STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 11-0918 (Mercer County 08-F-215)

Danny Honaker, Jr., Defendant
Below, Petitioner

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

MEMORANDUM DECISION

Petitioner Danny Honaker Jr., convicted of six counts of first degree sexual abuse and three counts of sexual abuse by a parent, appeals his sentence of twenty to forty years followed by lifetime probation. This appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The State 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.

Petitioner was accused of sexually abusing his son, after the son disclosed the sexual abuse while the son, at age eight, was being treated for sexually abusing his five-year-old sister. Petitioner was indicted in 2008 on nine counts: six counts of sexual abuse in the first degree and three counts of sexual abuse by a parent. Petitioner's first trial in April 2009 ended in a hung jury. Petitioner was tried again in June 2009, and was found guilty on all nine counts. At this trial, petitioner's son testified in the open courtroom, but petitioner was removed from the courtroom as per the request of the child's guardian ad litem and supported by the State's psychological expert. Petitioner watched on closed circuit television from outside the courtroom. Petitioner's son testified that petitioner had fondled him numerous times and threatened his life if he told anyone. The son's counselor testified that petitioner's son had reported sexual abuse by the petitioner, and petitioner's expert testified that the son had reported sexual abuse. Petitioner took the stand in his own defense, denying sexual or physical abuse toward his son, and testified that the son's allegations were instigated by

petitioner's wife's parents. Petitioner's expert testified that the son was fabricating the sexual abuse allegations, but did testify that the son had been the victim of extreme physical abuse by the petitioner.

The circuit court sentenced petitioner to one to five years on each of his six counts of sexual abuse in the first degree, and ten to twenty years for each of the three counts of sexual abuse by a parent, to all run consecutively. The one to five year sentence on the six counts of sexual abuse in the first degree, as well as one of the ten to twenty year sentences for one count of sexual abuse by a parent are suspended. Petitioner is then sentenced to probation for the remainder of his life upon release. Petitioner's motion for a new trial was denied.

This Court has stated that:

> In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review.

Syl. Pt. 3, *State v. Vance*, 207 W.Va. 640, 535 S.E.2d 484 (2000).

On appeal, petitioner first argues that he was denied his right to confrontation by being removed from the courtroom during the victim's testimony. During both trials, the victim testified in open court while the petitioner watched via closed circuit television from outside the courtroom. Petitioner argues that the State made no showing of the continued need for the closed circuit television between the two trials, nor did the circuit court make findings regarding the continued need for this procedure. Petitioner also argues that the criteria of West Virginia Code § 62-6B-3 were not met and that the procedure denied his right to confront the witness.

The State responds, arguing that pursuant to West Virginia Code § 62-6B-1 *et seq.*, the trial court relied on the expert opinion that the child should not testify in front of the petitioner. Further, petitioner was given the opportunity to obtain his own expert to dispute the State's expert, but did not do so. Further, petitioner's counsel agreed to allow the child to testify without the petitioner present during the second trial.

West Virginia Code § 62-6B-3 states as follows:

(a) Upon a written motion filed by the prosecuting attorney, and upon findings of fact determined pursuant to subsection (b) of this section, a circuit court may order that the testimony of a child witness may be taken at a pretrial proceeding or at trial through the use of live, two-way closed-circuit television.

(b) Prior to ordering that the testimony of a child witness may be taken through the use of live, two-way closed-circuit television, the circuit court must find by clear and convincing evidence, after conducting an evidentiary hearing on this issue, that:

(1) The child is an otherwise competent witness;

(2) That, absent the use of live, two-way closed-circuit television, the child witness will be unable to testify due solely to being required to be in the physical presence of the defendant while testifying;

(3) The child witness can only testify if live, two-way closed-circuit television is used in the trial; and

(4) That the state's ability to proceed against the defendant without the child witness' live testimony would be substantially impaired or precluded.

(c) The court shall consider the following factors in determining the necessity of allowing a child witness to testify by the use of live, two-way closed-circuit television:

(1) The age and maturity of the child witness;

(2) The facts and circumstances of the alleged offense;

(3) The necessity of the child's live testimony to the prosecution's ability to proceed;

(4) Whether or not the facts of the case involve the alleged infliction of bodily injury to the child witness or the threat of bodily injury to the child or another; and

(5) Any mental or physical handicap of the child witness.

(d) In determining whether to allow a child witness to testify through live, two-way closed-circuit television the court shall appoint a psychiatrist, licensed psychologist with at least five years clinical experience or a licensed clinical social worker with at least five years of significant clinical experience in the treatment and evaluation of children who shall serve as an advisor or friend of the court to provide the court with an expert opinion as to whether, to a

> reasonable degree of professional certainty, the child witness will suffer severe emotional harm, be unable to testify based solely on being in the physical presence of the defendant while testifying and that the child witness does not evidence signs of being subjected to undue influence or coercion. The opinion of the psychiatrist, licensed psychologist or licensed clinical social worker shall be filed with the circuit court at least thirty days prior to the final hearing on the use of live, two-way closed-circuit television and the defendant shall be allowed to review the opinion and present evidence on the issue by the use of an expert or experts or otherwise.

Pursuant to this code provision, the circuit court relied on an expert psychologist's opinion that the child, then age eleven, would be traumatized by having to testify before the petitioner. The circuit court considered all of the relevant factors, and properly utilized the closed circuit television. After the first trial, counsel for the petitioner agreed that there had been no change in circumstances for the child in the intervening two months between trials, and thus the child was again allowed to testify without petitioner present. This Court finds no error in the child victim testifying via closed circuit television.

Petitioner next argues that his right to confrontation was violated through the use of a videotaped deposition of the State's expert witness at both trials. The witness was unable to testify at trial due to undergoing chemotherapy treatments, and petitioner now argues that this was impermissible absent a showing that there was some necessity.

In response, the State argues that petitioner failed to object to the State's expert testifying via deposition, and the victim even testified that his counselor, who was the State's expert, was "sick." This issue was not raised until petitioner's motion for a new trial, and since the issue was not raised at either the first or second trial, petitioner has waived any objection.

This Court has stated that "[o]ne of the most familiar procedural rubrics in the administration of justice is the rule that the failure of a litigant to assert a right in the trial court likely will result in the imposition of a procedural bar to an appeal of that issue." *State v. Proctor*, 227 W.Va. 352, 360, 709 S.E.2d 549, 557 (2011) (quoting *State v. LaRock*, 196 W.Va. 294, 316, 470 S.E.2d 613, 635 (1996). In the instant matter, petitioner failed to object to the State's expert testifying via deposition during either of the trials. Thus, this Court finds no error.

Petitioner argues that the State's cross examination of petitioner's expert regarding his fees was so grossly improper as to mandate a new trial. He argues that the statement made by the prosecution, "[w]hat do you think that's going to cost us?" implies that the

defense was wasting taxpayer dollars, that it unfairly discloses to the jury that petitioner was being defended by appointed counsel, and that it causes confusion. Petitioner claims prejudice from this comment, because the expert could not answer the question completely due to his charges from the first trial being subtracted from the total.

The State responds, arguing that petitioner does not allege any error by the trial judge as to constitute reversible error, as the trial judge actually sustained the petitioner's objection to the question above and instructed the jury to disregard the question. Petitioner's counsel did not register further objection after the questioning was halted, nor did he ask for a curative instruction.

This Court has stated that "[o]rdinarily where objections to questions or evidence by a party are sustained by the trial court during the trial and the jury instructed not to consider such matter, it will not constitute reversible error." Syl. Pt. 18, *State v. Hamric*, 151 W.Va. 1, 151 S.E.2d 252 (1966). In the present case, the trial judge's prompt curative action sufficiently assured that there was no prejudice to the petitioner from the prosecutor's question. This Court finds no error.

Petitioner next argues that he was denied a fair trial because the State's expert witness referred to "oral sex" in her deposition after the circuit court had prohibited entry of any evidence regarding oral sex. Petitioner argues that the circuit court ruled that any reference to oral sex in the expert's videotaped deposition not be played to the jury, but at least one reference was not properly deleted. Petitioner argues that the reference to oral sex was highly prejudicial and thus his trial was unfair.

The State responds, arguing that petitioner's expert actually "blurted out" a reference to oral sex. One reference to oral sex was not deleted properly from the State's expert's deposition; however, petitioner did not object to the reference at the time, noting that "[i]t was [just] one place, your Honor." The judge admonished both sides not to mention oral sex again, and noted that the mention by the State's expert was harmless error. Further, the State argues that petitioner has shown no prejudice from the mentioning of oral sex.

Although the circuit court excluded any mention of oral sex, it appears from a review of the transcripts that both sides mentioned oral sex. The State failed to omit one reference from the videotaped deposition, and petitioner's expert specifically brought up oral sex in his testimony. Further, petitioner did not object at the time the videotaped testimony was played. This Court finds that petitioner was not denied a fair trial by the single reference to oral sex by the State's expert.

Finally, Petitioner argues that the jury verdict is contrary to the law and the evidence. He argues his innocence and that the victim only disclosed the alleged abuse when he was

being treated for abusing his sister. The State argues that the child testified and the jury determined that the child's testimony was truthful. This Court finds that the jury verdict was supported by the testimony and evidence, and that the jury verdict should not be overturned.

For the foregoing reasons, we affirm.

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