

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

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

vs) No. 11-0156 (Roane County 08-F-27)

**Jonathan Tranberg
Defendant Below, Petitioner**

FILED

June 24, 2011

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

MEMORANDUM DECISION

Petitioner Jonathan Tranberg appeals his jury conviction of child abuse resulting in serious bodily injury and the circuit court's order sentencing him to serve two to ten years in prison. He argues a violation of his right to a speedy trial, error in the circuit court's denial of his motion for acquittal, and error in the instruction given to the jury on the offense of child abuse resulting in serious bodily injury. 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.

On January 30, 2008, petitioner was babysitting his nine-month old son, while the baby's mother went to the store. While in petitioner's care, the baby suffered skull fractures to the left and right sides of his head as revealed by a CAT scan. The baby also sustained bruising and bleeding of the brain. Dr. Lambert, the Roane General Hospital emergency room physician who initially treated the baby, testified at trial that "bone fragments were separated from the rest of the skull" and that the baby required transfer to another facility for a possible neurosurgical evaluation. The baby was transferred to Women's and Children's Hospital where he remained hospitalized for five days.

Initially, petitioner indicated that the baby fell off the couch and hit a stool. The West Virginia Medical Examiner James Kaplan reviewed the medical evidence and opined that the baby's injuries were not consistent with petitioner's account but, instead, were indicative of an inflicted injury from more than one impact to the baby's head. At trial, Dr. Kaplan testified that the baby had sustained "two separate, very severe fractures, one of them being where the skull is partially pressed in against the brain as a result of the force involved in causing the fracture." After receiving *Miranda* warnings, petitioner admitted to police that he hit the baby in the head with his closed fists multiple times and then threw the baby across the room, causing the baby to hit his head on a metal swing.

On May 27, 2008, petitioner was indicted of one count of child abuse resulting in serious bodily injury and one count of child abuse resulting in bodily injury. The need for a competency evaluation delayed the scheduling of an initial trial date. In August of 2008, the circuit court found that petitioner was competent based upon his evaluation. Petitioner was arraigned and entered a plea of not guilty on August 18, 2008. The circuit court granted petitioner's motion that trial be set for the next term of court.

The initial trial date of October 21, 2008, was continued on petitioner's motion to December 9, 2008. Further delay in the proceedings was occasioned by the election of petitioner's original trial counsel as Roane County Prosecutor and the resulting need for the appointment of new counsel for petitioner and a special prosecutor. The circuit court appointed new counsel to represent petitioner and on February 4, 2009, a special prosecutor was appointed. Trial was set to begin on April 14, 2009, which was still within the January 2009 term of court. However, the State moved to continue the April 14, 2009, trial date based upon the absence of a material witness due to the wrong physician being subpoenaed for trial. Petitioner did not object to the continuance, and an agreed order was entered continuing the trial to September 15, 2009, which was within the May 2009 term of court. Both petitioner and his counsel signed the agreed order of continuance.

The September 15, 2009, trial was continued on the State's motion because a physician who was a material witness was unavailable for trial. Again, petitioner did not object to the continuance and he and his counsel signed the agreed order continuing the trial to December 8, 2009.

In December 2009, petitioner filed a motion to dismiss for failure to try him within three terms of court. While the State conceded below that the September 2009 term counts against the State under the three-term rule, it maintained that the failure to try petitioner during the January and May 2009 terms of court should not count against it based upon the agreed orders signed by petitioner and his counsel continuing trial. The circuit court agreed and denied petitioner's motion to dismiss. The circuit court held that "only reasonable

conclusion is that [petitioner] and his counsel agreed to the action of the court effectuated by the order, i.e., the continuance of the trial from one term to the next.”

The circuit court continued the trial to January 13, 2010. Petitioner waived his right to be tried within the January 2010, term of court, and the trial was re-scheduled for June 29, 2010.

During the June 29, 2010, trial, the State presented the testimony of emergency room physician Dr. Lambert, medical examiner Dr. Kaplan, investigating officer Lt. Smith, as well as the baby’s mother and grandmother. At the close of the State’s case, petitioner moved for a judgment of acquittal based upon alleged insufficiency of evidence of “serious bodily injury” within the meaning of the relevant charging statute [West Virginia Code § 61-8D-3 (b).] Petitioner argued that the baby’s injuries had not been shown to be serious, that the baby’s hospitalization was limited to five days, and the baby was discharged in good condition.

In response, the State cited the testimony of Dr. Lambert and Dr. Kaplan, both of whom described the extent of the baby’s injuries. The State also cited evidence adduced at trial including evidence regarding swelling of the brain and photos of the baby showing bruising. The State further argued that the seriousness of the baby’s injuries was an issue of fact properly determined by the jury. Finding that testimony presented in the State’s case-in-chief outlined in detail the bodily injuries sustained by the baby, the circuit court denied petitioner’s initial motion for acquittal. Petitioner again moved for acquittal at the close of his own case. The circuit court again denied the motion based upon the same reasoning.

Petitioner objected to the giving of a jury instruction as to the offense of child abuse resulting in serious bodily injury, again raising insufficiency of the evidence of serious bodily injury. The court rejected petitioner’s arguments and instructed the jury based upon the language of the charging statute. The jury convicted petitioner of child abuse resulting in serious bodily injury.

Petitioner raises three issues: 1) whether the circuit court erred in denying the motion to dismiss based upon violation of petitioner’s right to a speedy trial; 2) whether the circuit court erred in denying petitioner’s motion for judgment of acquittal on the charge of child abuse resulting in serious bodily injury; and 3) whether the circuit court erred by instructing the jury on the offense of child abuse resulting in serious bodily injury.

Right to a Speedy Trial

Petitioner argues that the circuit court erred in denying his motion to dismiss based upon violation of his right to a speedy trial.¹ “‘The right to a trial without unreasonable delay is basic in the administration of criminal justice and is guaranteed by both the State and Federal constitution. U.S. Const. Amend. VI; W.Va. Const., Art. 3 § 14.’ Syllabus point 1, *State v. Foddrell*, 171 W.Va. 54, 297 S.E. 2d 829 (1982).” Syl. Pt. 1, *State v. VanHoose*, 227 W.Va. 37, 705 S.E.2d 544 (2010). “‘Whereas W.Va. Code, 62-3-1 provides a defendant with a statutory right to a trial in the term of his indictment, it is W.Va. Code, 62-3-21, rather than W.Va. Code 62-3-1, which is the legislative adoption or declaration of what ordinarily constitutes a speedy trial within the meaning of U.S. Const., amend. VI, and W.Va. Const., art III, § 14.’ Syllabus point 1, *State ex. rel. Shorter v. Hey*, 170 W.Va. 249, 294 S.E. 2d 51 (1981).” Syl Pt. 2, *VanHoose*, 227 W.Va. 37, 705 S.E.2d 544 (2010). “‘A determination of whether a defendant has been denied a trial without unreasonable delay requires consideration of four factors:(1) the length of the delay; (2) the reasons for the delay; (3) the defendant’s assertion of his rights; and (4) prejudice to the defendant. The balancing of the conduct of the defendant against the conduct of the State should be made on a case-by-case basis and no one factor is either necessary or sufficient to support a finding that the defendant has been denied a speedy trial.’ Syllabus point 2, *State v. Foddrell*, 171 W.Va. 54, 297 S.E. 2d 829 (1982).” Syl. Pt. 3, *VanHoose*, 227 W.Va. 37, 705 S.E.2d 544 (2010).

The State conceded below that the failure to try petitioner during the September 2009 term counts against the State under the three-term rule but contended that the State’s failure to try petitioner during the January and May 2009 terms of court should not count against it based upon the agreed orders continuing trial. The circuit court agreed and denied petitioner’s motion to dismiss. The circuit court found that “only reasonable conclusion is that [petitioner] and his counsel agreed to the action of the court effectuated by the order, i.e., the continuance of the trial from one term to the next.” The Court finds no error in the circuit court’s holding under the facts and circumstances of the present case.

Denial of Acquittal

Petitioner next argues that the circuit court erred in denying his motion for judgment of acquittal on the charge of child abuse resulting in serious bodily injury. Petitioner alleged

¹ Roane County Circuit Court has three regular terms of court each year which commence on the fourth Tuesday of the months of January, May, and September.

that there was insufficient evidence that the baby's injuries were serious within the meaning of the charging statute. The 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). As this Court has further explained:

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).

Utilizing the foregoing standard, the Court notes, as did the circuit court, that the State presented evidence outlining in detail the bodily injuries sustained by the baby. This evidence demonstrated that the nine-month old baby's bodily injuries included bilateral skull fractures, bleeding of the brain, and bruising. West Virginia Code § 61-8B-1(10) defines "serious bodily injury," for the purpose of the offense of child abuse resulting in serious bodily injury, 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." Petitioner argues that the evidence was insufficient as to the seriousness of the baby's injuries because the baby's hospitalization was limited to five days and he was discharged in good condition. This Court disagrees with petitioner's contention that the evidence was insufficient to allow the issue to go to the jury. This Court concludes that the circuit court did not err in denying petitioner's motion for judgment of acquittal on the charge of child abuse resulting in serious bodily injury under the facts and circumstances of the present case.

Instruction regarding Child Abuse Resulting in Serious Bodily Injury

Petitioner also argues that the circuit court erred by instructing the jury on the offense of child abuse resulting in serious bodily injury and in support of this argument, raises the same arguments regarding lack of sufficiency of the evidence regarding the seriousness of the baby's injuries. "The formulation of jury instructions is within the broad discretion of a circuit court, and a circuit court's giving of an instruction is reviewed under an abuse of

discretion standard. A verdict should not be disturbed based on the formulation of the language of the jury instructions so long as the instructions given as a whole are accurate and fair to both parties.” Syl. Pt. 6, *Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va. 97, 459 S.E. 2d 374 (1995). As set forth above, this Court concludes that the State presented sufficient evidence supporting the charge of child abuse resulting in serious bodily injury to justify its submission to the jury for determination. This Court concludes that there was no error in instructing the jury in regard to this offense.

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 Menis E. Ketchum

Justice Thomas E. McHugh