STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs.) No. 18-0045 (Fayette County 17-F-18)

Robert M. Lee,
Defendant Below, Petitioner

FILED
March 15, 2019
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Robert M. Lee, by counsel Donald L. Stennett, appeals the Circuit Court of Fayette County's July 13, 2017, sentencing order following his convictions for conspiracy to commit a felony and first-degree robbery. Respondent State of West Virginia, by counsel Shannon Frederick Kiser, filed a response. Petitioner filed a reply. On appeal, petitioner contends that there was insufficient evidence at trial to support his convictions and that the prosecutor engaged in misconduct during closing argument.

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 affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

Petitioner was indicted in January of 2017 for one count of conspiracy to commit a felony, one count of first-degree robbery, one count of grand larceny, and three counts of possession of a controlled substance with intent to deliver.[1] These charges arose following a confidential informant's controlled drug buy from petitioner's codefendant, Jordan Goard, at an apartment complex.[2]

Petitioner's trial began on April 20, 2017, during which various witnesses testified. Bryanna Cummings, the confidential informant who purchased drugs from Mr. Goard, testified that the police provided her with money to purchase the drugs and a purse with a camera in it to record the transaction. After purchasing the drugs from Mr. Goard, Ms. Cummings began walking

[1]The grand larceny charge was later dismissed. The three possession charges were severed from the remaining three and are not at issue in this appeal.

[2]We affirmed Mr. Goard's conspiracy to commit a felony and first-degree robbery convictions in *State v. Goard*, No. 17-0712, 2018 WL 3005955 (W. Va. June 15, 2018)(memorandum decision).

away through the apartment complex's parking lot. Mr. Goard followed her, however, intent on taking the purse. Ms. Cummings testified that Mr. Goard caught up with her, grabbed her in a sort of "bear hug," and "slammed [her] down on the curb and then tried to jerk the purse off." As Ms. Cummings lay on the ground, petitioner appeared and asked what was going on. As Mr. Goard continued to try to wrest the purse from Ms. Cummings, Mr. Goard reportedly responded, "She's wearing a wire. She has a wire." Ms. Cummings stated that petitioner then pointed a handgun at her and instructed her to give the purse to Mr. Goard or he would shoot her. Mr. Goard struck the back of Ms. Cummings's head, and she then "gave up fighting" with him as he jerked the purse loose from her body.

This altercation was captured on the apartment complex's surveillance cameras, and the State published this footage to the jury. As it played, Ms. Cummings described to the jury what was occurring in the video.

At the close of petitioner's two-day trial, the jury found him guilty of conspiracy and first-degree robbery, but it did not make a finding that petitioner used a firearm in committing robbery. The circuit court sentenced petitioner to an indeterminate term of one year to five years of incarceration for his conspiracy conviction and a determinate term of thirty years of incarceration for his first-degree robbery conviction. Petitioner's sentence was memorialized in the circuit court's "Sentencing and Commitment Order," entered on July 13, 2017. It is from this order that petitioner appeals.

On appeal, petitioner first argues that the evidence was insufficient to sustain his convictions. Petitioner argues that "[t]he only evidence that [p]etitioner was involved in a conspiracy to commit robbery was the testimony of [Ms. Cummings]," but that "Ms. Cummings's testimony was not credible." Petitioner acknowledges that "[t]here is . . . 'evidence'" to support petitioner's convictions, but concludes that "[t]he problem with it is that it is simply not credible."

With respect to claims concerning the sufficiency of the evidence to support a conviction, this Court has stated that

> [t]he 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). Further,

> [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.

Id. at 663, 461 S.E.2d at 169, syl. pt. 3, in part.

Petitioner has failed to satisfy this "heavy burden." *Id.* Petitioner does not argue that "the record contains no evidence . . . from which the jury could find guilt beyond a reasonable doubt." In fact, petitioner acknowledges that there is evidence, but he contends the problem is that the evidence lacks credibility. It is well settled, however, that "[c]redibility determinations are for a jury and not an appellate court." *Id.* "As we have cautioned before, appellate review is not a device for this Court to replace a jury's finding with our own conclusion. On review, we will not weigh evidence or determine credibility." *Id.* at 669, 461 S.E.2d at 175.

Petitioner also assigns as error certain arguments made by the prosecutor during closing argument. Petitioner claims that the prosecutor's narration of the surveillance footage was "wholly unsupported by the evidence," and that the prosecutor offered personal opinions of certain witnesses' credibility, improperly impugned defense counsel, and told the jurors that they bore a responsibility to "do something about" crime.

Petitioner, however, failed to object during closing argument to the comments he now claims amount to prosecutorial misconduct. We have held that "[i]f either the prosecutor or defense counsel believes the other has made improper remarks to the jury, a timely objection should be made coupled with a request to the court to instruct the jury to disregard the remarks." Syl. Pt. 2, *State v. Rollins*, 233 W. Va. 715, 760 S.E.2d 529 (2014) (citation omitted). And it has long been the rule that "[f]ailure to make timely and proper objection[s] to remarks of counsel made in the presence of the jury, during the trial of a case, constitutes a waiver of the right to raise the question thereafter either in the trial court or in the appellate court." *Id.* at 720, 760 S.E.2d at 534, syl. pt. 3 (citing syl. pt. 6, *Yuncke v. Welker*, 128 W. Va. 299, 36 S.E.2d 410 (1945)). Accordingly, petitioner has waived his right to raise this assignment of error.[3]

For the foregoing reasons, the circuit court's July 13, 2017, sentencing order is hereby affirmed.

Affirmed.

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[3]In petitioner's *reply brief*, he urges this Court to apply the plain error doctrine to the remarks made during the State's closing. Petitioner's *brief*, however, does not frame this assignment of error so as to alert this Court to the fact that plain error is asserted. *See* W. Va. R. App. P. 10(c)(3) (requiring a petitioner to phrase assignments of error in his or her brief "in such a fashion as to alert the Court to the fact that plain error is asserted."). For the additional reason that "the doctrine of plain error with regard to objectionable closing remarks is sparingly applied," *State v. Grubbs*, 178 W. Va. 811, 818, 364 S.E.2d 824, 832 (1987), we decline to address this claim under plain error.

ISSUED: March 15, 2019

CONCURRED IN BY:

Chief Justice Elizabeth D. Walker
Justice Margaret L. Workman
Justice Tim Armstead
Justice Evan H. Jenkins

DISSENTING:

Justice John A. Hutchison