STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia
Plaintiff Below, Respondent

vs) No. 11-0061 (Ohio County 09-F-67)

Richard Lee Charnock
Defendant Below, Petitioner

FILED
June 24, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Richard Lee Charnock appeals his conviction of one count of daytime entry without breaking a dwelling house and one count of first degree sexual abuse. Petitioner was sentenced to consecutive terms of one to ten years and one to five years in prison. The State of West Virginia has filed its response.

This Court has considered the parties' briefs and the record on appeal. This matter has been treated and considered under the Revised Rules of Appellate Procedure pursuant to this Court's Order entered in this appeal on March 24, 2011. 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.

Prior to the events which led to the present criminal charges, petitioner and the victim dated and, from June 2008 to October or November 2008, they lived together at the victim's apartment. At trial, the victim testified that she ended the relationship and required petitioner to move out of her apartment in either October or November of 2008. Petitioner then went to stay with his brother and sister-in-law, Mr. and Mrs. Cooke. According to the victim, petitioner continued to seek contact with her, and she obtained a domestic violence protective order against him on November 22, 2008.[1]

[1] Petitioner was not served with the protective order prior to the incident that led to the present criminal charges.

While petitioner was staying with the Cookes, and specifically during the period of November 22 and December 2, 2008, Mr. and Mrs. Cooke testified that there were several instances where petitioner and the victim had contact at their home and the Cookes saw them kissing and hugging during some of these occasions. The victim testified at trial and disputed that she hugged or kissed petitioner during this period, although she admitted to seeing him once at the Cooke home. The victim further testified that petitioner was aware that she had obtained a protective order against him prior to the incident on December 2, which resulted in the present criminal charges. Petitioner contends that he first learned of the protective order on December 2 at the time of the alleged crimes.

On the morning of December 2, 2008, petitioner went to the victim's residence and used a key[2] to enter the residence. The victim was lying in bed watching a cartoon movie with her young son. The victim testified that petitioner entered her bedroom, demanded that she have sex with him, straddled her and touched her breasts without her permission. The victim testified that she managed to push him off and left the bedroom. She went into the kitchen to smoke a cigarette to calm down. She testified that he followed her into the kitchen, grabbed her by her hair and again demanded sex. At some point during the incident, she testified that petitioner choked her and her t-shirt became ripped. At some point thereafter, the victim's brother, Joshua Orum, and Gerald Vaughan, her child's father, arrived at her apartment and knocked on the door. The victim testified that she picked up her child and left the residence to call the police. Thereafter, petitioner exited her residence. Mr. Orum became aggressive toward petitioner, following him to his car and hitting the hood of petitioner's car. Petitioner left the apartment area and called the police to report Mr. Orum's actions. The police responded to petitioner's complaint and took his statement. The investigating officer testified that petitioner admitted to him that petitioner had been told about the protective order and was aware of it but that it had never been served on him. Petitioner testified at trial that he did not know that there was a protective order against him prior to his entry into the victim's apartment on December 2. Petitioner further testified that he recalled telling the investigating officer that he knew about the protective order because the victim had talked to him about it on the day he was arrested.

Petitioner was indicted for daytime burglary, first degree sexual abuse, and attempted second degree sexual assault. Prior to trial, petitioner filed a motion in limine seeking to exclude admission into evidence of the protective order based upon Rules 404(b) and 403 of the West Virginia Rules of Evidence. Petitioner also raised an argument that the protective

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[2] The victim testified that petitioner gave her his key back when she asked him to cease living at her residence. She indicated that he must have had another key made, which he used to enter her residence on December 2. Petitioner testified that he had not given her his key back and that he used it to enter her residence.

order was invalid pursuant to West Virginia Code § 48-27-601(c) because he was not aware of it or its contents. In response, the State asserted that evidence regarding the protective order constituted res gestae and was admissible under a Rule 404 (b) analysis for the limited purposes of establishing an unlawful entry into the victim's residence and the victim's lack of consent to such entry.

Following an evidentiary hearing, the circuit court ruled that the evidence regarding the existence of the protective order was relevant and admissible under a Rule 404(b) analysis for the limited purpose of showing that petitioner did not have the victim's consent to be at her home. In reaching this conclusion, the circuit court also performed an analysis under Rule 403, and found that the existence of the protective order was more probative of the central issue of the victim's consent than it was prejudicial to petitioner.

As for petitioner's arguments regarding West Virginia Code § 48-27-601(c), the circuit court concluded that the first part of this statute requiring actual notice of the order's existence was clearly satisfied because "[petitioner] admitted to responding officers that the alleged victim advised him of the existence of the. . . protective order on two separate occasions, including on the date of the events alleged in the indictment." As to remainder of the statute, which requires awareness of the contents of the order, the circuit court concluded that petitioner knew of the "contents" of the protective order at the time of the alleged crimes because "the purpose of a protective order is evident from its very title. . . ." The circuit court also stated that: "the Court finds incredible any assertion that, although the alleged victim advised him on two separate occasions that she obtained a Domestic Violence Protective Order against [petitioner], [that petitioner] was not aware of the effect of said Order." At trial, the circuit court gave a cautionary instruction to the jury indicating that the testimony regarding the protective order was to be considered solely for the purposes of whether or not petitioner committed an unauthorized entry of the victim's residence.

The jury acquitted petitioner of attempted second degree sexual assault but convicted him on the charges of daytime burglary[3] and first degree sexual abuse. Petitioner moved for acquittal arguing insufficient evidence to support the burglary and first degree sexual abuse convictions. He also moved for a new trial, arguing, *inter alia*, that the admission of the existence of the protective order violated his constitutional rights. The circuit court denied petitioner's post-trial motions and sentenced him to consecutive terms of one to ten years for

[3] The circuit court entered a post-trial order which moulded the verdict to conform to the evidence consistent with *State v. Noll*, 223 W.Va. 6, 672 S.E. 2d 142 (2008), by converting the verdict of guilty of the offense of burglary to a verdict of guilty for the offense of "daytime entering without breaking a dwelling house."

daytime entering without breaking a dwelling house and one to five years for first degree sexual abuse.

Admissibility of Protective Order

Petitioner challenges the circuit court's admission of evidence concerning the protective order obtained by the victim and argues that such evidence was unfairly prejudicial. Petitioner cites West Virginia Code § 48-27-601(c) to support his argument that the protective order should not have been admitted because he did not have notice of its contents. The State responds that it was not seeking to enforce the protective order nor was it prosecuting petitioner for violation of the protective order; rather it sought to use the protective order for the limited purpose of establishing that petitioner's entry of the victim's apartment was unauthorized. The State did not attempt to prove any act by petitioner which led to the issuance of the protective order, and it did not attempt to introduce evidence of any domestic difficulties between petitioner and the victim under Rule 404(b).

"A trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard." Syl. Pt. 4, *State v. Rodoussakis*, 204 W.Va. 58, 511 S.E. 2d 469 (1998).West Virginia Code § 48-27-601 (c) which addresses domestic violence protective orders, provides:

> "Orders shall be promptly served upon the respondent. Failure to serve a protective order on a respondent does not stay the effect of a valid order if the respondent has actual notice of the existence and the contents of the order."

Following an evidentiary hearing, the circuit court concluded by a preponderance of the evidence that petitioner knew about the existence of the protective order and had sufficient knowledge of its contents due to its title and that the victim had told him twice about the protective order. The circuit court performed the balancing test required by West Virginia Rule of Evidence 403 and determined that the evidence was relevant and that its probative value was not substantially outweighed by the danger of unfair prejudice. Further, the circuit court ruled that the evidence regarding the protective order was only admissible for the limited purposes of establishing petitioner's intent in entering victim's residence and the lack of consent to such entry by the victim. The circuit court provided a cautionary instruction to the jury to this effect. This Court finds no error in any of the circuit court's rulings in this regard.

Sufficiency of the Evidence

Petitioner next challenges the circuit court's denial of his motion for acquittal on the charges of daytime entering without breaking a dwelling house and first degree sexual abuse

counts based upon insufficiency of the evidence. "'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." Syl. Pt. 3, in part, *State v. Guthrie*, 194 W.Va. 657, 461 S.E. 2d 163 (1995).' Syl. Pt. 11, *State v. Minigh*, 224 W.Va. 112, 680 S.E. 2d 127 (2009)." After careful review of the testimony adduced at trial, including that of the victim on these issues, the Court finds no error in the circuit court's determination that the State's evidence was sufficient on both charges for submission to the jury.

Failure to Sua Sponte Order Mistrial or Continuance

Finally, petitioner argues that the circuit court erred in not granting either a continuance or mistrial, sua sponte, based upon the State's alleged violation of West Virginia Rule of Criminal Procedure 16. "'The traditional appellate standard for determining prejudice for discovery violations under Rule 16 of the West Virginia Rules of Criminal Procedure involves a two-pronged analysis: (1) did the non-disclosure surprise the defendant on a material fact, and (2) did it hamper the preparation and presentation of the defendant's case." Syllabus Point 2, *State ex. rel. Rusen v. Hill*, 193 W.Va. 133, 454 S.E. 2d 427 (1994).'" Syl. Pt.1, *State v. Adkins*, 223 W.Va. 838, 679 S.E. 2d 670 (2009).

At trial, the State revealed that since the time of petitioner's indictment, one of the State's witnesses, Gerald Vaughan, had been charged with possession with intent to deliver marijuana, which was resolved by a plea to simple possession of marijuana. Vaughan, the father of the victim's child, arrived at the victim's apartment after the commission of the crimes, along with the victim's brother. Prior to the beginning of Vaughan's testimony, the State provided petitioner with a copy of Vaughan's updated National Crime Information Center ("NCIC") report. The State notes that petitioner's trial counsel did not request exclusion of Vaughan as a witness and did not seek either a recess, continuance or mistrial. Further, petitioner's trial counsel did not ask Vaughan any questions regarding his arrest or subsequent plea to misdemeanor possession.

Petitioner now argues that *State v. Adkins*, 223 W.Va. 838, 679 S.E. 2d 670 (2009), warrants reversal of his convictions based upon the State's failure to provide an updated criminal history of this witness prior to trial. Petitioner further argues that the circuit court had a duty to order sua sponte a mistrial or at least a continuance given this circumstance.

This Court reviews the issue of whether a trial court erred in not granting a mistrial sua sponte under an abuse of discretion standard. *See State v. Elliott*, 186 W.Va. 361, 412 S.E. 2d 762 (1991). This Court concludes, under the facts and circumstances of the present case, that *Adkins* does not require the circuit court to take the asserted actions sua sponte and that there was no abuse of discretion by the circuit court.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: June 24, 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