STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 11-1049 (Hampshire County 10-F-32)

Robert Edward Winters,
Defendant Below, Petitioner

FILED
October 19, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner, Robert Edward Winters, by counsel, Daniel R. James, seeks a reversal of his conviction of second degree sexual assault in violation of West Virginia Code § 61-8B-4 following a jury trial. Petitioner appeals from the Circuit Court of Hampshire County's Order entered on June 10, 2011, denying his motion for a new trial and sentencing him to ten to twenty-five years in the penitentiary for his conviction. Respondent, the State of West Virginia, appears by its counsel, C. Casey Forbes.

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.

On April 2, 2010, petitioner was visiting the home of long-time friends, C.B. and his wife, S.B., with plans to spend the night. Petitioner had visited and spent many nights in the mobile home where his friends lived with their four children. The oldest child, S.M.,[1] is the daughter of S.B. from a prior relationship. S.M. was seventeen years old at the time, and petitioner was forty years old.

S.M. testified that during the early morning hours of April 3, 2010, petitioner forced her to perform oral sex on him. S.M. testified that afterwards, petitioner asked her if she was mad and if she were going to report him to anyone. S.M. testified that she felt "disgusting and scared" and responded "no" to his questions. S.M. reported the incident to her mother later that day and her mother telephoned petitioner to hear his explanation. S.M.'s mother testified that during this telephone conversation, petitioner confessed that he had done sexual "things" with S.M.; that he did not think that S.M. was a willing participant; that he was "sick;" and that he would "like to

[1] In keeping with the Court's policy of protecting the identity of minors and victims of sexual crimes, the victim in this matter and her parents will be referred to by their initials.

shoot himself." According to petitioner, he told the mother that S.M. offered to perform oral sex on him, that he accepted her offer, and that he made it clear during their telephone conversation that S.M. performed oral sex on him voluntarily. S.M.'s mother reported the incident to the West Virginia State Police that evening. Thereafter, petitioner was arrested and he was later indicted on one count of second degree sexual assault.

At trial, during voir dire, a prospective juror indicated she had been raped when she was younger. When asked by the trial court whether that experience would preclude her from serving on the jury, she responded, "I- -don't think it would, I really don't think it would bother me because- -I don't know how [to] explain it and he was forgiven. God has- -I'm a Christian person and it's up to God." Petitioner's trial counsel questioned this prospective juror about her prior experience, but did not object to her remaining on the jury panel. Petitioner states that his trial counsel later struck this prospective juror using a peremptory challenge.

The jury returned a verdict finding petitioner guilty of second degree sexual assault. The trial court denied petitioner's motion for a new trial and sentenced him to ten to twenty-five years in the penitentiary on his conviction.

Juror Disqualification

Petitioner asserts that the trial court committed reversible error and plain error by failing to sua sponte remove the prospective juror who disclosed during voir dire that she was a victim of sexual assault when she was younger. Petitioner argues that once a prospective juror has indicated the presence of a disqualifying prejudice or bias, the juror is disqualified as a matter of law and cannot be rehabilitated through subsequent questioning or promises of fairness. Petitioner asserts that under West Virginia Code § 62-3-3, he had a right to an unbiased panel of twenty prospective jurors from which to exercise his strikes. Because the prospective juror in question was retained on the jury panel, petitioner states that he was forced to use a peremptory challenge to remove her from the jury.

In Syllabus Point 5 of *State v. Tommy Y., Jr.*, 219 W.Va. 530, 637 S.E.2d 628 (2006), we stated that

> [w]hen a defendant has knowledge of grounds or reason for a challenge for cause, but fails to challenge a prospective juror for cause or fails to timely assert such a challenge prior to the jury being sworn, the defendant may not raise the issue of a trial court's failure to strike the juror for cause on direct appeal.

Here, petitioner knew of his current basis to challenge this prospective juror for cause during voir dire, yet he failed to object or raise a challenge for cause at that time, thus he waived this issue for appeal. Further, even if petitioner had not waived the issue by his failure to challenge this particular prospective juror for cause, we have also stated that

> "[t]he relevant test for determining whether a juror is biased is whether the juror had such a fixed opinion that he or she could not judge impartially the guilt of the

> defendant. Even though a juror swears that he or she could set aside any opinion he or she might hold and decide the case on the evidence, a juror's protestation of impartiality should not be credited if the other facts in the record indicate to the contrary." Syllabus point 4, *State v. Miller*, 197 W.Va. 588, 476 S.E.2d 535 (1996).

Syl. Pt. 3, *State v. Hughes*, 225 W.Va. 218, 691 S.E.2d 813 (2010). Our review of the appendix record does not support the argument that this prospective juror had such a fixed opinion that she was automatically precluded from serving on the jury, and we find no other facts in the record to indicate to the contrary. Based upon our consideration of the parties' briefs and our review of the appendix record, we find that petitioner's right to an unbiased panel of twenty prospective jurors was not violated. Accordingly, we find no error, plain or otherwise.

Jury Instructions

Petitioner asserts that it was reversible error for the trial court to refuse to give his proposed jury instruction number three: "The Court instructs the jury that delay in reporting a sexual assault is a factor that the jury may consider when determining the alleged victim's credibility." Petitioner argues that because S.M. waited several hours to report the sexual assault, it was imperative that the jury be instructed that the delay was a factor that it could consider in determining her credibility. Petitioner adds that in *State v. Blankenship*, 208 W.Va. 612, 542 S.E.2d 433 (2000), the Court found that the refusal to give a requested jury instruction is reversible error if the instruction is a correct statement of law that is not substantially covered in the charge given to the jury and the failure to give it seriously impairs a defendant's ability to effectively present a given defense. Petitioner contends that the failure to give his proposed instruction seriously impaired his ability to effectively present a defense and, citing *State v. R.E.B.*, 385 N.J. Super. 72, 895 A.2d 1224 (2006), argues that his proposed jury instruction number three was a correct statement of the law that was not substantially covered in the trial court's charge to the jury.

We have stated that "[a]s a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. By contrast, the question of whether a jury was properly instructed is a question of law, and the review is *de novo*." Syl. Pt. 1, *State v. Hinkle*, 200 W.Va. 280, 489 S.E.2d 257 (1996). We find that the jury was adequately instructed on assessing the credibility of witnesses in another jury instruction given by the trial court:

> You are the sole judges of the weight of the testimony of any witness who has testified before you in this case, and in ascertaining such weight, you have the right to take into consideration the credibility of such witnesses as disclosed from his evidence, his manner or her manner of testifying and demeanor upon the witness stand, and his or her interest, if any, in the result of this case. And if you believe that any witness has testified falsely as to any material fact, you have the right to disregard all the testimony of such witness so testifying falsely, or to give to him- -him or her testimony or any part thereof such weight only, as the same in your opinion may be entitled.

Based upon the foregoing, we find that the trial court did not abuse its discretion in refusing to give petitioner's proposed jury instruction number three because the trial court sufficiently instructed the jury on assessing witness credibility in the instructions that it gave to the jury.

Sufficiency of the Evidence

Petitioner asserts that the evidence at trial was insufficient to convince impartial minds of his guilt of the offense of second degree sexual assault beyond a reasonable doubt. Again, petitioner contends that notwithstanding S.M.'s testimony to the contrary, their sexual encounter was consensual. According to petitioner, his argument is supported by the fact that S.M. did not wake her mother and/or step-father, who were sleeping in a nearby bedroom. Although S.M. testified that petitioner placed his hand over her mouth when she tried to yell for her mother, petitioner states that the very act of her performing oral sex on him would have required him to remove his hand from her mouth.

In reviewing a defendant's challenge to the sufficiency of the evidence to convict, we have stated that

> "[t]he 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). Applying this standard to our consideration of the parties' arguments as set forth in their briefs and our review of the trial transcript, we see no reason to set aside the jury's verdict on an insufficiency of the evidence challenge.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: October 19, 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