STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) **No. 11-1121** (Kanawha County 10-F-185)

Brandon George Sherrod,
Defendant Below, Petitioner

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

MEMORANDUM DECISION

Petitioner Brandon George Sherrod, by counsel Edward L. Bullman, appeals the Circuit Court of Kanawha County's order entered on July 27, 2011, sentencing him to life with mercy for his conviction on one count of first degree murder following a jury trial. The State of West Virginia, by counsel Robert D. Goldberg, has filed its response.

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.

This case arises out of the shooting death of a male known as "Baby Goon." The victim was shot through his kitchen window. Trial testimony showed that petitioner and his co-defendant were driven to the home where the victim was located, and the two then stood outside the kitchen window. When the victim entered the room, petitioner and his co-defendant shot through the window. The co-defendant testified that he was only attempting to scare the victim, but petitioner was deliberately aiming at the victim. The driver of the vehicle testified that after petitioner and his co-defendant returned, petitioner noted that he had shot the victim and later laughed about it. The jury returned a verdict finding petitioner guilty of first degree murder and petitioner was sentenced to life in prison with mercy. Petitioner appeals from this conviction.

Petitioner first argues that there was insufficient evidence to establish the element of premeditation to commit murder. He argues that his purpose of going to the home where the victim was at the time was merely to scare him. He also notes that the only evidence that there was intent to kill was from the co-defendant, who testified that petitioner was aiming at the victim. Petitioner argues, however, that this does not prove the intent to kill. The State argues that a reasonable juror could find premeditation from petitioner's conduct. There was testimony that an inmate put a "hit" on the victim which petitioner carried out. The State argues that the forensic evidence shows that the shots fired by petitioner were straight, which demonstrated that he was targeting the victim.

This Court has found as follows:

> 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). In this case, we find no error in petitioner's conviction on first degree murder. A reasonable person could have found that petitioner planned the murder when considering the co-defendant's testimony, the fact petitioner brought a gun to the scene, the "hit" put on the victim by petitioner's friend, and the testimony of the driver of the vehicle.

Petitioner next argues that the circuit court erred in refusing to grant a mistrial following the statement of a witness for the State regarding petitioner's current incarceration. The witness, when asked if petitioner looked the same as he had at the time of the shooting, testified that petitioner actually looked healthier which she attributed to his incarceration. The State argues in response that petitioner failed to prove a manifest necessity for a mistrial and notes that he did not file a motion in limine seeking to prevent his incarceration from being mentioned. The State adds that it did not elicit the response regarding petitioner's incarceration, that the statement was not repeated, and that the circuit court judge immediately instructed the jury to disregard the response regarding incarceration.

This Court has stated as follows:

> The decision to declare a mistrial, discharge the jury and order a new trial in a criminal case is a matter within the sound discretion of the trial court. *State v. Craft*, 131 W.Va. 195, 47 S.E.2d 681 (1948). A trial court is empowered to exercise this discretion only when there is a "manifest necessity" for discharging the jury before it has rendered its verdict. W.Va.Code § 62-3-7 (1977 Replacement Vol.). This power of the trial court must be exercised wisely; absent the existence of manifest necessity, a trial court's discharge of the jury without rendering a verdict has the effect of an acquittal of the accused and gives rise to a plea of double jeopardy. *See State ex rel. Brooks v. Worrell*, 156 W.Va. 8, 190 S.E.2d 474 (1972); *State ex rel. Dandy v. Thompson*, 148 W.Va. 263, 134 S.E.2d 730, *cert. denied*, 379 U.S. 819, 85 S.Ct. 39, 13 L.Ed.2d 30 (1964); *State v. Little*, 120 W.Va. 213, 197 S.E. 626 (1938).

State v. Williams, 172 W.Va. 295, 304, 305 S.E.2d 251, 260 (1983). This Court finds that the circuit court did not abuse its discretion in this matter. Petitioner failed to show manifest

necessity requiring a new trial, as petitioner's incarceration was only mentioned once and the trial judge immediately instructed the jury to disregard the statement.

For the foregoing reasons, we affirm the circuit court's decision.

Affirmed.

ISSUED: November 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