STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 11-0001 (Berkeley County 09-F-6)

Monica Boggs,
Defendant Below, Petitioner

FILED
May 27, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Monica Boggs appeals her convictions for three felonies: Death of a Child by a Parent, Child Abuse Causing Bodily Injury, and Gross Child Neglect Creating Substantial Risk of Bodily Injury. The State filed a timely response.

This Court has considered the parties' briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, 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.

On the night of August 19, 2008, petitioner called 911 to report that she believed her infant son, Skylar, was dead. Skylar was seven months old. Attempts to revive the baby were unsuccessful and he was pronounced dead at a nearby hospital. That same night, petitioner spoke to a county coroner and a state trooper. She denied any child abuse but reported that the child had recently, accidentally, hit his eye on a toy piano.

Thereafter, Medical Examiner Dr. Matrina Schmidt conducted an autopsy of the infant and found brain hemorrhaging and a skull fracture that extended from the left parietal bond, over and across the midline, onto the right parietal bond. The medical examiner also found older bruising near the child's eye and on other parts of his body. The medical examiner determined the cause of death to be blunt force head trauma that she believed was a homicide.

After reviewing the autopsy report, two state troopers re-interviewed petitioner on the night of August 20, 2008. Petitioner signed a *Miranda* waiver. The troopers told her that her story did not match the autopsy findings. Petitioner initially said that she was unaware of anyone injuring Skylar, but later in the interview admitted that she had injured the baby by "toss[ing]" him into the crib, where he hit his head on the toy piano that was inside the crib. Still later in the interview, she said she "threw" the baby into the crib and heard a loud pop. According to a trooper, petitioner demonstrated an overhead throwing motion. The State asserted that this throwing occurred approximately twenty-four hours before the baby died, but petitioner did not seek medical attention for him. She further admitted that the day before she threw the child into the crib, she threw a baby bottle at him, striking him in the left eye and causing bruising.

At trial, petitioner's defense was that she was tired and under considerable stress, the baby was extremely cranky, and she just "snapped" and "lost it" – but she denied that she intended to hurt the baby and denied acting maliciously. The jury found her guilty of Death of a Child By a Parent, West Virginia Code § 61-8D-2a(a), for throwing the baby in the crib; Child Abuse Causing Bodily Injury, West Virginia Code § 61-8D-3(a), for throwing the bottle at the baby; and Gross Child Neglect Creating Substantial Risk of Bodily Injury, West Virginia Code § 61-8D-4(e), for failing to obtain medical treatment for the baby. The circuit court imposed the statutory sentences, consecutively, for a total effective sentence of forty-two to fifty years in prison. This is petitioner's direct appeal of those convictions.

I. Voluntariness of Statements to Police

In her first assignment of error, petitioner asserts that her due process rights were violated because she was convicted based upon her statement to police, but the voluntariness of the statement was never tested. At a pretrial hearing held on August 10, 2009, petitioner's then-defense counsel indicated that his own investigation, which included having petitioner evaluated by a forensic psychologist, had uncovered no grounds to challenge the voluntariness of the statement. Defense counsel informed the trial court that petitioner's statements had been given intelligently and knowingly after a waiver of her rights.

Petitioner argues that the trial court should have *sua sponte* held a hearing to ascertain the voluntariness of her confession. She asserts that there was some evidence indicating that her statements might not have been voluntary, including that she suffers from depression; has chronic low self-esteem and other personality disorders; has a low IQ; was only nineteen years old and immature; and was upset. Petitioner argues that, at the very least, the trial court should have *sua sponte* given a jury instruction that would allow the jury to determine whether her statement was voluntary.

We reject petitioner's arguments. Defense counsel clearly waived this issue. Based upon the representation of counsel, and the execution of the *Miranda* waiver, the trial court

had no reason to question the voluntariness of the statement. This Court has held, "'[w]hen there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined.' Syl. Pt. 8, in part, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995)." Syl. Pt. 1, *State v. White*, 223 W.Va. 527, 678 S.E.2d 33 (2009) (per curiam); Syl. Pt. 1, *State v. Day*, 225 W.Va. 794, 696 S.E.2d 310 (2010) (per curiam).

Petitioner also asserts that it was ineffective assistance of counsel for her trial lawyer not to challenge the voluntariness of the statement. This Court's ability to review a claim of ineffective assistance of counsel is very limited on direct appeal. Such a claim would be more appropriately developed in a petition for writ of *habeas corpus*. Syl. Pt. 11, *State v. Garrett*, 195 W.Va. 630, 466 S.E.2d 481 (1995); Syl. Pt. 10, *State v. Triplett*, 187 W.Va. 760, 421 S.E.2d 511 (1992). Accordingly, we decline to rule on any claims of ineffective assistance of counsel in the context of this direct appeal. If she desires, petitioner may pursue a petition for writ of post-conviction *habeas corpus*. We express no opinion on the merits of petitioner's ineffective assistance claims or of any *habeas* petition.

II. Testimony by the Medical Examiner

In her second assignment of error, petitioner asserts that the circuit court erred by allowing the medical examiner to testify to areas that were not disclosed to defense counsel and that were outside of the medical examiner's area of expertise. Dr. Schmidt testified that an infant's skull is more pliable than an adult's skull. The prosecutor then asked Dr. Schmidt if she had any idea how much force it would take to fracture a child's skull. Dr. Schmidt answered that it would take more force to break a baby's skull than an adult's skull, but she did not know how much force it would take.

The State responds that this area of testimony was clearly disclosed pre-trial. The State disclosed that Dr. Schmidt would testify about the contents and photographs of her autopsy findings and may testify about the difference between adult and child bone structure of the skull. Moreover, trial defense counsel stated at trial that the testimony did not come as a surprise to him. The State also denies that this questioning exceeded the doctor's area of expertise, particularly since the doctor answered that she did not know how much force was required to break a child's skull.

"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." Syl. Pt. 6, *State v. Kopa*, 173 W.Va. 43, 311 S.E.2d 412 (1983); Syl. Pt. 1, *State v. Nichols*, 208 W.Va. 432, 541 S.E.2d 310 (1999). Upon a review of this issue, we find no abuse of discretion.

III. Additional Juror Voir Dire

In her third assignment of error, petitioner asserts that the trial court erred by not conducting additional jury voir dire. On the second day of trial, the court security officer indicated that a juror, Mary Perkey, had told the officer that she realized she knew the victim's biological father. During initial voir dire, Juror Perkey had not realized that she knew anyone connected to the child or the case, but during the first day of trial the jury was shown a photo that included the biological father. According to the court security officer, Juror Perkey recognized him from the photo as a next-door neighbor to the house she grew up in. The court security officer told the court that Juror Perkey stated that she could remain impartial. Defense counsel consulted petitioner and told the court that the defense did not see a problem with this, the defense had no objection and did not want to question Juror Perkey, and the defense wanted the trial to proceed. The prosecutor also had no concerns. Accordingly, the court did not question the juror and the trial resumed.

Petitioner argues that it was insufficient for the court to rely upon the statement of the court security officer and that additional voir dire should have been conducted. We reject this argument. Trial defense counsel clearly waived this issue. "When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined." Syl. Pt. 8, in part, *State v. Miller*.

Petitioner also argues that defense counsel should have moved to strike the juror or, at least, should have requested further voir dire. This is essentially a claim of ineffective assistance of counsel that would more appropriately be raised in a petition for post-conviction habeas corpus, not in the direct appeal. If she desires, petitioner may raise this issue in a subsequent habeas petition in the context of a claim for ineffective assistance of counsel. We express no opinion on the merits of petitioner's ineffective assistance claims or of any habeas petition.

IV. Prosecutor's Closing Argument

In her fourth assignment of error, petitioner asserts that the State's closing argument unfairly prejudiced and inflamed the jury because the State began by presenting the jury with a black-and-white autopsy photograph of the victim. Petitioner asserts that the photograph was gruesome, but the photograph was admitted into evidence without objection during the medical examiner's testimony. Petitioner argues that the State's use of the photograph during its closing argument violated Rule 403 of the West Virginia Rules of Evidence. The State asserts that the photograph was relevant to the issue of whether petitioner acted intentionally and with malice, which are elements of the crime Death of a Child by a Parent, and was relevant to the issue of gross neglect, which is an element of the crime Gross Child Neglect Causing Substantial Risk of Serious Bodily Injury. Moreover, a review of the transcript

shows that the defense did not object during the closing argument to the use of this photograph. Upon a review of this issue, we find that the photo was relevant to the closing argument and its relevance was not substantially outweighed by the danger of unfair prejudice under Rule 403. Accordingly, we find no error.

V. Negligence Theory

In her fifth assignment of error, petitioner asserts that the circuit court prevented her from presenting her theory of the case at trial – specifically, that her action was negligent, but not intentional or malicious. She argues that the trial court would not permit her to argue negligence and refused to give a jury instruction on Child Neglect Resulting in Death as a lesser included offense of Death of a Child by a Parent.

The State responds that Child Neglect Resulting in Death is not a lesser included offense of Death of a Child by a Parent, thus the circuit court correctly refused to give the instruction. The State notes that Child Neglect Resulting in Death contains the element of negligence, while Death of a Child by a Parent requires a showing of malice or intentional action. The State also asserts, and the circuit court found, that the evidence at trial did not support such an instruction because there was no evidence that petitioner acted negligently when she threw her child into the crib. Moreover, the circuit court told the defense counsel that even though there would not be an instruction on Child Neglect Resulting in Death, counsel could argue to the jury that petitioner "snapped" and did not act maliciously. Upon a review of this issue, we find no error.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: May 27, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

DISSENTING:

Justice Menis E. Ketchum