

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

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

vs) **No. 11-0874** (Roane County 10-F-06)

**Matthew Jonathan Robey,
Defendant Below, Petitioner**

FILED

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

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Roane County, wherein a jury convicted the petitioner of kidnapping. This appeal was timely perfected by counsel, with Petitioner Robey's appendix accompanying the petition. The State has filed a response in support of the petitioner's conviction.

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.

1. Facts

Petitioner Robey was convicted of kidnapping on September 15, 2010, from events that arose on August 16, 2009. In the early morning hours of August 16, 2009, the victim was driving a U-Haul from Warren, Pennsylvania, to her new home in Charleston, West Virginia. As she came upon the thirty-three mile marker on Interstate 79, she noticed that a car was wrecked on the side. She pulled over to see if anybody was hurt or needed help. As she was pulling over, she felt the back of her vehicle hit. When she parked and came out of the car, she noticed damage to the rear end of her car, which was attached to the U-Haul. According to the victim, she noticed that the car that had been wrecked was the same car that had hit the back of her car. The victim approached the man, who is the petitioner herein, who was inside the vehicle and requested his insurance information. She asserted at trial that at this point, the man grabbed her, took her into the U-Haul, and ordered her to drive. She drove him to the next exit where they eventually pulled into a residential driveway. She was able to call 911 when the petitioner stepped out of the car and West Virginia State Trooper Shaun McCullough arrived at the scene. By this time, the petitioner had left the resident's

driveway and Trooper McCullough later found him passed out on the side of the road. According to the petitioner's trial testimony, he had asked the victim if she had a phone he could use to call for help. When she told him that she did not, he asked her to drive him to the next exit to find a phone to use. After they pulled off the exit and pulled into the resident's driveway, the victim asked him to help her back up the U-Haul. At this point, he stepped outside of the vehicle.

At trial, the jury heard testimony from the investigating officer, West Virginia State Trooper McCullough; the victim, Mindy Bussolletti; and the petitioner. The Court recaps only the testimony pertinent to this decision. Trooper McCullough testified that before he arrived at the residential driveway, he had been called to the scene of the initial accident along Interstate 79. In response to the State's question, "What were you able to see when you made it to this accident?", Trooper McCullough testified that, "I found a car that – I ran the registration plate. It was registered to [another individual's name], and I found alcohol bottles and other drug paraphernalia inside the car."

The victim testified after Trooper McCullough. She explained that as she was asking the petitioner for his insurance information, he started "flipping out." When called to elaborate on how the petitioner was "flipping out," the victim replied, "He was talking about being in a lot of trouble; something that was going on with his girlfriend. He said he had took [sic] this car tonight. He said that I was going to get him away from this accident because he was going to be in trouble, said he has a gun; he was going to kill me if I don't take him away. Then he jumps out of the car, and you could tell that he was just messed up."

At the close of the evidence, the circuit court instructed the jury on the charge for kidnapping. The circuit court directed the members of the jury to consider seven elements to determine the petitioner's guilt: "(1) The defendant, Matthew Jonathan Robey, (2) in Roane County, West Virginia, (3) on or about the [16th] day of August, 2009, (4) did by force, threat, and duress (5) confine and otherwise kidnap (6) Mindy Bussolletti, (7) for the purpose or the intent of demanding or extorting any concession or advantage of any sort by evading capture or arrest after being involved in a car accident while intoxicated."

Following instructions, the State and counsel for Petitioner Robey presented closing arguments. At one point in its closing, the State told the jury, "Also, a very important fact to remember is that Matthew Robey was not in his car. Trooper McCullough checked the registration information of the vehicle, and it was registered to someone else. Matthew Robey that night had taken that car apparently." Counsel for the petitioner promptly objected and the circuit court held a bench conference. At the bench conference, counsel for the petitioner argued that the State mentioning that the petitioner was not in his car was a matter

under Rule of Evidence 401(b)¹ and that there was no evidence that the car he was in was stolen. The circuit court advised the attorneys that, “The element that needs to be proved is evading capture, arrest, as being involved in an accident while intoxicated. I’ve [the circuit court judge] given brief instruction about that.” The bench conference then concluded and the circuit court addressed the jury, advising that, “[T]he element that must be proven to you beyond a reasonable doubt . . . in the [c]ourt’s charge [of] ‘for the purpose or the intent of demanding or extorting any concession or advantage of any sort by evading capture or arrest after being involved in car accident while intoxicated.’ The ownership of the car is not an issue in this case. So, with that, disregard that part, and go ahead [prosecuting attorney.]” After closing arguments were finished, the jury was dismissed for deliberations. Deliberations continued and were completed the next day, after which the jury returned a verdict finding the petitioner guilty of kidnapping.

Consequently, at sentencing, the circuit court sentenced the petitioner to twenty years in the state penitentiary. The issues concerning restitution were suspended for another hearing. The circuit court issued a separate order addressing restitution and ordered the petitioner to pay the victim \$862.23 and pay the insurance carrier \$2,522.77, both within five years at the end of his imprisonment. It is from this final order of the circuit court that the petitioner appeals.

2. Discussion

This Court reviews evidentiary and procedural rulings of the circuit court under an abuse of discretion standard. “‘The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings.’ Syl. Pt. 1, [in part,] *McDougal v. McCammon*, 193 W.Va. 229, 455 S.E.2d 788 (1995).” Syl. Pt. 1, in part, *Warner v. Wingfield*, 224 W.Va. 277, 685 S.E.2d 250 (2009).

The petitioner argues that the circuit court committed reversible error when it allowed the State to make comments in its closing argument about the vehicle the petitioner was in on August 16, 2009. The petitioner argues that because this commentary fell into Rule of Evidence 404(b) as a prior bad act, the circuit court should have engaged in the proper analysis under *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994), and should have held an in-camera hearing on the matter. Petitioner Robey further argues that the circuit court failed to adequately instruct the jury on this issue. Consequently, the petitioner argues

¹ The trial transcript indicates that trial counsel for Petitioner Robey argued under “Rule 401(b).” The Court believes this is a typo because there is no Rule 401(b), but a Rule 404(b), which is the Rule of Evidence that the petitioner argues on appeal.

that the only fair correction would be for a re-trial of this case. He argues that Syllabus Point 6 of *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995), provides four factors to consider in determining whether an improper prosecutorial comment is so damaging as to require reversal. These factors include considering the degree to which the remarks have a tendency to mislead the jury and prejudice the defendant; whether the remarks were isolated or extensive; absent the remarks, the strength of competent proof introduced to establish the defendant's guilt, and whether the comments were deliberately placed before the jury to divert its attention to extraneous matters. *Id.*

Petitioner argues that all four *Sugg* factors are present here. One of the elements for the crime of kidnapping involves concealment of a crime, giving the jury an indication that the petitioner was not only hiding from a driving under the influence charge, but from an automobile theft charge as well. Petitioner argues that these remarks were extensive because they were made in the Trooper's testimony and multiple times in the State's closing argument. Although it is hard to determine what the outcome of the trial would have been without these remarks, there was some reasonable doubt as to the victim's story. Lastly, the prosecutor's remarks were deliberate with the intention to show the jury all of the crimes that the petitioner was purportedly trying to conceal. Accordingly, the petitioner seeks for this Court to overturn his kidnapping conviction and remand the case for a new trial.

The State contends that the circuit court did not commit reversible error and therefore, this Court should affirm the petitioner's kidnapping conviction. The State's primary argument is that the information raised by the State in its closing argument was not new information. Prior witnesses had testified, without objection, that the petitioner was not in his own car at the time of this incident. Therefore, neither an analysis nor an in-camera hearing for Rule 404(b) evidence pursuant to *McGinnis* was necessary. It argues that the prosecutor's comments were permissible because "evidence of uncharged prior acts which is inextricably intertwined with the charged crime is admissible over a Rule 403 objection." *State v. LaRock*, 196 W.Va. 294, 313, 470 S.E.2d 613, 632 (1996). The State's comments about the petitioner not being in his own car were not raised to show that the petitioner had acted in conformity with prior conduct in the commission of the crime charged but rather, it was raised because the conduct of being in someone else's car was intrinsic to the charged offense of kidnapping. This was not an issue of Rule 404(b) evidence.

The State further argues that even if the State's closing remarks fell into the realm of Rule 404(b), the circuit court did not commit reversible error in allowing them. As previously argued, the material basis for these comments had already been introduced at trial. Further, there was no objection by defense counsel to the circuit court's curative instruction and there was no request for a mistrial; the petitioner has waived these issues for appeal. With regard to the *Sugg* factors, the State contends that the petitioner's arguments are speculative and lack merit.

The Court finds that the remarks made by the State prosecuting attorney in closing were not of Rule 404(b) material. The remarks made at closing indicated that the petitioner was in a vehicle not his own. This information was previously raised during the trial without objection. Further, the circuit court clearly instructed the jury twice that it was to consider the seventh element of the circuit court's charge as "for the purpose or the intent of demanding or extorting any concession or advantage of any sort by evading capture or arrest after being involved in car accident while intoxicated." The remarks made at the State's closing pertaining to the vehicle Petitioner Robey was driving did not fall into the purview of Rule 404(b) and accordingly, the circuit court was not required to engage in the requisite analysis under *State v. McGinnis*, nor was it required to conduct an in-camera hearing of this information.

3. Conclusion

For the foregoing reasons, we affirm the petitioner's conviction for kidnapping in circuit court.

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