STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 11-1045 (Morgan County 07-F-69)

Jason M. Payne,
Defendant Below, Petitioner

FILED
June 22, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Jason Payne, by counsel, B. Craig Manford, appeals the Morgan County Circuit Court's "Agreed Order Re-Sentencing Defendant" entered on June 6, 2011, sentencing him to forty years in prison for his second degree murder conviction and to an additional five years for his recidivist conviction.[1] Respondent State of West Virginia appears by its counsel, Laura Young.

This Court has considered the parties' briefs and the record 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 record 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.

In April of 2006, an individual reported to police that Keese Bare was dead and in a fire pit at a camp site by the Potomac River referred to as "Lot 17" and that there were four suspects responsible for his death: petitioner and his cousins, Vernon Kerns, Jr,.his sister Amanda Kerns Ecatah, and Jerome "B.J." Smith. Mr. Bare was positively identified based upon an examination of the bone fragments found in the fire pit.

Petitioner was indicted on charges of first degree murder and conspiracy to commit murder. His trial commenced on May 5, 2008. There were numerous witnesses for the State at trial, including Ms. Ecatah, who implicated her brother, Mr. Kerns, and her cousins, petitioner and Mr. Smith, in the murder of Mr. Bare. Ms. Ecatah testified that she was promised leniency by the State if she testified truthfully at petitioner's trial.

[1] Petitioner raises four of his five assignments of error in his brief as "plain and prejudicial error." However, as it appears that these issues were raised below, they would not be subject to analysis under the plain error doctrine.

Ms. Ecatah testified that late in the day on September 2, 2004, and at her brother's request, she drove to Lot 17 and, that upon her arrival, her brother approached her and said that "they were going to kill Keese." She testified that Keese Bare was on the ground and that Mr. Smith pulled Mr. Bare's head back and cut his throat while petitioner and her brother restrained Mr. Bare. She testified that after they released their hold on Mr. Bare, he stood up and began to run at which point her brother started stabbing Mr. Bare with a knife. Ms. Ecatah further testified that petitioner told Mr. Bare "that is what happened to people that told" and that petitioner beat Mr. Bare in the head with a metal baton until it bent in half. Ms. Ecatah testified that "I begged him (petitioner) to stop[.] I said that was enough and he (petitioner) said he wasn't going to jail for attempted murder." Ms. Ecatah testified that the three men burned the victim's body in the fire pit at the campsite. Ms. Ecatah testified that Mr. Bare was killed because it was believed that he was going to implicate them in a credit card fraud case.

On cross-examination, Ecatah acknowledged that she had a criminal history for forgery and that she had previously lied to the police when questioned about Mr. Bare's murder. She also acknowledged the differences in a statement she gave to the police versus her trial testimony.

Petitioner testified that he was invited to Lot 17 by Vernon Kerns on the night in question and that upon arriving, Mr. Kerns, Jerome Smith, Ms. Ecatah, and Mr. Bare were all drunk and sitting near the fire pit while laughing and drinking. Petitioner testified that he saw Mr. Bare, Mr. Kerns, and Mr. Smith all walk down toward the river; that he suddenly heard a noise and saw Mr. Bare fall to the ground; that Mr. Bare did not move after Mr. Kerns and Mr. Smith stopped hitting him; and that approximately five minutes later, Mr. Kerns and Mr. Smith dragged Mr. Bare's body into the fire. Petitioner testified that he previously had a metal baton similar to the one described by Ms. Ecatah, but he denied either killing or participating in the murder of Mr. Bare.

Petitioner's former wife, Vanessa Mickey,[2] testified concerning statements made by Vernon Kerns in May of 2006, when she was riding in a pickup truck with him and petitioner. Ms. Mickey testified that Mr. Kerns stated that "they" had taken the victim down to the river lot where Mr. Smith slit the victim's throat and that he and petitioner beat the victim with some kind of bar or club after which they burned the body. Ms. Mickey also testified regarding a recorded jail telephone call between her and petitioner during which this May 2006 conversation was referenced.

Petitioner's motions for judgment of acquittal at the close of the State's case and at the close of all the evidence were denied by the trial court. Jury instructions were reviewed and modified without objection by either party. The jury began its deliberations. At 11:50 p.m., the jury sent the trial court a question asking what was meant by the word "duty" in one of the jury instructions. After much discussion, the parties agreed that the trial judge would simply tell the jury: "We are unable to give you further definition."

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[2] She is listed as "Vanessa Payne" and as "Vanessa Mickey" in the trial transcript in the appendix record.

At 12:25 a.m., at the request of defense counsel, the trial judge asked the jury if it would like to break for the night and return on Monday morning to continue its deliberations. The jury declined the trial judge's offer and, at 1:37 a.m., returned its verdict finding petitioner guilty of second degree murder and acquitting him of the conspiracy charge. The State filed a recidivist information that petitioner agreed not to contest. The trial court sentenced petitioner as indicated above.

Failure to Direct a Verdict

Petitioner asserts that the trial court erred in failing to direct a verdict in his favor. In the alternative, petitioner asserts that the jury's verdict was contrary to the evidence at trial. Petitioner contends that Ms. Ecatah's trial testimony was impeached by her prior inconsistent statements to law enforcement. Petitioner asserts that if even if the jury believed Ms. Ecatah's testimony concerning petitioner's alleged statement that he was not "going down for attempted murder," or words to that effect, it showed that petitioner ceased his attack upon the victim while he was still alive and that petitioner terminated his role in the conspiracy. We first note that Ms. Ecatah testified that she did not know whether the victim was alive when petitioner made this statement, and that we agree with the State's argument that the more likely implication of this statement was that petitioner was going to cooperate with Mr. Kerns and Mr. Smith in killing the victim and destroying the evidence. We further note that petitioner was acquitted of the conspiracy charge. Petitioner also argues that he attempted to show that his ex-wife, Vanessa Mickey, had motives for fabricating the conversation that allegedly took place in the pickup truck in May of 2006, as discussed above, and that his various, recorded telephone conversations with Ms. Mickey while he was incarcerated contained no admissions to any crime.

Petitioner argues that even when the evidence is considered in the light most favorable to the State, as required by *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995), and after crediting the State with all inferences and credibility assessments that the jury could have drawn from the evidence, reasonable minds could not have reached the same conclusion as to petitioner's guilt of second degree murder.

> "The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." Syl. Pt. 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Syl. Pt. 1, *State v. Juntilla*, 227 W.Va. 492, 711 S.E.2d 562 (2011). We have also stated that

> "[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." Syl. pt. 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Syl. Pt. 2, *State v. McFarland*, 228 W.Va. 492, 721 S.E.2d 62 (2011). Having applied these standards to our review of the State's evidence at trial as set forth in the appendix record, and having considered the parties' arguments in this regard, we find that there was sufficient evidence to support petitioner's convictions.

Jury Instruction

As noted, during its deliberations, the jury asked for the definition of the word "duty" as used in one of the jury instructions. After much discussion between the trial judge and counsel, and after giving the jury the option of returning and continuing its deliberations on Monday morning so that its question could be researched further, the parties agreed that the jury would simply be told: "We are unable to give you further definition." Petitioner asserts that the trial court's failure to define a *legal* duty versus a *moral* duty could reasonably have left the jury to presume that, at a minimum, a moral duty existed even where no legal duty was present, which was unconstitutional burden-shifting that denied him the right to a fair trial. Petitioner argues that this is plain error that can be addressed on appeal, even though the parties agreed that no further definition of "duty" could be given to the jury at the time. Petitioner adds that this instructional error was not harmless because the outcome of petitioner's trial might have been different had the trial court answered the jury's question by defining a legal duty versus a moral duty.

"'To 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.' Syllabus point 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995)." Syl. Pt. 1, *State v. Davis*, 220 W.Va. 590, 648 S.E.2d 354 (2007). Having considered the parties' arguments and having reviewed the trial transcript, including the jury instructions and the discussion between the trial court and counsel on this issue, we conclude that petitioner has not met his burden of demonstrating plain error in this regard.

Recess

Petitioner asserts that the trial court abused its discretion and denied him a fair trial when it instructed the jury that it could continue to deliberate or recess until the next judicial day, which was

the following Monday, particularly given the lateness of the hour and because the parties were forced to reach a compromise on how to instruct the jury on its question related to the definition of "duty." Instead of giving the jury the option of continuing its deliberations, petitioner argues that the trial court should have advised the jury that due to a legal issue, the proceedings were going to be recessed until Monday morning. Petitioner asserts that his right to due process was compromised and the trial court's failure to recess the jury's deliberations constitutes plain and prejudicial error.

Prior to the jury beginning its deliberations, the trial court stated: "The Court can't stop your deliberation. We can give you the option of when you feel as though you've gone too long and you're too tired and it is too hot and you need to call it a day. If at some point you all opt to end your deliberation for the day and go home[,] then we can clear our day on Monday and we can start again Monday morning at nine just so you know." Petitioner's trial counsel suggested that the trial court ask the jury if it wanted to "break for the night," and the trial court, in its discretion, gave the jury the option of recessing its deliberations, which the jury declined. *See Dupuy v. Allara*, 193 W.Va. 557, 564, 457 S.E.2d 494, 501 (1995) ("Ordering a recess or temporary adjournment is within the sound discretion of the trial court.") Based upon our review of the appendix record and our consideration of the parties' arguments, we find that the trial court did not abuse its discretion in allowing the jury to continue its deliberations and that petitioner has not met his burden of demonstrating plain error in this regard.

Exculpatory Evidence

Ms. Ecatah told law enforcement that she received a cellular phone call from her brother, Vernon Kerns, while she was driving to Lot 17 on the night in question. Petitioner asserts that the State had sufficient time thereafter to secure Ms. Ecatah's cellular telephone records for the date in question, but chose not to do so. Petitioner contends that he had no way to obtain these records prior to trial. He further contends that these phone records "most probably contained" exculpatory evidence as they "may have shown" additional communications and, thus, a possible conspiracy between Mr. Kerns, Mr. Smith, and Ms. Ecatah, which was petitioner's theory at trial. Petitioner argues that a police investigator's knowledge of evidence in a criminal counsel is imputed to the prosecutor, and that Ms. Ecatah's cellular phone records were favorable to him as either exculpatory or impeachment evidence, or both, which was suppressed by the State, at least inadvertently, and that such evidence was material as its absence denied him a fair trial. Petitioner does not cite to the appendix record to show whether this issue was raised below.

The State asserts that it did not possess Ms. Ecatah's cellular phone records, therefore, it could not have withheld those records from petitioner. Petitioner's contention that Ms. Ecatah's phone records would have been exculpatory appears to be speculative, at best. Further, petitioner and the State relied at trial upon the phone records of the victim and the various other parties involved, which records would have shown that calls occurred among Ms. Ecatah and others.

"'There are three components of a constitutional due process violation under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *State v. Hatfield*, 169 W.Va. 191,

286 S.E.2d 402 (1982): (1) the evidence at issue must be favorable to the defendant as exculpatory or impeachment evidence; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must have been material, i.e., it must have prejudiced the defense at trial.' Syllabus point 2, *State v. Youngblood*, 221 W.Va. 20, 650 S.E.2d 119 (2007)." Syl. Pt. 8, *State v. Black*, 227 W.Va. 297, 708 S.E.2d 491 (2010). Upon our review of the appendix record and the arguments of the parties, we find no error.

Conclusion

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: June 22, 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