STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 11-0562 (Monongalia County 10-F-153)

Larry E. Mayle, Jr.,
Defendant Below, Petitioner

FILED
February 13, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Larry E. Mayle, Jr., convicted of second degree murder by jury, appeals the circuit court order sentencing him to serve twenty years. This appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The State has filed its response. Petitioner has filed his reply.

This Court has considered the parties' briefs and the appendix on appeal. 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.

Petitioner was arrested for the first degree murder of his brother after stabbing his brother in the heart with a pocket knife while both were intoxicated. There was later conflicting testimony over which brother was the aggressor, but it appears that during a long night of heavy drinking, each brother had been aggressive toward the other. No witnesses saw specifically how the victim was stabbed but the victim was unarmed. Petitioner was indicted on one count of first degree murder, and after a trial, was found guilty of second degree murder. At sentencing, the State requested a forty year sentence, while petitioner argued for home confinement or probation. He was then sentenced to twenty years. Petitioner moved for a reduction of sentence and credit for time served. He was granted credit for his time served on home confinement, but his motion for reduction of sentence was denied.

"'Where 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)." Syl. Pt. 1, *State v. Hinchman*, 214 W.Va. 624, 591 S.E.2d 182 (2003). Moreover, this Court has repeatedly stated:

> "In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition 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. 2, *Walker v. West Virginia Ethics Comm'n*, 201 W.Va. 108, 492 S.E.2d 167 (1997).

Syl. Pt. 2, *State v. Hinchman*, 214 W.Va. 624, 591 S.E.2d 182 (2003). In regards to petitioner's assignments of error, because there were no objections below, these issues must be 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). Moreover, this Court has stated:

> Under the "plain error" doctrine, "waiver" of error must be distinguished from "forfeiture" of a right. A deviation from a rule of law is error unless there is a waiver. When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined. By contrast, mere forfeiture of a right-the failure to make timely assertion of the right-does not extinguish the error. In such a circumstance, it is necessary to continue the inquiry and to determine whether the error is "plain." To be "plain," the error must be "clear" or "obvious."

Syl. Pt. 8, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Petitioner appeals on several issues. The first assignment of error is that the circuit court erred in instructing the jury that a deadly weapon was used in the alleged crime. Petitioner argues that the circuit court committed plain error by referring to the pocketknife used in the stabbing as a deadly weapon, as the knife was not a deadly weapon *per se* pursuant to *State v. Choat*, 178 W.Va. 607, 363 S.E.2d 493 (1987). The State responds, arguing first that petitioner waived any error, and that this does not rise to the level of "plain error." The State also argues that petitioner offers no authority for his position that the

definitional language in the statutes defining deadly weapons in the context of licensure for said weapons must be incorporated into a homicide statute.

No objection was made during trial, and thus this assignment of error must be reviewed under the plain error doctrine. As to the knife being referred to as a deadly weapon, this Court has recognized that a knife of an unspecified size was considered a deadly weapon permitting an instruction allowing the inference of malice, with the same qualifications given in this case. *State v. Carey*, 210 W.Va. 651, 662, 558 S.E.2d 650, 661 (2001). Moreover, West Virginia Code § 61-7-2(9) states that knives with less than three and a half inch blades are not "knives" as a deadly weapon unless they are "knowingly used or intended to be used to produce serious bodily injury or death." Therefore, this Court does not find plain error.

Petitioner next argues that the circuit court abused its discretion by amending the voluntary manslaughter instruction offered by the defense. The State points out in its response that petitioner's counsel specifically agreed on the rewording of the jury instructions.

A careful review of the record shows that the instruction used was one submitted by the petitioner, and that the only change made was the addition of an eighth element stating "upon gross provocation and in the heat of passion." Petitioner argues that the change created error; however, the introduction to the same jury instruction states "[t]his crime is consistently defined as a sudden, intentional killing upon gross provocation and in the heat of passion." Thus, the circuit court did not change the jury instruction, but merely reiterated the statement already submitted in the instruction by the petitioner. No objection was made to this jury instruction, and thus this Court must review this assignment of error under the plain error doctrine. This Court finds no plain error in this instruction.

Petitioner argues that the circuit court committed plain error by permitting the State to improperly influence the jury. Petitioner argues that the State gave the jury a transcript of petitioner's taped statement that had some markings on it, which included some underlining and circling. Petitioner also argues that the State influenced the jury by giving the prosecutor's laptop to the jury to review the audio of the statement during deliberations. The State responds, arguing first that there was no objection, and that the markings on the transcript were light. Further, the transcript did not go to the jury room and therefore was not significant in their verdict. The State also argues that the petitioner argues no specific impropriety with regard to the use of the prosecutor's laptop.

No objection was made during trial, and thus this assignment of error must be reviewed under the plain error doctrine. A review of the transcript in question shows faint markings on a few pages, but the markings are nonspecific. Although the jury reviewed the

audio on the prosecutor's laptop, there are no specific allegations of information gleaned from said laptop that was improper. Thus, this Court finds no plain error.

Finally, petitioner argues that the circuit court committed plain error by improperly influencing jury deliberations. Petitioner argues that the circuit court erred by frequently expressing its concern that the trial conclude by Friday. Petitioner believes that the trial court's comments negatively impacted the petitioner's chance that the jury would fully and fairly weigh the evidence, and denied him due process. The State argues that the judge indicated to the jury that the trial would likely only last until Friday, but the judge had already made arrangements for a room for the jury to deliberate in should their deliberations continue until Monday. Petitioner's counsel never objected to any alleged trial mismanagement.

This Court has previously found that trial judges have scheduling authority and it is not error for a judge to attempt to determine the expected length of a trial. *State v. Pannell*, 225 W.Va. 743, 751, 696 S.E.2d 45, 53 n.30 (2010). Upon a review of the trial transcripts, it does not appear that the circuit judge improperly influenced or "rushed" the jury. The judge simply advised the jury as to when the trial was likely to conclude. This Court finds no plain error committed by the circuit judge.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: February 13, 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