STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff below, Respondent

vs) No. 11-0130 (Jefferson County 09-F-65)

Robert Scott Sencindiver,
Defendant below, Petitioner

FILED
July 6, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Robert Scott Sencindiver appeals his conviction for felony Child Neglect Resulting in Bodily Injury by a Parent, Guardian or Custodian, West Virginia Code § 61-8D-4(a). The State filed a timely response brief. Petitioner's co-defendant, Jacqueline Reed, has filed a separate appeal. [1]

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.

In 2008, petitioner and Ms. Reed took two children into their home: C.C., a boy who was approximately fourteen to twenty months old during the time he was in petitioner's care, and M.C., the boy's three-year-old sister. The children's father, with whom petitioner worked, had been deported. The children's mother was incarcerated. The children resided with petitioner and Reed for approximately five months.

Soon after the children's mother retrieved the children, she observed that C.C. had a dark rash with lesions on his genital area and inner thighs and bruising on his body. She also

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[1] Ms. Reed's appeal is docket number 11-0124.

noticed that he could not sip through a straw. She took C.C. to a hospital, where it was determined that he had five broken ribs on his right side that were healing, a rash and sores on the inner thighs and genital area that were typical of healing burns, and a number of bruises in various stages of healing. A radiologist opined that C.C.'s rib fractures were probably two to four weeks old, but not more than four months old. Moreover, a forensic nurse who examined C.C. testified that C.C. had abrasions on his ankles that were a linear "wrap around configuration" and were the same diameter across the top of the ankle. The nurse opined that such abrasions are seen when a child is "tethered with something."

Petitioner and Ms. Reed, who were tried together, denied neglecting C.C. They asserted that C.C. had a terrible diaper rash when he came to them, which they treated with over-the-counter products. They asserted that C.C. was adventurous and often accidentally bruised himself while playing. They asserted that C.C. likely broke his ribs when he climbed up and fell off of a sliding board. They asserted that after C.C. fell off of the sliding board, he resumed playing, thus they did not know he was injured. They argued that no other child in their home, including M.C., had any indications of injury or neglect.

Petitioner was indicted for two felonies: Child Neglect Resulting in Serious Bodily Injury by a Parent, Guardian or Custodian, West Virginia Code § 61-8D-4(b), and Conspiracy, West Virginia Code § 61-10-31. At trial, the jury found petitioner guilty of the lesser included felony offense of Child Neglect Resulting in Bodily Injury by a Parent, Guardian or Custodian, West Virginia Code § 61-8D-4(a). The jury found him not guilty of Conspiracy. He was sentenced to one year in jail.

In this direct appeal, petitioner raises four assignments of error. First, he asserts that the circuit court erred by reducing the number of peremptory jury strikes available to him. The six peremptory strikes were split with co-defendant Reed, with whom petitioner was jointly tried. The State responds that West Virginia Code § 62-3-8 provides, "[p]ersons indicted and tried jointly, for a felony, shall be allowed to strike from the panel of jurors not more than six thereof, and only such as they all agree upon shall be stricken therefrom." The State asserts that even though petitioner and Reed were separately indicted, they asked to be tried to together, and there should be no difference in the procedures merely because separate indictments were used. Upon a review of the arguments, we find no error.

In his second assignment of error, petitioner argues that the circuit court erred by failing to grant his motion for judgment of acquittal on the crime charged in Count I of his indictment, Neglect Causing Serious Bodily Injury, West Virginia Code § 61-8D-4(b). He argues that the State failed to prove "serious" bodily injury, which is defined in West Virginia Code § 61-8B-1(10) as "bodily injury which creates a substantial risk of death, which causes serious or prolonged disfigurement, prolonged impairment of health or

prolonged loss or impairment of the function of any bodily organ." We reject this argument as moot. Petitioner was convicted of the lesser included felony, Neglect Causing Bodily Injury, West Virginia Code § 61-8D-4(a). This crime only requires a showing of "bodily injury," which is defined in West Virginia Code § 61-8B-1(9) as "substantial physical pain, illness or any impairment of physical condition."

In his third assignment of error, petitioner asserts that the circuit court erred by refusing to grant his motion for judgment of acquittal based upon insufficiency of the evidence to prove Neglect Causing Bodily Injury. This Court applies a de novo standard of review to the denial of a motion for judgment of acquittal based upon the sufficiency of the evidence. *State v. LaRock*, 196 W. Va. 294, 304, 470 S.E.2d 613, 623 (1996). Moreover,

> 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).

Upon a review of the record, we find that petitioner does not meet his heavy burden of proving insufficiency of the evidence. The evidence shows that this young child suffered five broken ribs during the time he was in the care and control of petitioner. The forensic nurse opined that the healing sores on C.C.'s genitals and inner thighs resembled burns, and he had marks on his ankles that were consistent with having been tethered. Further, the child had multiple bruises in various stages of healing. Petitioner asserts that C.C. had the redness and sores on his diaper area when the child first came to live with them, which means that the child suffered for approximately five months without medical care. Petitioner asserts that there was no evidence that *he* caused any injuries to the child, to which the State responds that if a custodian allows abuse, or turns a blind eye to abuse, then he is guilty of neglect. The jury heard all of the evidence, including petitioner's and Ms. Reed's testimony, and we do not find reversible error in the conviction for Neglect Resulting in Bodily Injury.

In his final assignment of error, petitioner asserts that he was deprived of a fair trial because the circuit court permitted the prosecutor to repeatedly argue to the jury that C.C. had been "tortured." Petitioner argues that he was charged with neglect, not the intentional act of torture, and that the prosecutor's argument was unduly inflammatory. The State responds that the forensic nurse's opinions that the redness on C.C.'s inner thighs looked like healing

burns, and that the ankle abrasions resembled tether marks, provided a sufficient basis for the prosecutor to argue during closing argument that the child was tortured. "A prosecutor may argue all reasonable inferences from the evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw." Syl. Pt. 7, *State v. England*, 180 W.Va. 342, 376 S.E.2d 548 (1988). Upon a review of the arguments, we do not find reversible error.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: July 6, 2011

CONCURRED IN BY:

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

DISSENTING:

Justice Brent D. Benjamin
Justice Menis E. Ketchum, dissenting in part