

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

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

vs) No. 11-0742 (Marshall County 10-F-38)

**Rodney Ray Yocum
Defendant Below, Petitioner**

FILED

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

MEMORANDUM DECISION

Petitioner Rodney Ray Yocum appeals the circuit court's order sentencing him to five years in prison based upon his jury conviction of wanton endangerment involving a firearm. Petitioner argues that the circuit court erred in admitting into evidence a compact disc ("CD") containing an audio recording of the events of his crime. He asserts that the recording was not properly authenticated and did not satisfy the best evidence rule. The State of West Virginia ("the State") has filed a response.

This Court has considered the parties' briefs and the record 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 May 31, 2011. 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.

"The West Virginia Rules of Evidence . . . allocate significant discretion to the trial court in making evidentiary . . . rulings. Thus, rulings on the admission of evidence . . . are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary . . . rulings of the circuit court under an abuse of discretion standard.' Syl. Pt. 1, in part, *McDougal v. McCammon*, 193 W.Va. 229, 455 S.E. 2d 788 (1995)." Syl. Pt. 9, *Tudor v. Charleston Area Med. Ctr., Inc.*, 203 W.Va. 111, 506 S.E. 2d 554 (1997).

Petitioner argues that the circuit court erred in allowing the admission of the CD made from the tapeless audio recording of his altercation with the victim, his former girlfriend and the mother of his son. The victim made the recording with a micro audio recorder that does not use tape. The police created a CD from the digital sound file present in the audio

recorder. Petitioner objected to the playing of the CD before the jury and its admission into evidence based upon the assertion that it was not properly authenticated. The circuit court overruled the objection and allowed the playing of the CD before the jury following testimony by the victim that the CD accurately represented the audio file recorded within the audio recorder. The Court finds no abuse of discretion by the circuit court in concluding that the CD was properly authenticated.

Petitioner also argues that the CD does not satisfy the best evidence rule found at Rule 1002 of the West Virginia Rules of Evidence because the CD should be considered a duplicate and not the original audio recording. Rule 1002 provides: “[t]o prove the contents of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.” The State responds that the audio recorder in question does not use a tape in its recording process and, therefore, the admission of the CD made from the audio recorder’s digital sound file serves as an original under the Rules of Evidence. In support of its position, the State cites Rule 1001(3) of the West Virginia Rules of Evidence, which states in part: “[i]f data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an ‘original.’” The State argues that the CD made from the tapeless sound file of the victim’s audio recorder is analogous to the situation set forth in this rule and that the CD should be considered an original. Under the particular facts and circumstances of the case-at-bar, the Court finds that the best evidence rule was not violated and the circuit court did not abuse its discretion by its admission of the CD in question.

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