STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent

vs.) No. 11-0877 (McDowell County 03-F-134)

SAMUEL S.,
Defendant Below, Petitioner

FILED
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Following a jury trial, the petitioner herein and defendant below, Samuel S.[1] (hereinafter "the petitioner"), was convicted of 110 counts of sexual offenses against his daughter, S.S. (hereinafter "daughter" or "victim"). The petitioner was re-sentenced for purposes of appeal by order dated April 28, 2011, by the Circuit Court of McDowell County. To this Court, the petitioner argues that the indictment and jury instructions were defective in that they failed to specify any facts that distinguished one count from another and, further, that improper hearsay testimony was introduced. Based upon the parties' written briefs and oral arguments, the appendix record designated for our consideration, and the pertinent authorities, we determine that the circuit court committed no prejudicial error. This Court further finds that this case presents no new or significant questions of law; therefore, it will be disposed of through a memorandum decision as contemplated under Rule 21 of the Revised Rules of Appellate Procedure.

On October 27, 2003, the petitioner was indicted by the McDowell County Grand Jury for 140 counts of sexual offenses against his daughter, which allegedly occurred over a period of ten years. The indictment charged that the petitioner began abusing S.S. in 1992, when she was only eight years old. The specific counts of the indictment included the crimes with which the petitioner was charged, listed the victim of the crimes, and the year they were committed. Prior to trial, the petitioner filed a motion for a bill of particulars seeking the date on which each offense was to have occurred, the time of each offense, the

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[1]Because of the sensitive nature of the facts alleged in this case, we use the initials of the affected parties. *See State v. Edward Charles L.*, 183 W. Va. 641, 645 n.1, 398 S.E.2d 123, 127 n.1 (1990) ("Consistent with our practice in cases involving sensitive matters, we use the victim's initials. Since, in this case, the victim . . . [is] related to the appellant, we have referred to the appellant by his last name initial." (citations omitted)).

location of each offense, the manner in which each crime was committed, and the means by which each offense was committed. The State responded that it could not be more specific because the indictment was based upon the victim's recorded statement. The State informed the petitioner that he could interview the victim; however, the petitioner did not take such opportunity.

Following a jury trial, on April 14, 2005, the petitioner was found not guilty of the first thirty counts of the indictment, which included sexual charges from 1992 to 1996. The petitioner was found guilty of the remaining 110 counts in the indictment, which included sexual charges that took place between 1996 to 2002. The petitioner's guilty verdicts consisted of twenty-five counts of sexual assault in the third degree, forty-five counts of incest, and forty counts of sexual abuse by a parent. The petitioner was sentenced to a term of incarceration of one to five years for each of the felony counts of sexual assault in the third degree, said sentences to run consecutively; a term of incarceration of five to fifteen years for each felony count of incest, with eight counts ordered to run consecutively to each other and consecutively to all other counts, and the remaining incest counts to run concurrently to each other and all other counts; and a term of incarceration of ten to twenty years for each felony count of sexual abuse by a parent, with six counts to run consecutively to one another and all other counts, and the remaining counts to run concurrently to each other and all other counts. The sentences accumulated to 125 to 365 years in prison. The defendant originally was sentenced on June 30, 2006, and was re-sentenced for purposes of appeal on April 28, 2011.

On appeal to this Court, the petitioner states that the indictment and jury instructions failed to specify any facts that distinguished one count from another, which, as argued by the petitioner, constituted plain error in that trial counsel failed to move to dismiss or to request appropriate jury instructions. The petitioner further contends that his trial was irreparably tainted by constant, improper hearsay repetitions of the victim's story, constituting plain error because counsel failed to object to virtually all of the hearsay testimony. In response, the State argues that the defendant's acquittal of the first thirty counts and conviction for the last 110 counts under the same indictment is evidence of the jury's ability to distinguish between the specific counts. Moreover, the State argues that the defendant cannot satisfy the plain error standard in relation to the purported admission of hearsay evidence; he is essentially arguing the weight of the testimonial evidence presented at trial.

This case comes before this Court on issues regarding the sufficiency of an indictment and the introduction of alleged hearsay testimony. We have stated that, "[g]enerally, the sufficiency of an indictment is reviewed *de novo*." Syl. pt. 2, in part, *State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996). With regard to the lower court's

admission of evidence regarded by the petitioner as hearsay, we review such allegation under an abuse of discretion standard. "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." Syl. pt. 4, *State v. Rodoussakis,* 204 W. Va. 58, 511 S.E.2d 469 (1998).

The petitioner argues that "[a]ll of these issues should be reviewed under the plain error standard, because defense counsel at trial did not object to them, make appropriate motions, or request appropriate jury instructions." As we have instructed, "[t]he 'plain error' standard of review requires error that is clear or obvious and that affects substantial rights which in most cases means that the error is of such great magnitude that it probably changed the outcome of trial." *State v. Omechinski*, 196 W. Va. 41, 47, 468 S.E.2d 173, 179 (1996) (internal citations omitted). This Court further has explained, "[t]o trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). We will first review the indictment issue in the context of the plain error doctrine, followed by an analysis of the alleged hearsay testimony.

The defendant first contends that it is impossible to tell whether the indictment charges 140 separate criminal incidents, or any lesser number.[2] The State argues that the jury's verdict confirms that enough factual allegations were presented that allowed the jury to distinguish one count from another. Of the 140 counts, the defendant was acquitted of the first thirty in chronological order because the jury failed to find beyond a reasonable doubt that the defendant committed the crimes alleged to have occurred from 1992 to 1996. However, the jury found the defendant guilty of the crimes occurring from 1996 until 2002, based upon the evidence presented, which included testimony from a treating doctor who saw the victim in 1997, as well as the victim's own testimony regarding the intensifying nature of the abuse as the victim matured in age.

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[2]With regard to indictments, we have explained that,

> [f]or the purposes of Rule 12(b)(2) and Rule 12(f) of the West Virginia Rules of Criminal Procedure, if a defect in a charging instrument does not involve jurisdiction or result in a failure to charge an offense, a defendant must raise the issue prior to trial or the defect will be deemed waived absent a showing of good cause for failing to timely raise the issue.

Syl. pt. 2, *State v. Tommy Y., Jr.*, 219 W. Va. 530, 637 S.E.2d 628 (2006). Because the petitioner waived his objection to the charging instrument, he relies on the plain error doctrine to garner this Court's review.

The minimum requirements for an indictment were established in *State v. Adams*, 193 W. Va. 277, 282 n.8, 456 S.E.2d 4, 9 n.8 (1995):

> (1) the indictment must contain a statement of essential facts constituting the offense charged; (2) it must contain allegations of each element of the offense charged, so that the defendant is given fair notice of the charge that he must defend against; and (3) the allegations must be sufficiently distinctive so that an acquittal or conviction on such charges can be pleaded to bar a second prosecution for the same offense. See W. Va. R.Crim.P. 7(c)(1); *Hamling v. United States*, 418 U.S. 87, 94 S. Ct. 2887, 41 L.Ed.2d 590 (1974); *State v. Knight*, 168 W. Va. 615, 285 S.E.2d 401 (1981).

Moreover,

> [a]n indictment is sufficient under Article III, § 14 of the West Virginia Constitution and W. Va. R. Crim. P. 7(c)(1) if it (1) states the elements of the offense charged; (2) puts a defendant on fair notice of the charge against which he or she must defend; and (3) enables a defendant to assert an acquittal or conviction in order to prevent being placed twice in jeopardy.

Syl. pt. 6, *State v. Wallace*, 205 W. Va. 155, 517 S.E.2d 20 (1999).

The petitioner's reliance on *Valentine v. Konteh*, 395 F.3d 626, 628 (6th Cir. 2005) is misplaced. In *Valentine*, the court held impermissible indictments with identically-worded counts so that there was no differentiation between the charges. *Valentine* concerned twenty identical counts of child rape and twenty identical counts of felonious sexual penetration, and thirty-eight of those counts were found to violate the due process clause. The *Valentine* court found that "the prosecution did not distinguish the factual bases of these charges in the indictment, in the bill of particulars, or even at trial." While the petitioner argues that *Valentine* is applicable to his case, we disagree. The indictment counts in *Valentine* were identical, while the counts in this current matter are distinguishable because of the year of occurrence, the age of the victim, and the manner of the abuse. Based upon the victim's testimony, and the testimony of the other State witnesses, the jury was able to differentiate between the counts and find the petitioner not guilty on the first thirty counts of the indictment.

This Court has noted that "[t]ime is not an element of the crime of sexual assault, the alleged variances concerning when the assaults occurred did not alter the substance of the charges against the defendant." *State v. Miller*, 195 W. Va. 656, 466 S.E.2d 507 (1995). Moreover, "[w]here a particular date is not a substantive element of the

crime charged, strict chronological specificity or accuracy is not required." *United States v. Kimberlin*, 18 F.3d 1156 (4th Cir 1994).

In the present case, the indictment was sufficient as it clearly stated the elements of the offense charged and gave the petitioner fair notice of the charges against which he must defend by stating the year, the offense committed, and the victim. If the petitioner desired more information, he could have taken advantage of the opportunity to interview the victim, or he could have made a proper motion before the lower court and asked for a ruling thereon. Because our review shows an indictment that meets the minimum guidelines for charging documents,[3] there is no error that was plain such that the plain error doctrine should be invoked.

The petitioner's arguments with regard to the jury instructions are that the instructions were improper as they were based on the defective indictment and that trial counsel failed to make a request for appropriate jury instructions in light of the alleged defective indictment. We have determined that the indictment was sufficient. It follows that the attendant jury instructions, where the only argument on appeal is that they were based on an insufficient indictment, were proper. *See State v. Miller*, 194 W. Va. 3, 17 n.23, 459 S.E.2d 114, 128 n.23 (1995) ("Today, we declare that in West Virginia criminal cases the sole bases for attacking an unobjected to jury charge are plain error and/or ineffective assistance of counsel."). However, we note that the alleged error is not sufficiently argued in the petitioner's brief, nor is the underlying record developed to the extent that would allow proper appellate review regarding any alleged deficiencies in the jury instructions. Syl. pt. 4, in part, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995) ("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 misled by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. . . .").[4]

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[3]The petitioner argues that, because the indictment failed to distinguish one count from another, the Double Jeopardy Clause was violated. "The Double Jeopardy Clause in Article III, Section 5 of the West Virginia Constitution, provides immunity from further prosecution where a court having jurisdiction has acquitted the accused. It protects against a second prosecution for the same offense after conviction. It also prohibits multiple punishments for the same offense." Syl. pt. 1, *Conner v. Griffith*, 160 W. Va. 680, 238 S.E.2d 529 (1977). Having determined that the indictment sufficiently identified separate counts, we decline to consider further the petitioner's double jeopardy claims.

[4]To the extent that the petitioner is arguing that his trial counsel was ineffective for not objecting appropriately or for not requesting certain jury instructions, this Court has

The petitioner also requests application of the plain error doctrine to the "improper hearsay repetitions of the [victim's] story."[5] In support of his position, t he petitioner argues that plain error existed in that his counsel failed to object to virtually all of the hearsay testimony from the State's witnesses. The petitioner complains about the testimony of five of the State's witnesses, all of whom testified to the effect that S.S. told them that her father was molesting her. The petitioner argues that these witnesses corroborated the victim's story by simply repeating it. The State responds that the petitioner is essentially arguing the weight of the testimonial evidence presented at trial.

Even assuming, *arguendo*, that introducing the testimony of the five complained-of witnesses constituted plain error, the petitioner cannot satisfy the next prong of the plain error doctrine because he can show no prejudicial affect to any substantial right. *See* Syl. pt. 9, *Miller*, 194 W. Va. 3, 459 S.E.2d 114 ("Assuming that an error is 'plain,' the inquiry must proceed to its last step and a determination made as to whether it affects the substantial rights of the defendant. To affect substantial rights means the error was prejudicial. It must have affected the outcome of the proceedings in the circuit court, and the defendant rather than the prosecutor bears the burden of persuasion with respect to prejudice."). In this case, the victim testified, and the petitioner had the opportunity to challenge her veracity. There was no prejudice to the petitioner because the victim's testimony, alone, was sufficient to convict him and was not inherently incredible. As this

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directed that

> [t]he very nature of an ineffective assistance of counsel claim demonstrates the inappropriateness of review on direct appeal. To the extent that a defendant relies on strategic and judgment calls of his or her trial counsel to prove an ineffective assistance claim, the defendant is at a decided disadvantage. Lacking an adequate record, an appellate court simply is unable to determine the egregiousness of many of the claimed deficiencies.

State v. Miller, 194 W. Va. 3, 15, 459 S.E.2d 114, 126 (1995). Thus, we decline at this time to consider any claims of ineffective assistance of counsel.

[5]"[I]t has always been necessary for a party to object or except in some manner to the ruling of a trial court, in order to give said court an opportunity to rule on such objection before this Court will consider such matter on appeal." *Loar v. Massey*, 164 W. Va. 155, 159-60, 261 S.E.2d 83, 86-87 (1979). As the petitioner concedes that "counsel failed to object to virtually all of the hearsay testimony[,]" he asserts that this Court should apply the plain error doctrine.

Court has stated: "A conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible, the credibility is ordinarily a question for the jury." Syl. pt. 5, *State v. Beck*, 167 W. Va. 830, 286 S.E.2d 234 (1981). While the petitioner attacks the victim's testimony, the jury clearly found the same to be credible.

For the foregoing reasons, we affirm the petitioner's convictions and resulting sentences.

Affirmed.

ISSUED: November 9, 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