IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2007 Term

No. 33299

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee

v.

DANIEL B. BINGMAN,
Defendant Below, Appellant

Appeal from the Circuit Court of Gilmer County
Honorable Richard A. Facemire, Judge
Criminal Action No. 05-F-8

AFFIRMED

Submitted: September 19, 2007
Filed: October 26, 2007

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The Opinion of the Court was delivered PER CURIAM.
JUSTICE STARCHER and JUSTICE ALBRIGHT dissent and reserve the right to file dissenting opinions.

SYLLABUS BY THE COURT

1. "When a defendant is not indicted within one year of the date on which an offense is committed but requests the circuit court to instruct the jury on a time-barred lesser included offense, the defendant by that act waives the statute of limitations defense contained in W.Va.Code § 61-11-9." Syllabus Point 3, *State v. Boyd*, 209 W.Va. 90, 543 S.E.2d 647 (2000).

2. "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." Syllabus Point 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

3. "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. . . .” Syllabus Point 3, in part, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

Per Curiam:

This case is before the Court upon the appeal of the appellant, Daniel B. Bingman. The appellant appeals from the March 10, 2006, order of the Circuit Court of Gilmer County, which denied his motion for a new trial and sentenced him to a term of one year in the state penitentiary upon his conviction by a jury of one count of petit larceny in violation of West Virginia Code § 61-3-13(b). The appellant argues that the circuit court erred in instructing the jury on the lesser included misdemeanor offense of petit larceny during a felony prosecution for grand larceny where the indictment came more than one year after the offense. Based upon the parties' briefs and arguments in this proceeding, as well as the relevant statutory and case law, we are of the opinion that the circuit court did not commit reversible error and accordingly, affirm the decision below.

I.

FACTS

In 1994, Virginia Woofter Rafferty died. At the time of her death, Ms. Rafferty lived in Akron, Ohio, but she also owned property in Gilmer County, West Virginia, which she left in divided shares to her various heirs. The appellant's mother, Ramona Bingman, owns two-sixths of the property through one-sixth heirship and a purchase of one-sixth of the property from Mr. Tommy Ross Gainer, the grandson of Ramona Bingman's aunt, Dora

Gainor. The appellant's uncle, Roger Rafferty, owns three-sixths of the property, acquiring two-sixths by heirship and purchasing one-sixth from his cousin, Richard Woofter.

On his property near his home, Roger Rafferty owned and kept various items of farming equipment including a five-foot-tiller, a four-foot brush hog, a potato plow, a four-row-cultivator, and a boom pole. According to Mr. Rafferty, he purchased this equipment from Lemon's Tractor Supply solely on his own with no money from any heirship property.

On January 31, 2002, unbeknownst to Mr. Rafferty, the appellant procured the farm equipment and sold it for $500 to Gerald and Shirley Ball of Grantsville, West Virginia. At the time of the sale, the appellant represented himself to the Balls by another name, Jim West. Mr. Bingman explained that all of his adult life he had been in the entertainment business, mostly working as an on-air radio personality, and that he had always used the name "Jim West." He explained that using a pseudonym is a very standard practice in the radio industry and he was not attempting to mislead the Balls with regard to his identity.

On April 16, 2002, Mr. Rafferty reported his farm equipment missing to Sergeant Larry Gerwig of the Gilmer County Sheriff's Department. Sergeant Gerwig conducted an investigation, and Mr. Ball agreed to return the equipment to the sheriff due to the controversy. The Balls never received the $500 from their initial purchase of the

equipment and Mr. Ball died prior to the appellant's trial. Subsequently, the appellant was indicted for grand larceny for taking the farm equipment and selling it.

During trial, Ms. Marilyn Matheny, a partner of Lemon's Farm Equipment, valued the equipment to be approximately $1,200. On December 14, 2005, the jury found the appellant guilty of petit larceny in violation of W.Va. Code § 61-3-13(b), the lesser-included offense of grand larceny, a violation of W.Va. Code § 61-3-13(a).[1] The circuit court then sentenced the appellant to one year in the state penitentiary. This appeal followed.

II.

STANDARD OF REVIEW

[1]W.Va. Code § 61-3-13, provides:

> (a) If a person commits simple larceny of goods or chattels of the value of one thousand dollars or more, such person is guilty of a felony, designated grand larceny, and, upon conviction thereof, shall be imprisoned in the penitentiary not less than one nor more than ten years, or, in the discretion of the court, be confined in jail not more than one year and shall be fined not more than two thousand five hundred dollars.
>
> (b) If a person commits simple larceny of goods or chattels of the value of less than one thousand dollars, such person is guilty of a misdemeanor, designated petit larceny, and, upon conviction thereof, shall be confined in jail for a term not to exceed one year or fined not to exceed two thousand five hundred dollars, or both, in the discretion of the court.

In Syllabus Point 1 of *State v. Paynter*, 206 W.Va. 521, 526 S.E.2d 43 (1999), we held, "'Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.' Syllabus Point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995)." We have further indicated that a circuit court's final order and ultimate disposition are reviewed under the abuse of discretion standard. *State ex rel. Hechler v. Christian Action Network*, 201 W.Va. 71, 491 S.E.2d 618 (1997). Thus, with these standards in mind, we consider the parties' arguments.

III.

DISCUSSION

As set forth above, the appellant contends that the circuit court erred by instructing the jury on the lesser included offense of petit larceny. The appellant maintains that this case fits squarely within the rule found in *State v. Leonard*, 209 W.Va. 98, 543 S.E.2d 655 (2000), to the effect that one cannot be convicted of a lesser included misdemeanor in a felony prosecution where the indictment came more than one year after the offense. The appellant admits, however, that the true issue is whether the provisions of *State v. Boyd*, 209 W.Va. 90, 543 S.E.2d 647 (2000), regarding waiver of the statute of limitations by having the jury instructed on the misdemeanor apply. Syllabus Point 3 of Boyd provides:

> When a defendant is not indicted within one year of the date on which an offense is committed but requests the circuit court to instruct the jury on a time-barred lesser included offense, the defendant by that act waives the statute of limitations defense contained in W.Va.Code § 61-11-9.

The appellant points out that the sale of the farm equipment occurred on January 31, 2002, and that W.Va. Code § 61-11-9 provides: "A prosecution for a misdemeanor shall be commenced within one year after the offense was committed. . . ." In this case, Mr. Bingman was not indicted until March 4, 2003, more than one year after the offense. Then, that indictment languished for nineteen months until it was dismissed on October 25, 2004. The appellant was then indicted again on the same offenses on March 9, 2005. The appellant's trial was held on December 13 and 14, 2005, and he was found guilty of petit larceny, a misdemeanor, the lesser included offense to grand larceny, a felony. Thus, he maintains that his conviction for a misdemeanor was barred by the statute of limitations, while a conviction for grand larceny would not have been barred.

Conversely, the State contends that the appellant waived any right for this Court to review this matter due to his defense counsel's failure to object to the jury instructions that gave the jurors the option to convict the appellant of the misdemeanor offense of petit larceny rather than the felony of grand larceny. The State further points out that the appellant took an active role in formulating the jury instructions and that his defense counsel actually offered an instruction on the lesser included offense. Thus, his failure to

object and his actual involvement in formulating the instructions resulted in waiver and no error occurred. We agree.

In this case, the State charged the appellant with the felony offense of grand larceny for stealing farm equipment in violation of W.Va. Code §61-3-13(a). Since there is no statute of limitations for the felony offense of grand larceny, there has never been any assertion by the appellant that prosecution for that offense was time barred. *See State v. Parsons*, 214 W.Va. 342, 353, 589 S.E.2d 226, 237 (2003). The problem, however, occurred during the time period when jury instructions were being proposed. It was at that time when the lesser included offense of petit larceny was added for the jury's consideration. As discussed above, the record reflects that the appellant's counsel was vigorously involved in establishing the instructions to be presented to the jury and even included the option of finding him guilty of the misdemeanor offense of petit larceny in the "[Appellant's] Proposed Jury Instructions."

The appellant's proposed instruction, which was given without objection, stated as follows:

> As part of these instructions you were instructed as to each of the elements of the offense of Grand Larceny and the lesser included offense of Petit Larceny as charged in the indictment. The distinguishing feature between these two offenses is the value of the property alleged to have been taken

> and carried away. In that regard the value that must be established is the current market value of the property at the time it was alleged to have been taken. The owner of the property is generally a competent witness to establish its current market value at the time the property was taken, although other witnesses may also be competent witnesses on the issue of current market value.

Likewise, during a bench conference discussing the potential instructions to be presented to the jury, the appellant's defense counsel stated the following:

> But I think that we . . . somewhere uh, make uh, allowance uh, either as Instruction Number 1, or Instruction Number 2 for the uh, for the lesser included offense. I mean, we're, we're obviously, obviously think that you know, under Count 1, it could be grand larceny or petit larceny.

We believe that Syllabus Point 3 of *Boyd*, *supra*, is directly on point. In *Boyd*, identical to the appellant's situation, the defendant was not indicted within one year of the date on which his offense was committed, but requested the circuit court to instruct the jury on a time-barred lesser included offense. In Syllabus Point 3, we held specifically that "the defendant by that act waives the statute of limitations defense contained in W.Va.Code § 61-11-9." We concluded in *Boyd*,

> The requested charge was obviously in the appellant's best interest. He requested the charge, was convicted under the charge, and benefitted from the charge. He cannot now complain of the result. His actions constitute a waiver of the time limitation contained in W.Va.Code § 61-11-9. To hold otherwise would allow defendants to sandbag trial judges by requesting and approving an instruction they know or should know would result in automatic reversal if given. "After a guilty verdict has been returned based on the requested

> instruction, defense counsel cannot be allowed to change legal positions in midstream and seek a reversal based on that error."

(Citation omitted).

In this case, the appellant was involved with the formation of instructions from the very beginning and even proposed an instruction for the lesser included offense of petit larceny to be provided to jurors. The appellant's counsel clearly had a choice in whether or not this instruction would be included and the record reflects that he did not object in any manner to the inclusion of this instruction. Moreover, the decision to include the lesser included offense could have been a strategic decision on the part of the appellant's counsel. He may have felt that jurors were going to convict his client of the felony of grand larceny. With that in mind, a reasonable attorney could have concluded that the inclusion of the lesser included offense of petit larceny would have allowed for the possibility of the jury convicting the appellant of a misdemeanor, which is a better alternative than a felony conviction of grand larceny. Consequently, having reviewed this issue in its entirety, we find no violation of the appellant's rights due to the inclusion of the instruction for the lesser included offense of petit larceny.

The appellant also maintains that there was insufficient evidence to support his conviction. He claims that the only evidence that the farm equipment was owned solely by Mr. Rafferty was his testimony. The appellant contends that the farm equipment was his and that it was purchased with Virginia Rafferty's money and that Mr. Rafferty did not have the money to purchase that equipment. Thus, the appellant argues that he was entitled to treat

this equipment as heirship property.

In Syllabus Point 1 of *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995), we held:

> 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.

Moreover, as this Court made clear in Syllabus Point 3 of *Guthrie*,

> 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. . . ."

In the case at hand, we believe there was more than enough evidence for a rational trier of fact to find the appellant guilty of this offense beyond a reasonable doubt. It was established at trial that Mr. Rafferty owned three-sixths of the heirship property in

question where the farm equipment was located. Evidence was further presented that Mr. Rafferty had actually purchased the farm equipment at Lemon's Tractor Supply from his own money and not from any heirship money. Mr. Rafferty also testified that the equipment in question was solely his property and that he did not give any share of it to any of his family members. Thus, in consideration of all of the evidence presented, a rational trier of fact could have concluded that the evidence established that the appellant sold equipment purchased exclusively by his uncle, Mr. Rafferty, that was situated on land owned by Mr. Rafferty. Thus, in this case, we find the evidence was sufficient to prove beyond a reasonable doubt that the appellant did commit petit larceny. We consequently affirm the circuit court's decision.

IV.

CONCLUSION

Accordingly, for the reasons stated above, the final order of the Circuit Court of Gilmer County entered on March 10, 2006, is affirmed.

Affirmed.