STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 11-0848 (Berkeley County 10-F-59)

Harry W. Creamer,
Defendant Below, Petitioner

FILED
April 16, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Harry W. Creamer, by counsel B. Craig Manford, appeals the sentencing order from the Circuit Court of Berkeley County entered on April 25, 2011, sentencing him to one year for misdemeanor breaking and entering and one year for misdemeanor petit larceny, to run concurrently with one another but consecutively with the remaining sentences; ten years on each of seven counts of fraudulent use of an access device, to run concurrently with one another but consecutively to the other sentences; one to ten years on one count of forgery and one to ten years on one count of uttering, to run concurrently with one another but consecutively with the other sentences. This appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The State, by counsel Cheryl K. Saville, has filed its response.

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 of Appellate Procedure.

Petitioner was tried and convicted of eleven counts stemming from the theft of a purse from a vehicle and the repeated attempt to use an automated teller machine ("ATM") card and to cash checks found in that purse. The perpetrator of the crime was seen on two different surveillance videos, one outside a bank and one at an ATM. Petitioner also used or attempted to use the ATM card at a Sheetz store and a Walmart store. Prior to trial, petitioner moved to exclude his jail photograph for identification, and was told by the State that there would be no in-court identification because the witnesses had not identified the petitioner outside of court. However, at the time of trial, the prosecution discovered that one of the bank tellers, who had been on vacation previously, could identify the petitioner by his tattoos. This was disclosed just prior to trial and the testimony was allowed over petitioner's objections.

At trial, several witnesses testified. Petitioner's former roommate testified that his brother had called the police to give them petitioner's identity after a surveillance photograph of petitioner was published in the newspaper, and the former roommate confirmed to the police that the person in the surveillance photograph was the petitioner. Two bank tellers testified regarding petitioner's attempted transactions at the bank. The victim testified, as well as a woman who saw the purse being taken from the vehicle. A regional security officer also testified regarding the surveillance at the bank. Petitioner moved for a mistrial several times, arguing that the witnesses' use of the term "defendant" and "Mr. Creamer" was prejudicial, and arguing that the witnesses provided undisclosed eye witness identification. These motions were denied.

Upon his conviction on all counts, petitioner was sentenced to one year for misdemeanor breaking and entering and one year for misdemeanor petit larceny, to run concurrently with one another but consecutively with the remaining sentences; ten years on each of seven counts of fraudulent use of an access device, to run concurrently with one another but consecutively to the other sentences; one to ten years on one count of forgery and one to ten years on one count of uttering, to run concurrently with one another but consecutively with the other sentences. Petitioner had argued for leniency, stating that he had previously abused drugs and alcohol but that he was now sober. Petitioner's motion for judgment of acquittal and motion for a new trial were denied. The court noted that petitioner has a lengthy criminal history, including over thirty arrests. Petitioner appeals from this sentencing order.

Petitioner first argues that the circuit court erred in allowing publication of petitioner's tattoos to the jury and witnesses without conducting a balancing analysis pursuant to Rule 403 of the West Virginia Rules of Evidence. Petitioner argues that the sole issue at trial was the identity of the perpetrator, and the court's failure to conduct a balancing analysis is plain error. Further, the petitioner argues that the circuit court did not actually view the tattoos in question.

In response, the State argues that publication of the tattoos to the jury and witnesses was proper, as it is clear that the circuit judge weighed the possible prejudice to petitioner before ruling, even if he did not explicitly cite Rule 403. In fact, the circuit court ruled that the presentation of the petitioner's tattoos was proper but that the State could not have the witnesses provide a full positive identification in open court.

"The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion ." Syl. Pt. 1, *State v. Harris*, 216 W.Va. 237, 605 S.E.2d 809 (2004) (internal citations omitted). Moreover, this Court has addressed the presentation of a defendant's tattoos to a witness and the jury, stating:

> Ordinarily, it is not an abuse of discretion for a trial court in a criminal case to direct the accused to reveal or display the accused's tattoos to a witness and to the jury at trial, where the accused's tattoos are relevant to the question of the identification of

> the perpetrator of the offense and where the trial court has weighed the probative value of such evidence against the danger of unfair prejudice, *etc.*, pursuant to Rules 401, 402 and 403 of the *West Virginia Rules of Evidence.*

Syl. Pt. 2, *State v. Meade,* 196 W.Va. 551, 474 S.E.2d 481(1996). In the present case, this Court finds that the circuit court did not abuse its discretion in allowing the publication of petitioner's tattoos for the purpose of identification. The circuit court limited the identification and the petitioner and his counsel had prior knowledge that the bank teller could identify him by his tattoos. Moreover, the identification was relevant.

Petitioner next argues that the circuit court abused its discretion in denying petitioner's motions for mistrial due to the State's witnesses characterization of the petitioner as the "defendant" and "Mr. Creamer" and that the repeated references had a cumulative and prejudicial effect on the jury whose sole duty was to determine identity. Petitioner argues that neither bank teller was able to make an out-of-court identification of the petitioner, but testified that it was the "defendant" and "Mr. Creamer" who attempted to cash fraudulent checks on several occasions. Petitioner argues that any cautionary instruction could not "cure the taint of substantial likelihood of improper influence upon the jury."

The State argues that the circuit court properly denied the motions for mistrial as petitioner failed to demonstrate that any references to the perpetrator as the "defendant" or "Mr. Creamer" had a prejudicial effect upon the jury. After the initial use of the word "defendant" in reference to petitioner, the circuit court gave a cautionary instruction. Petitioner did not object to the first use of "Mr. Creamer" but the court did give another limiting instruction, stating "ladies and gentlemen of the jury, again, the question of identity is one for you all to decide." Defense counsel indicated that the instruction was sufficient. Petitioner later moved for a mistrial based on the identifications of witnesses, but the circuit court denied the same, as no witness had made an actual in-court identification, and the statements were made spontaneously and not in reference to identification questions by the State. The State argues that the circuit court did not abuse its discretion in these rulings.

This Court has stated that:

> The decision to declare a mistrial, discharge the jury and order a new trial in a criminal case is a matter within the sound discretion of the trial court. *State v. Craft,* 131 W.Va. 195, 47 S.E.2d 681 (1948). A trial court is empowered to exercise this discretion only when there is a "manifest necessity" for discharging the jury before it has rendered its verdict. W.Va.Code § 62-3-7 (1977 Replacement Vol.). This power of the trial court must be exercised wisely; absent the existence of manifest necessity, a trial court's discharge of the jury without rendering a verdict has the effect of an acquittal of the accused and gives rise to a plea of double jeopardy. *See State ex rel. Brooks v. Worrell,* 156 W.Va. 8, 190 S.E.2d 474 (1972); *State ex rel. Dandy v. Thompson,* 148 W.Va. 263, 134 S.E.2d 730, *cert. denied,* 379 U.S. 819, 85

S.Ct. 39, 13 L.Ed.2d 30 (1964); *State v. Little*, 120 W.Va. 213, 197 S.E. 626 (1938). *State v. Williams*, 172 W.Va. 295, 304, 305 S.E.2d 251, 260 (1983). In the present case, the circuit court properly gave a limiting instruction to the jury, and informed them that the identification of the perpetrator was their decision. Moreover, the witnesses were not asked identification questions. Petitioner has not shown that the circuit court abused its discretion.

Next, petitioner argues that the circuit court committed plain error by allowing witnesses to identify petitioner by his tattoos as this constituted substantial surprise as he was assured by the State prior to trial that no in-court identifications would be made. Petitioner argues that at least one of the bank tellers had not disclosed to the police that she could identify the perpetrator by his tattoos, and the prosecution only discovered just prior to trial that she could do so. Thus, this constitutes unfair surprise to the petitioner, as he believed that the only identification would be the jury's comparison of him to the surveillance photographs. Further, petitioner argues that the State indicated that there would be no in-court identification and relied on that fact. Petitioner argues that his strategy was to rely on the photographs but the tattoo identification prejudiced that defense.

The State argues that the witnesses were properly allowed to identify petitioner by his tattoos. The State argues that although the prosecutor did not learn that one witness could identify petitioner by his tattoos until just prior to trial, it immediately informed defense counsel of this development. Further, the identification was ruled upon prior to its admission, and the circuit court even limited the identification. Moreover, the State notes that the witness previously identified petitioner at the preliminary hearing via his tattoos, and thus this does not constitute surprise to him, as the petitioner and his counsel had notice of the same. The State also argues that the publication of the tattoos did not implicate any alternative theories of prosecution in this case, and the State notes that petitioner did not request a continuance after the circuit court ruled that the tattoos were admissible.

> "When a trial court grants a pre-trial discovery motion requiring the prosecution to disclose evidence in its possession, non-disclosure by the prosecution is fatal to its case where such non-disclosure is prejudicial. The non-disclosure is prejudicial where the defense is surprised on a material issue and where the failure to make the disclosure hampers the preparation and presentation of the defendant's case." Syllabus Point 2, *State v. Grimm*, 165 W.Va. 547, 270 S.E.2d 173 (1980), *modified*, Syllabus Point 1, *State v. Johnson*, 179 W.Va. 619, 371 S.E.2d 340 (1988).

Syl. Pt. 5, *State v. Graham*, 208 W.Va. 463, 541 S.E.2d 341 (2000). In the present matter, the identification of the tattoos was proper. While the disclosure of the witness was not timely, the petitioner had notice from testimony at the preliminary hearing that a bank teller had identified his tattoos. This Court finds no error.

Petitioner also argues that the circuit court erred in allowing one bank teller to testify to her

identification of petitioner's tattoos from the outside ATM surveillance photographs as she was not at a vantage point to have seen the same. Petitioner argues that the teller was not close enough to the individual at the ATM outside to identify his tattoos. Petitioner further argues that his former roommate, who testified as a witness should not have been allowed to identify the petitioner from the outside bank surveillance photographs as this invaded the province of the jury. Petitioner says this identification amounted to an in-court identification and a Rule 403 analysis should have been used.

The State argues that both identifications were proper. As to the ATM surveillance photographs, the bank teller testified that the man came to her window, and after his unsuccessful attempt to cash the check, left the bank and walked to the ATM outside. The bank teller actually witnessed this action and knew it was the same man, as per her trial testimony. Likewise, the bank teller testified that she saw the perpetrator's tattoos and could identify him by the tattoos if she saw them again. As to the identification made by petitioner's former roommate, the State argues that this testimony showed how the petitioner became known to the police as a suspect. The former roommate was not asked about the events at the bank but only about who he believed was in the photograph. The State argues that the circuit court did not abuse its discretion in allowing in this testimony.

Pursuant to the *Harris* case cited above, the circuit court has discretion in admitting or excluding evidence. 216 W.Va. 237, 605 S.E.2d 809. Moreover, *Harris* directs as follows:

> Rule 602 of the West Virginia Rules of Evidence does not require that the witness's knowledge be positive or rise to the level of absolute certainty. Evidence is inadmissible under this rule only if in the proper exercise of the trial court's discretion it finds that the witness could not have actually perceived or observed that which he testifies to." Syllabus Point 6, *State v. Whitt,* 184 W.Va. 340, 400 S.E.2d 584 (1990).

Syl. Pt. 3, *Id*. The witnesses testified to their relative abilities to identify the petitioner. This Court finds no abuse of discretion in the admission of this evidence.

Additionally, petitioner argues that the cumulative weight of all of the errors is sufficient to warrant a new trial, and that the jury's verdict was not supported by the evidence. Petitioner argues that his motion for judgment of acquittal should have been granted. Petitioner argues that there is no evidence that he forged a check to the bank as the check was never recovered, and given the improper identification, no jury could have found petitioner guilty simply from comparison of the surveillance photographs to his appearance at trial.

In response, the State argues that petitioner failed to show any error warranting a new trial. Further, the State argues that the jury's verdict was supported by the evidence, as the victim and the witness to the theft testified, as well as the bank teller and petitioner's former roommate. Moreover, the surveillance photographs are of good quality for identification purposes. The witnesses described the perpetrator's clothing, which was also seen in the photographs, and the jury actually compared

the petitioner to the photographs.

> "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." Syllabus Point 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Syl. Pt. 4, *State v. Thornton*,__ W.Va. __,720 S.E.2d 572 (2011). Additionally,

> "When a criminal defendant undertakes a sufficiency challenge, all the evidence, direct and circumstantial, must be viewed from the prosecutor's coign of vantage, and the viewer must accept all reasonable inferences from it that are consistent with the verdict. This rule requires the trial court judge to resolve all evidentiary conflicts and credibility questions in the prosecution's favor; moreover, as among competing inferences of which two or more are plausible, the judge must choose the inference that best fits the prosecution's theory of guilt." Syllabus Point 2, *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996).

Syl. Pt. 5, *Id*. Additionally, "'[w]here the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error.' Syllabus Point 5, *State v. Smith*, 156 W.Va. 385, 193 S.E.2d 550 (1972)." Syl. Pt. 14, *State v. George W.H.*, 190 W.Va. 558, 439 S.E.2d 423 (1993). In the present case, this Court finds first that the evidence was sufficient to sustain a conviction. Numerous witnesses testified as to the crimes committed, and the jury reviewed the surveillance footage showing petitioner committing said crimes. Moreover, this Court does not find that there were cumulative errors in this trial warranting that the conviction be set aside.

Finally, petitioner argues that the circuit court erred by imposing a sentence that was disproportionate. Petitioner argues that less than $700 was involved in the thefts, and there was no violence. Further, he argues that he has no prior felony convictions, and thus this sentence shocks the conscience. In response, the State argues that petitioner's sentences were proper and within all statutory limits, and are therefore not subject to appellate review. Further, the sentences do not shock

the conscience, and the concurrent versus consecutive sentences are within the circuit judge's discretion, as the circuit judge noted petitioner's extensive criminal history, the frequency of his arrests, his prior probation periods, and the fact that he still has outstanding felony charges. Finally, the State argues that the sentences are not disproportionate.

"'Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review.' Syllabus Point 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982)." Syl. Pt. 4, *State ex rel. Hatcher v. McBride*, 221 W.Va. 760, 656 S.E.2d 789 (2007). If a sentence is subject to appellate review, however, the Court must review it under the standards set forth in *State v. Cooper*, 172 W.Va. 266, 305 S.E.2d 851 (1983), and Syllabus Point 5 of *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 275 S.E.2d 205 (1981):

> There are two tests to determine whether a sentence is so disproportionate to a crime that it violates our constitution. *Accord*, *Stockton v. Leeke*, 269 S.C. 459, 237 S.E.2d 896, 897 (1977). The first is subjective and asks whether the sentence for the particular crimes shocks the conscience of the court and society. If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further. When it cannot be said that a sentence shocks the conscience, a disproportionality challenge is guided by the objective test we spelled out in Syllabus Point Five of *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 275 S.E.2d 205 (1981): In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.

State v. Cooper, 172 W.Va. 266, 272, 304 S.E.2d 851, 857 (1983). In the present case, each of the sentences is within statutory limits. Further, a review of the sentencing order shows that the sentences taken as a whole do not shock the conscience, as the petitioner has a long history of criminal behavior. Moreover, the sentences do not violate the proportionality principle in this matter.

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