

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

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

vs) **No. 11-1415** (Cabell County 06-F-290)

**Jacob Hubbard,
Defendant Below, Petitioner**

FILED

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

MEMORANDUM DECISION

Petitioner Hubbard's appeal, filed by counsel Glen Conway, arises from the Circuit Court of Cabell County, wherein petitioner was sentenced to forty years in prison for his conviction for first degree robbery. Petitioner's sentencing order was entered by the circuit court on September 13, 2011. The State, by counsel Barbara Allen, filed a response in support of petitioner's conviction.

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.

Petitioner Hubbard represented himself at trial for which he was charged with first degree robbery. Several witnesses testified to petitioner's robbery of a local grocery store and provided accounts of witnessing petitioner and his vehicle outside of the grocery store and of his attire and shotgun as petitioner robbed the grocery store. In light of these accounts, police located and searched petitioner and his vehicle and found a large sum of cash and receipts for multiple cash purchases made by petitioner. During petitioner's case-in-chief, petitioner began to question a witness concerning an alibi defense. The State objected to this testimony on the basis that it did not receive any notice from petitioner of an alibi defense. The circuit court sustained the objection and petitioner proceeded accordingly. Following two days of trial, the jury convicted petitioner of first degree robbery with the use of a firearm.

Petitioner appeals. We keep in mind the following for our review:

“‘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. 9, *State v. Thompson*, 220 W.Va. 398, 647 S.E.2d 834 (2007). Moreover,

“An unpreserved error is deemed plain and affects substantial rights only if the reviewing court finds the lower court skewed the fundamental fairness or basic integrity of the proceedings in some major respect. In clear terms, the plain error rule should be exercised only to avoid a miscarriage of justice. The discretionary authority of this Court invoked by lesser errors should be exercised sparingly and should be reserved for the correction of those few errors that seriously affect the fairness, integrity, or public reputation of the judicial proceedings.” Syllabus Point 7, *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996).

Syl. Pt. 8, *State v. Thompson*, 220 W.Va. 398, 647 S.E.2d 834 (2007).

Petitioner argues that the circuit court wrongfully sustained the State’s objection to petitioner’s attempt to elicit alibi testimony at trial. Petitioner asserts that he was under no duty to provide the State with his alibi defense as the State had never requested that it be provided pursuant to Rule 12.1 of the West Virginia Rules of Criminal Procedure. The State concedes that it did not file a written demand for notice of an alibi defense under Rule 12.1, but also argues that petitioner never objected to the circuit court’s refusal to allow him to admit alibi evidence and that his complaint on appeal now does not rise to the level of plain or prejudicial error. The State also argues that petitioner insisted on representing himself at trial, that he had standby counsel whom he chose not to consult, and that he did not raise this issue in any post-trial motion before the circuit court. The State points out that petitioner did not take the advice of his standby counsel to request a mistrial and an appointment of a trial attorney. Moreover, the State had overwhelming evidence that supported petitioner’s conviction. Upon our review of the record, we find that the record supports petitioner’s conviction for first degree robbery, and we find no error to warrant overturning this conviction.

For the foregoing reasons, we affirm petitioner’s conviction and sentencing.

Affirmed.

ISSUED: November 19, 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