The victim's longtime caretaker testified that the victim was very careful with the ring, which was valued anywhere from \$5000 to \$20,000 dollars. The caretaker testified that the victim only wore the ring when she was going to leave the house, and at all other times the ring was kept in a certain area of a jewelry box in the victim's bedroom. Further, the caretaker testified that the ring fit well, and even had a ring guard on it to keep it from being easily removed. After the victim and her caretaker determined that the ring was missing, the victim's niece had someone contact local pawn shops to determine if it had been sold. The owner of one of the pawn shops later called the victim's niece to let her know that petitioner came into the store to sell the ring that same day, and the owner agreed to pay the

petitioner \$1000 for the ring so that the ring would be secured. The owner of the pawn shop made a photocopy of the petitioner's driver's license. Petitioner was later arrested.

Petitioner testified at trial that he had found the ring outside of the victim's home, and despite the fact that there were three women residing on the property, he did not ask any of the women if the ring belonged to them. He also testified that he thought the ring was fake, but still took it to a pawn shop to determine its worth. Petitioner was arrested and indicted on one count of burglary and one count of grand larceny. After a jury trial, he was found guilty of grand larceny and acquitted on the burglary count. Petitioner filed a motion for a new trial, arguing that the State was allowed to contradict a standard jury instruction when the prosecutor asked the following question during voir dire: "[i]f two different versions of what happened are presented to you today, is there anyone here who could not find the defendant guilty beyond a reasonable doubt?" Defense counsel objected and after a side bar, the objection was overruled. Petitioner also moved for post-verdict judgment of acquittal. Both motions were denied and the petitioner was sentenced to one to ten years in prison.

On appeal, the petitioner first argues that the voir dire question posed by the prosecuting attorney misled the jury into believing that the jury had to convict the petitioner if it was given two different versions of the event. The petitioner argues that the State shifted the burden of proving every element of a criminal offense to the defense. Additionally, petitioner argues that the prosecution's statement leads to an automatic guilty verdict and was confusing to the jury.

In response, the State argues that it is entitled to determine if any jurors harbored a belief that it is not possible to convict if the defendant puts on a defense, or if two different stories would equate an automatic acquittal in a juror's mind. The State argues that this is permissible, and argues that the circuit court also gave a standard jury charge that the defendant is always presumed innocent and that the State has the burden to prove guilt beyond a reasonable doubt. Petitioner does not complain about the jury instructions, and therefore the State argues that any possible error in voir dire is cured by the jury instruction.

In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review. Syl. pt. 3, *State v. Vance*, 207 W.Va. 640, 535 S.E.2d 484 (2000).

State v. Berry, 227 W.Va. 221, 224, 707 S.E.2d 831, 834 (2011). Moreover, "[v]oir dire inquires are left to the sound discretion of the trial court and are subject to review only to the extent such discretion is abused." *State ex rel. Nationwide Mut. Ins. Co. v. Karl*, 222 W.Va. 326, 330, 664 S.E.2d 667, 671 (2008) (internal citations omitted). In the present case, this Court finds that the circuit court did not abuse his discretion in allowing the voir dire question. Further, under the facts of this case, any potential error was cured by the jury instructions.

Petitioner also argues that his conviction was based on insufficient evidence, as the State did not prove beyond a reasonable doubt that he had the intent to permanently deprive the victim of the ring. Petitioner argues that the State failed to prove intent, as petitioner testified that he found the ring on a sidewalk, and this testimony was not controverted at trial. Further, petitioner testified that he did not know the ring belonged to his aunt, and states that had he known, he would have given it to her. Thus, he argues that he did not intend to deprive her of the ring.

In response, the State argues that there is sufficient evidence to sustain the conviction. The State argues that the petitioner took the ring, which was against the victim's will and without her permission. The State points out that the victim's caretaker states that the ring was kept in a jewelry box in a bedroom when the victim was not wearing the ring, and that petitioner was in the bedroom the day before it was discovered that the ring was missing. The State argues that this testimony contradicts petitioner's testimony, and that the jury clearly believed the caretaker's testimony over the petitioner's testimony.

"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. 4, *State v. Haid*, ___ W.Va. ___, 721 S.E.2d 529 (2011). Additionally,

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

Syl. Pt. 5, *State v. Haid*, ___ W.Va. ___, 721 S.E.2d 529 (2011). This Court finds that there was in fact sufficient evidence to convict the petitioner, as the caretaker's testimony as to where the ring was kept contradicts petitioner's claim that he found the ring. Further, petitioner's actions of taking

the ring to the pawn shop show a clear intent to deprive the victim of the ring.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: April 16, 2012

CONCURRED IN BY:

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