

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

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

vs.) No. 11-0941 (Harrison County 10-F-83-3)

**H.M.B., Defendant Below,
Petitioner**

FILED

May 29, 2012

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

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Harrison County's May 18, 2011, sentencing order entered following a jury trial. Petitioner, H.M.B.,¹ by counsel Wiley W. Newbold, appeals his sentence to a term of incarceration of ten to twenty years and a fine of \$500.00 for his conviction of the crime of sexual abuse by a parent, guardian, or custodian, and a term of incarceration of twenty-five to 100 years and a fine of \$5,000.00 for the crime of sexual assault in the first degree, said sentences to run concurrently. The State, by counsel C. Casey Forbes, has filed its response, to which petitioner has filed a reply.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented, 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 instant matter arose from allegations that petitioner engaged in sexual intercourse with the daughter of V.R., with whom he fathered a separate child. Petitioner and V.R. lived together, along with the alleged victim, J.R., who was four years old at the time of the crime. According to the State, petitioner forcibly inserted his penis in J.R.'s mouth while the two were cutting grass. The child told her mother about this incident, and a criminal investigation was initiated. In May of 2010, the Harrison County Grand Jury returned a five-count indictment against petitioner, charging him with the following crimes: one count of sexual assault in the first degree; two counts of sexual abuse in the first degree; and, two counts of sexual abuse by a parent, guardian, or custodian. Upon petitioner's motion, one count of sexual abuse in the first degree was severed from the other charges for purposes of trial. A jury found petitioner not guilty of this single count of first degree sexual abuse in a separate trial

¹ In keeping with the Court's policy of protecting the identify of minors and the victims of sexual crimes, the parties will be referred to by their initials throughout the memorandum decision.

Following a jury trial on the remaining charges, petitioner was convicted of one count of sexual assault in the first degree and one count of sexual abuse by a parent, guardian, or custodian. By order entered May 18, 2011, petitioner was sentenced to a term of incarceration of ten to twenty years and fined \$500.00 for his conviction of the crime of sexual abuse by a parent, guardian, or custodian, and to a term of incarceration of twenty-five to 100 years and fined \$5,000.00 for the crime of sexual assault in the first degree. The circuit court ordered these sentences to run concurrently.

Petitioner appeals and asserts the following five assignments of error: (1) that the circuit court erred in allowing V.R., a State witness, to be present in the courtroom during the testimony of her daughter, J.R., the victim; (2) that the circuit court erred when it admitted photographs of a tractor and allowed testimony on the same without sufficient authentication of their relevance or whether the person on the tractor was petitioner; (3) that the circuit court erred in sustaining the State's objections to petitioner's questioning of Sergeant Tige Pratt and Terri Walker; (4) that the victim J.R. was inherently unbelievable and her testimony was insufficient to support a jury verdict; and, (5) that the cumulative effect of all these errors constitutes an abuse of discretion by the circuit court and a due process violation of petitioner's constitutional rights. These assignments of error, as well as the State's responses, are addressed in turn below.

To begin, petitioner argues that the circuit court erred in allowing V.R., a State witness, to be present in the courtroom during the testimony of her daughter J.R. According to petitioner, the circuit court granted the State's motion to sequester witnesses under Rule 615 of the West Virginia Rules of Evidence and, pursuant to this ruling, V.R. should not have been allowed in the courtroom when her daughter testified. Petitioner argues that V.R. was in the courtroom, as evidenced by the child's testimony. Petitioner asserts that his counsel was not aware of V.R.'s presence in the courtroom until well after trial and argues that her presence constitutes reversible error. Petitioner argues that "when a trial court fails to comply with Rule 615 of the West Virginia Rules of Evidence, prejudice is presumed and reversal is required unless the prosecution proves by a preponderance of the evidence that the error was harmless." Syl. Pt. 6, in part, *State v. Omechinski*, 196 W.Va. 41, 468 S.E.2d 173 (1996).

In response, the State argues that no violation of Rule 615 occurred and, even if one did, it amounts to harmless error. The State argues that a plain error analysis applies because petitioner did not object to V.R.'s alleged presence during the victim's testimony. However, the State notes that the testimony upon which petitioner relies to establish V.R.'s presence in the courtroom is not clear on the issue. The State argues that the witnesses were being sequestered in a room outside the courtroom and that a statement made by the child during her trial testimony is ambiguous as to whether V.R. was actually in the back of the courtroom or in a room outside the courtroom. For these reasons, the State argues that no violation of the sequestration order occurred.

We have previously held that "[w]here a trial court's determination involves a construction of the *West Virginia Rules of Evidence* and rulings of law, our review is plenary." *State v. Lowery*, 222 W.Va. 284, 287, 664 S.E.2d 169, 172 (2008) (citing *State v. Omechinski*, 196 W.Va. 41, 44, 468

S.E.2d 173, 176 (1996); *Gentry v. Mangum*, 195 W.Va. 512, 518, 466 S.E.2d 171, 177 (1995)). The only evidence upon which petitioner relies to establish V.R.'s presence in the courtroom during J.R.'s testimony are two references to "the mommy back there" in the child's testimony. Based upon the limited record related to this assignment of error, it is impossible for the Court to tell if the young victim's reference to "the mommy back there" signifies V.R.'s presence in the back of the courtroom or in the sequestration room, where the two had been awaiting their respective turns to testify. The Court finds that petitioner has failed to sufficiently establish that V.R. was present in the courtroom during J.R.'s testimony and, therefore, has failed to establish any alleged error regarding the circuit court's sequestration order.

As to petitioner's second assignment of error, he argues that the circuit court erred when it admitted photographs of a tractor without sufficient authentication of either their relevance or whether or person on the tractor was petitioner. Petitioner argues that the photographs in question, which depict petitioner and the victim on a tractor, are too distant for a firm identification. Additionally, he argues that no foundation was given as to who took the photographs, when they were taken, and how they were relevant to the trial. Admitting that no objection was made to the introduction of the photographs during trial, petitioner argues on appeal that their introduction constitutes plain error.² In response, the State argues that the photographs were properly authenticated and that their introduction into evidence does not constitute plain error. The State argues that when the photographs were introduced, V.R. testified that they depicted petitioner and the victim on a tractor and testified to the contents of the photos from her personal knowledge of petitioner and her home. Under Rule 901 of the West Virginia Rules of Evidence, the State argues that testimony is sufficient to authenticate the photographs. The Court agrees.

"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." Syllabus point 10, *State v. Huffman*, 141 W.Va. 55, 87 S.E.2d 541 (1955), *overruled on other grounds by State ex rel. R.L. v. Bedell*, 192 W.Va. 435, 452 S.E.2d 893 (1994)." Syl. Pt. 2, *State v. Doonan*, 220 W.Va. 8, 640 S.E.2d 71 (2006). It is clear that the circuit court did not abuse its discretion in allowing the State to introduce the photographs depicting petitioner and the victim on a tractor. First, the photos were clearly relevant under Rule 401 of the West Virginia Rules of Evidence, as they depicted petitioner and the victim on a tractor together, and the victim testified that it was during one such occasion when she was on the tractor with petitioner that he committed the criminal conduct at issue. Under Rule 402 of the West Virginia Rules of Evidence, relevant evidence is generally admissible. Regarding the authenticity of the photographs, the Court finds no merit in petitioner's argument that a photograph's author and when it was taken must be established in order for the same to be properly authenticated. V.R. identified petitioner in the photograph and testified as to her familiarity with the area in which the picture was taken. Under Rule 901 of the West Virginia Rules of Evidence, authentication can be satisfied by testimonial evidence of a witness with personal knowledge of the matter establishing that the item is what its

² Counsel notes that he is raising this argument at the urging of the petitioner, and in furtherance of the mandate of *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967).

proponent claims. In this instance, V.R. provided such testimony. For these reasons, we find no error in the circuit court's decision to admit the photographs at issue into evidence.

Petitioner next argues that the circuit court erred in sustaining the State's objections to the petitioner's questioning of Sergeant Tige Pratt and Terri Walker. According to petitioner, J.R. was unable to recall the forensic examination performed on her by Ms. Walker. As such, petitioner argues that J.R. was unavailable for purposes of cross-examination as to what she told Ms. Walker during this interview. Further, petitioner alleges that the forensic interview, along with V.R.'s corroboration of J.R.'s accusations, formed the basis of Sgt. Pratt's complaint. Therefore, he argues that the only way to examine the facts of the case critically was through cross-examination of Sgt. Pratt and Ms. Walker about the forensic interview. Specifically, petitioner cites to questions directed to Ms. Walker concerning alleged inconsistencies in the words that J.R. used for male and female genitalia. Petitioner argues that when his counsel began questioning Ms. Walker regarding the substance of the forensic interview, the circuit court sustained the State's objection. The circuit court also, according to petitioner, inappropriately sustained the State's objections to questions that called for Ms. Walker's opinion testimony and questions related to the suggestible nature of children. Upon questioning Sgt. Pratt, petitioner argues that the State objected to questions related to the forensic interview and the objection was sustained. According to petitioner, these rulings deprived petitioner of an effective defense and precluded him from examining the charges fully.

In response, the State argues that the circuit court did not commit error regarding these two witnesses. As to Sgt. Pratt, the State argues that petitioner was allowed to cross-examine him as to the forensic interview without objection. However, when petitioner recalled Sgt. Pratt during his case-in-chief, the State objected to Sgt. Pratt testifying as to the contents of the interview because he was not present during the same. According to the State, Sgt. Pratt viewed a recording of the interview as part of his investigation, and the circuit court was correct in preventing him from testifying to the contents of the interview based on hearsay objections. However, despite the sustained objection, petitioner's counsel was allowed to ask Sgt. Pratt if the victim stated during the interview that the crime did not happen, and Sgt. Pratt responded, "yes."

As to Ms. Walker, the State argues that she was never qualified or admitted as an expert in child psychology, yet petitioner's counsel repeatedly questioned her on cross-examination as to general questions about child behavior. While the circuit court sustained the State's objections about the witness's opinion testimony, it did allow limited questioning as to her work with children. Ms. Walker was also called during petitioner's case-in-chief, during which counsel attempted to elicit testimony concerning what the victim said during the forensic interview. According to the State, the circuit court sustained its objection on hearsay grounds, and then sustained a subsequent objection to a rephrased question on the grounds that it called for a legal conclusion. The State argues that under Rules 801 and 802 of the West Virginia Rules of Evidence, hearsay is defined as an out-of-court statement asserted for the truth of the matter and is not admissible. In short, the State argues that the circuit court's decision on the objections at issue were correct, and that no hearsay exception properly applies to admit the out-of-court statements of the victim through another witness at trial.

“‘The West Virginia Rules of Evidence . . . allocate significant discretion to the trial court in making evidentiary . . . rulings. Thus, rulings on the admissibility of evidence . . . are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary . . . rulings of the circuit court under an abuse of discretion standard.’ Syllabus Point 2, *State v. Harris*, 216 W.Va. 237, 605 S.E.2d 809 (2004).” Syl. Pt. 1, *State v. Cyrus*, 222 W.Va. 214, 664 S.E.2d 99 (2008) (internal citations omitted). Upon review of the appendix, the Court does not find an abuse of discretion in any of the evidentiary rulings of which petitioner complains. The circuit court was correct to sustain this hearsay objection to Ms. Walker’s testimony, as counsel was free to ask the victim whether this incident occurred. Further, the circuit court was correct to prevent Ms. Walker from testifying to child behavior and development because she was not qualified under Rule 702 of the West Virginia Rules of Evidence to offer opinions in this area.

Petitioner next argues that he should have been allowed to use a transcript of J.R.’s forensic interview when examining Sgt. Pratt for purposes of questioning the officer about the underlying criminal investigation. According to petitioner, his counsel should have been allowed to read portions of the transcript during his direct examination of the officer to establish that the victim gave conflicting statements about the crime in order to determine exactly how the investigating officer drew conclusions about the case. Upon review of the appendix, the Court finds that the circuit court correctly prevented counsel from reading directly from the transcript because of concerns over the accuracy of the transcript and whether it properly reflected the interview in question. As such, the circuit court ruled that petitioner could question Sgt. Pratt as to how he conducted his investigation and could even ask if he reviewed the interview in question and whether it contained any inconsistencies. However, petitioner was properly precluded from reading directly from the transcript.

Similarly, during his direct examination of Ms. Walker, petitioner’s counsel again attempted to have the witness read portions of the victim’s statement made during the forensic interview on the record. The State objected to the testimony as hearsay, which the circuit court sustained. Counsel rephrased the question, asking if the answer the child gave to the question of whether petitioner put his penis in her mouth supported the charges against him. The State objected to this question because it called for a legal conclusion and the circuit court sustained that objection as well. Upon reviewing the appendix, the Court finds that the circuit court did not abuse its discretion in making these evidentiary rulings. There are no hearsay exceptions that would allow Ms. Walker to read the child’s statement into evidence. It was clearly being offered into evidence to prove the truth of the matter asserted; namely that petitioner did not commit the crime in question. Further, objection to petitioner’s questioning as to whether the child’s response was sufficient to support the charges against him was properly sustained because Ms. Walker was not qualified to answer such questions. For these reasons, the Court finds no error in regard to the circuit court’s evidentiary rulings related to the transcript of J.R.’s forensic interview.

As to petitioner’s next assignment of error, he argues that the victim, J.R., provided testimony that was inherently unbelievable and insufficient to sustain petitioner’s conviction. Petitioner argues that upon questioning, the child could not distinguish between her left and right hands and could not

remember or explain the concepts of testimony or truth after the circuit court explained the same to her. As to the criminal conduct at issue, petitioner argues that the child was twice asked if anyone had “given her bad touches,” and that she twice responded negatively. Not until the question was asked a third time did the child testify to the conduct for which petitioner was indicted. However, petitioner argues that the child provided conflicting statements during the forensic interview when she said that this incident did not happen. Further inconsistencies existed between the interview and the child’s testimony, according to petitioner, including her refusal to testify to the molestation charges which resulted in petitioner’s acquittal on Counts I and II of the indictment. According to petitioner, on cross-examination, the child could not recall the forensic interview at all. Petitioner argues that the victim’s testimony was inconsistent with her mother’s testimony, thereby making the victim’s testimony inherently unreliable and untrustworthy.

In response, the State argues that the victim’s testimony was not inherently incredible, despite difficulty in testifying due to her young age. According to the State, J.R. was five years old at the time of her testimony, but she still testified that she knew the difference between the truth and a lie and even demonstrated that difference. The State argues that the child promised to tell the truth and stated she was in court to testify. The State points to the child’s testimony where she described petitioner holding her down and shoving his penis into her throat so that it caused her to choke. Based upon this testimony, the State argues that the child sufficiently established that sexual intercourse took place in order to support petitioner’s convictions. Upon review of the appendix, the Court agrees. We have held as follows:

“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. 1, *State v. Malfregeot*, 224 W.Va. 264, 685 S.E.2d 237 (2009). Additionally, we have held that “[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 a question for the jury.” Syl. pt. 5, *State v. Beck*, 167 W.Va. 830, 286 S.E.2d 234 (1981).” Syl. Pt. 1, *State v. Haid*, 228 W.Va. 510, 721 S.E.2d 529 (2011).

Looking to the child’s testimony, she clearly stated that “winkie” was the term she had been taught for a male’s genitals. With little prompting, the child clearly recalled an instance where she

was riding a tractor with petitioner while he cut grass and recalled that he had to urinate. According to the child's testimony, she turned around so she could not see him while he relieved himself, only to have petitioner turn her around and hold her so she could not get away. According to J.R., it was at this point that petitioner "shoved [her] head on his winker," and that "[h]e made it go all the way in [her] throat and made [her] choke." Further, the child identified petitioner in court as the individual that perpetrated this act on her. It is clear from the child's testimony that the State was able to establish that sexual intercourse took place sufficient to satisfy that element in both West Virginia Code § 61-8B-3(a)(2) and § 61-8D-5(a), the statutes under which petitioner was convicted. It is clear that the child's testimony was not inherently incredible such that petitioner's conviction was not supported by the evidence, and it is clear that the jury determined that this witness was credible in reaching its verdict. For these reasons, we decline to disturb petitioner's convictions on appeal.

As to petitioner's final assignment of error, he argues that the cumulative effect of all the alleged assignments of error constitutes an abuse of discretion by the circuit court and a due process violation of his constitutional rights. According to petitioner, even if the errors are found to be insufficient to warrant reversal individually, the cumulative effect of the errors render a high probability that a due process violation occurred. In response, the State argues that petitioner has not established that any errors even occurred, let alone that their cumulative effect rendered his trial constitutionally unfair. For these reasons, the State argues that the cumulative effect doctrine should not apply to this case. The Court agrees. We have previously held that "[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. 11, *State v. Cecil*, 221 W.Va. 495, 655 S.E.2d 517 (2007). Based upon our review, we find no error on the part of the circuit court in relation to petitioner's various assignments of error. As such, we decline to find that the cumulative error doctrine applies to this matter.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: May 29, 2012

CONCURRED IN BY:

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum