STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) **No. 11-0849** (Marion County 11-F-46)

Janet Washington,
Defendant Below, Petitioner

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

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Marion County, wherein the petitioner was sentenced by order entered April 25, 2011, to one year of incarceration after a jury found her guilty of brandishing a deadly weapon, though that sentence was suspended and petitioner was placed on supervised probation for a period of two years. Petitioner's appeal was timely perfected by counsel, Pamela R. Folickman, with petitioner's appendix accompanying the petition. The State of West Virginia, by Jacob Morgenstern, has responded, arguing in favor of affirming the circuit court's sentencing order.

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.

The criminal proceedings below were initiated after petitioner attempted to stab the victim, Kimberly Satterfield, in a Dollar General Store on November 3, 2009. According to testimony, the petitioner saw the victim in the store from the street and made her way inside. The situation became tense, and petitioner initially produced a pen which she used in an attempt to stab Ms. Satterfield. After both parties fought over the pen, each one ending up with half, petitioner then drew a knife and again attempted to stab the victim. However, Ms. Satterfield's husband stepped between the two and separated them. After this altercation, the police located the knife in the store, and the corresponding sheath was located in petitioner's purse. Petitioner was thereafter indicted by a grand jury for attempted malicious assault, and was later found guilty of a single count of brandishing a deadly weapon following a jury trial.

On appeal, petitioner argues that the circuit court erred in denying her motion to dismiss the verdict based upon the circuit court's allegedly improper giving of a jury instruction on the lesser included offense of brandishing a deadly weapon. She argues this was improper because this lesser

included offense allegedly requires an element not present in the greater offense with which she was originally indicted, being attempted malicious assault. Petitioner cites to our prior holding in *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982), to argue that a lesser included offense must be such that it is impossible to commit the greater offense without first having committed the lesser offense, and further that an offense is not a lesser included offense if it requires the inclusion of an element not required in the greater offense. In regard to her trial, petitioner argues that the circuit court erred because brandishing a deadly weapon requires the presence of a deadly weapon, while malicious assault does not require such a weapon. Because one can commit malicious assault without a deadly weapon, brandishing a deadly weapon should not have been a lesser included offense to attempted malicious assault.

Petitioner also argues that the circuit court erred by denying her motion to exclude the victim of her crime as a State's witness because the State failed to timely disclose its witness list and because of the victim's extensive criminal history. Specifically, petitioner argues that Rule 32.03(a)(10) of the West Virginia Trial Court Rules requires the State to provide a list of names and addresses of all the State's witnesses, together with any record of prior convictions of any such witnesses. She further cites Rule 32.06(b), which provides for granting a continuance or prohibiting the party from introducing evidence not disclosed when the State fails to comply with the rule. Petitioner argues that the alleged victim had an extensive criminal history, and that upon the State's failure to provide her with a witness list or information on this criminal history, she filed a motion to exclude the victim as a witness. However, the circuit court denied the same, and petitioner argues that only after this denial did the State provide the witness list. Because of the lack of timely disclosure, petitioner argues that she did not receive full disclosure of the facts or a fair trial on the merits. As such, petitioner argues that the circuit court's decision to allow the victim to testify was unfairly prejudicial and placed petitioner at a great disadvantage, as the circuit court should have either excluded the victim as a witness or provided a continuance for petitioner to review the undisclosed information.

In response, the State argues that applying the test set out in Syllabus Point 5 of *State v. Wright*, 200 W.Va. 549, 490 S.E.2d 636 (1997), there is no question that under certain circumstances, brandishing a deadly weapon is a lesser included offense of malicious assault. This is true in the instant matter because the circumstances of petitioner's case required proof of the same set of facts, namely the presence of a deadly weapon. The State cites the language of the indictment, wherein it was alleged that petitioner "unlawfully, feloniously and maliciously attempt[ed] to assault and/or wound [the victim], to-wit: by attempting to stab [the victim] with a fixed blade knife . . . ." Therefore, in the absence of this knife, it would have been impossible in this case for the petitioner, as alleged at trial, to have committed attempted malicious assault. Therefore, both attempted malicious assault and brandishing a deadly weapon included the element of a deadly weapon. The State further argues that the petitioner was given timely notification, as she received its witness list approximately one week before trial. Further, the petitioner was aware of the victim's criminal background, and she therefore cannot satisfy the element of surprise required for non-disclosure to be prejudicial, as adopted by this Court in *State v. Miller*, 178 W.Va. 618, 624, 363 S.E.2d 504, 510 (1987). Further, the State cites this Court's prior holding that a defendant is not prejudiced when the

State delays disclosure of a witness that the defendant knew or should have known would testify at trial. *State v. Wilson*, 226 W.Va. 529, 533, 703 S.E.2d 301, 305 (2010). In the instant case, the State argues that the petitioner was clearly aware that the victim would be a witness, and was therefore not prejudiced by any alleged delay in disclosure.

"This Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*.' Syl. Pt. 4, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996)." Syl. Pt. 2, *Nutter v. Nutter*, 218 W.Va. 699, 629 S.E.2d 758 (2006). Upon review of the appendix, we find no error in the circuit court's decisions below. "'A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not mislead by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.' Syl. Pt. 4, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995)." Syl. Pt. 1, *State v. Kendall*, 219 W.Va. 686, 639 S.E.2d 778 (2006). To begin, it is clear that the jury was properly instructed as to brandishing a deadly weapon being a lesser included offense of attempted malicious assault, given the facts of this case, and that the circuit court was correct to deny petitioner's motion on this issue.

This Court has previously held that "'[t]he test of determining whether a particular offense is a lesser included offense is that the lesser offense must be such that it is impossible to commit the greater offense without first having committed the lesser offense. An offense is not a lesser included offense if it requires the inclusion of an element not required in the greater offense.' Syl. Pt. 5, *State v. Wright*, 200 W.Va. 549, 490 S.E.2d 636 (1997) (quoting Syl. Pt. 1, *State v. Louk*, 169 W.Va. 24, 285 S.E.2d 432 (1981) [*overruled on other grounds, State v. Jenkins*, 191 W.Va. 87, 443 S.E.2d 244 (1994)]; Syl. Pt. 1, *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982))." Syl. Pt. 4, *State v. Bell*, 211 W.Va. 308, 565 S.E.2d 430 (2002). As the State correctly argued in its response, it would have been impossible for petitioner in this matter to have been found guilty of attempted malicious assault without also establishing that she also committed the crime of brandishing a deadly weapon.

West Virginia Code § 61-2-9(a) states, in relevant part, that a person is guilty of malicious assault if that person "maliciously shoot[s], stab[s], cut[s] or wound[s] any person, or by any means cause[s] him bodily injury with intent to maim, disfigure, disable or kill . . . ." While it is true that this code section does not require the use of a deadly weapon, when applied specifically to petitioner's case such proof is necessary because the indictment alleged that she committed the crime of attempted malicious assault by "attempting to stab [the victim] with a fixed blade knife." We have previously found such broadly defined crimes to include lesser offenses based on specific application to the facts of individual criminal cases, and have also found that under certain circumstances, brandishing a deadly weapon is a lesser included offense of wanton endangerment, and that wanton

endangerment is a lesser included offense of malicious assault. See generally, *State v. Wright*, supra; *State v. Bell*, supra. Further, West Virginia Code § 61-7-11 states, in relevant part, that "[i]t shall be unlawful for any person armed with a firearm or other deadly weapon, whether licensed to carry the same or not, to carry, brandish or use such weapon in a way or manner to cause, or threaten, a breach of the peace." For these reasons, it is clear that in the context of the petitioner's specific trial below, brandishing a deadly weapon was a lesser included offense of attempted malicious assault. For these reasons, we decline to find an abuse of discretion in the circuit court's instruction to the jury on this lesser included offense, or in its decision to deny petitioner's motion on this issue.

As to petitioner's second assignment of error, we decline to find that the alleged delay in providing petitioner with a witness list constitutes reversible error. "'The traditional appellate standard for determining prejudice for discovery violations under Rule 16 of the West Virginia Rules of Criminal Procedure involves a two-pronged analysis: (1) did the non-disclosure surprise the defendant on a material fact, and (2) did it hamper the preparation and presentation of the defendant's case.' Syl. pt. 2, *State ex rel. Rusen v. Hill*, 193 W.Va. 133, 454 S.E.2d 427 (1994)." Syl. Pt. 2, *State v. Smith*, 220 W.Va. 565, 648 S.E.2d 71 (2007). Although petitioner argues that the alleged non-disclosure below was violative of West Virginia Trial Court Rule 32.03(a)(10), the Court finds that the above-quoted language concerning the companion rule governing witness disclosures in criminal matters is the appropriate standard of review. Upon a review of the appendix, we find that petitioner cannot satisfy either element required to show prejudice by the State's alleged untimely disclosure.

The witness of the case at bar which petitioner argues was not disclosed was the victim in the matter. Based upon the facts of the case at bar, this Court declines to find that failing to timely disclose that the victim of an attempted malicious assault would testify at the resulting criminal trial constitutes surprise to the petitioner on a material fact, or that it would have hampered the petitioner's preparation and presentation of a material fact. Further, Rule 16(d)(2) of the West Virginia Rules of Criminal Procedure states, in relevant part, that a circuit court may remedy a non-disclosure by "grant[ing] a continuance, or prohibit[ing] the party from introducing evidence not disclosed." A review of the appendix indicates that in ruling on petitioner's motion related to this alleged non-disclosure, the circuit court offered to allow for a continuance, as it believed the same to be the proper remedy. The transcript indicates that the petitioner was given a deadline by which to request such a continuance, and the appendix is devoid of any reference to a request for continuance. As such, we decline to disturb the circuit court's discretion on this issue.

For the foregoing reasons, we find no error in the decision of the circuit court to deny petitioner's motion to dismiss the verdict or her motion to exclude the victim from testifying as the State's witness, and the sentencing order is hereby affirmed.

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