STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 11-0692 (Ohio County 08-F-55)

Odell D. Morgan,
Defendant Below, Petitioner

FILED
June 22, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Odell D. Morgan, by counsel, Richard H. Lorensen, appeals from the Ohio County Circuit Court's "Sentencing Order" entered on March 22, 2011, resentencing petitioner for his convictions of four counts of conspiracy, two counts of abduction with the intent to defile, two counts of second degree sexual assault, and six counts of aiding and abetting second degree sexual assault. Respondent State of West Virginia appears by its counsel, Shawn R. Turak and Joseph E. Barki III.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, 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 of Appellate Procedure.

In late June of 2007, the victim, D.M., an adult female, went with James Harris to a local bar called "Alpha." They met at a Dairy Queen where Mr. Harris instructed D.M. to leave her car and ride with him. A man whom D.M. knew only as "Corey" (later identified as Johnny Ray Boykin II) was already in Mr. Harris's vehicle. D.M., Mr. Harris, and Mr. Boykin were joined at the bar by two more men: "Old School," who apparently has never been identified, and "Sweetness," who was later identified as petitioner. D.M. drank alcohol and used cocaine while at the bar. D.M. left the bar with Mr. Harris and his three friends. Mr. Harris eventually drove to a local motel, where Mr. Harris told D.M. that they were going to drink the beer that he had purchased at the bar. D.M. testified that while traveling to the motel, she made it clear to everyone in the vehicle that she did not intend to have sex with them and that she was repeatedly assured that was not their intention.

D.M. testified that upon entering the motel room with Mr. Harris and the three others, Mr. Harris locked the door behind them and instructed D.M. to remove her clothing. D.M. testified that she responded that she did not want to do so after which Mr. Harris again instructed her to undress.

D.M. testified at trial that she told the men "since I obviously have no say in what's going to happen here tonight, could you please use protection." Thereafter, D.M. was sexually assaulted in multiple ways and multiple times by Mr. Harris, Mr. Boykin, and petitioner. "Old School" was present in the motel room, but apparently did not participate in the assaults.

D.M. reported the rape later that same day to a co-worker and the co-worker's girlfriend, but did not report the rape to police until almost two months later. On the day D.M. reported the rape to law enforcement, she used her cell phone to make a tape-recorded, one-party consent call to Mr. Boykin whom she only knew as "Corey." She did not know his real name. During the call, D.M. was unsuccessful in her attempt to learn the identity of "Old School" and "Sweetness" (petitioner).

In September of 2007, while police were investigating D.M.'s rape allegations and trying to identify the suspects, there was a second gang rape involving J.L., a nineteen-year-old girl. On September 25, 2007, J.L. and two of her friends, Tasha Bundy and Megan Mangino, were at a bar called "Capone's" with Dondi Williams, Mr. Boykin, petitioner, and Jahmal Darby. It appears that by the time the group left the bar, J.L. was so intoxicated she had difficulty walking or standing without assistance.

After the group left the bar, they went to a motel and rented two adjoining rooms. Ms. Mangino and Ms. Bundy took J.L. into one of the two rooms, showered her in an effort to sober her up, redressed her, and left her lying on a bed. The two women then returned to the adjoining room where the group began smoking marijuana and drinking alcohol. At some point, Mr. Harris, and Mr. Boykin went into the adjoining room occupied by J.L. Ms. Bundy and Ms. Mangino began pounding on the door to get the men out. Approximately twenty to thirty minutes later, when the two women were finally able to get into the room, they found J.L. lying on the bed naked except for her bra. The two women took J.L. to a hospital where a rape test was performed and the police were notified. J.L. remembered nothing between leaving Capone's and waking up in a hospital bed.

During the criminal investigation, Mr. Boykin and petitioner were interviewed by law enforcement and both maintained that they and the other men had consensual sexual intercourse with both D.M. and J.L. on the evenings in question and both denied that J.L. was intoxicated.

Petitioner, Mr. Harris, Mr. Boykin, and Mr. Williams were indicted on thirty-nine counts involving the sexual assaults of D.M. and J.L., including kidnapping and conspiracy. Petitioner states that the man named "Old School" and Jahmal Darby were not indicted in any count, either as uncharged or unknown co-conspirators. The trial court severed the charges and each defendant was tried separately. Petitioner was named in seventeen of the thirty-nine counts.[1]

At petitioner's trial, the evidence included videotapes of the police interviews of both Mr. Boykin and petitioner and surveillance video footage from the motel where J.L. was sexually

[1]The appendix record reflects that sixteen of the seventeen counts went to the jury and that petitioner was acquitted on one of the sixteen counts.

assaulted, which confirmed the presence of the men, as well as J.L. DNA evidence also connected petitioner to the sexual assault of J.L.

The jury returned its verdict as referenced above. The trial court sentenced petitioner to life in prison with mercy for his kidnapping conviction and to consecutive periods of imprisonment for his other convictions, which resulted in a cumulative sentence of not less than ninety nor more than 240 years to be served upon completion of his life sentence.

On appeal, petitioner asserts that the trial court erred in admitting the two out-of-court statements of Mr. Boykin as co-conspirator statements under Rule 801(d)(2)(E) of the West Virginia Rules of Evidence. The first statement was Mr. Boykin's recorded statement given to law enforcement, which petitioner contends was highly prejudicial as it included certain questions asked by the officers implying that he was a convicted felon who had served time in prison. The second statement was the audio recording of the one-party consent phone call between D.M. and Mr. Boykin that was recorded at the Ohio County Sheriff's Office on the day that she reported the rape. Petitioner contends that both of these statements were made by Mr. Boykin after any conspiracy ended and they neither furthered nor concealed the underlying conspiracies charged. Petitioner adds that a conspiracy must relate to a charged crime and that Mr. Boykin was not charged with either a conspiracy to commit sexual assault or an overarching conspiracy to obstruct justice.

"'A trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard.' Syllabus Point 4, *State v. Rodoussakis*, 204 W.Va. 58, 511 S.E.2d 469 (1998)." Syl. Pt. 5, *State v. McCartney*, 228 W.Va. 315, 719 S.E.2d 785 (2011). Applying this standard to our review and consideration of the parties' arguments and the appendix record, we find that the trial court did not abuse its discretion in the admission of Mr. Boykin's statements at petitioner's trial. In Syllabus Point Four of *State v. Helmick*, 201 W.Va. 163, 495 S.E.2d 262 (1997), we stated 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." Given the other evidence at trial establishing petitioner's guilt, even if the trial court had abused its discretion in the admission of these statements, it was harmless error.

Petitioner next asserts that the trial court erred by overruling his hearsay and narrative objections and allowing the testimony of investigating officers which detailed statements taken during the course of their investigations. The trial court found that the testimony was neither narrative nor was it being offered for the truth of the matter asserted since the information was part of the officers' investigations. The trial court instructed the jury on hearsay and stated, in part, that "you're (the jury) not to accept what these witnesses have said as the truth of the matter . . . . [y]ou accept it only as a basis for which this witness continued and conducted his investigation with this information as a basis for it."

Petitioner also asserts that the trial court erred by allowing an officer to bolster the credibility of witnesses when the officer testified that there were no major differences in the statements given by Ms. Bundy and Ms. Mangino and that minor differences are not unusual. The only objection

arguably raised to this particular testimony at trial was a hearsay objection. Although petitioner cites Rule 608 of the West Virginia Rules of Evidence on appeal, regarding opinion evidence on the credibility of witnesses, he apparently did not raise a Rule 608 objection at trial. In reviewing the trial transcript, it does not appear that either of the investigating officers testified as to an opinion or reputation concerning the credibility of any witness. Petitioner does not cite to any instance in the trial transcript where the State asked the testifying officer for his opinion regarding the credibility of any witness or whether Ms. Bundy and Ms. Mangino were truthful and credible despite the differences in their respective statements.

As indicated above, a trial court's evidentiary rulings and it application of the Rules of Evidence are reviewed under an abuse of discretion standard. *McCartney*, 228 W.Va. 315, 719 S.E.2d 785. Applying this standard to our review of the parties' arguments and the appendix record, we find that the trial court did not abuse its discretion in this regard.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: June 22, 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