STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED
February 17, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff below, Appellee

vs.) No. 35551 (Ohio County 06-F-90)

FREDERICK K. FERGUSON, III,
Defendant below, Appellant

MEMORANDUM DECISION

This is an appeal by Frederick K. Ferguson, III [hereinafter "Appellant"], from a conviction for voluntary manslaughter rendered subsequent to a jury trial in the Circuit Court of Ohio County. Having thoroughly reviewed the record, briefs, arguments of counsel, and applicable precedent, this Court concludes that the trial court committed no prejudicial error. This Court further finds that this case presents no new or significant questions of law. Thus, this case will be disposed through a memorandum decision as contemplated under Rule 21 of the Revised Rules of Appellate Procedure.[1]

The underlying facts of this matter are undisputed. The Appellant was involved in a romantic relationship with Elizabeth Gorayeb. Mr. Maurice Sears, the decedent, considered Ms. Gorayeb to be his girlfriend and telephoned the Appellant to express his dissatisfaction with the Appellant's involvement with Ms. Gorayeb. During this conversation, Mr. Sears allegedly threatened to kill the Appellant and his family.

In response to the threatening telephone call, the Appellant and his friend Mr. Robert Hodge personally confronted Mr. Sears. All witnesses to this confrontation agreed and testified at trial that Mr. Sears initiated the aggressive behavior by hitting the Appellant and kicking the Appellant's car door while the Appellant was still seated in the vehicle. The

[1]Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules.

Appellant and Mr. Sears briefly struggled over a gun. The gun ultimately discharged, and Mr. Sears died of the gunshot wound. The firearm that discharged the bullet was never located.

The Appellant was indicted for first degree murder and ultimately convicted of voluntary manslaughter. Three assignments of error relating to trial court rulings were accepted by this Court for review. During oral argument, counsel for the Appellant indicated that the primary point of error involved the trial court's ruling prohibiting defense counsel from cross-examining Officer Howard Keith Brown on the issue of his allegedly false grand jury testimony. During grand jury questioning regarding the issue of premeditation, Officer Brown had responded to a grand juror's inquiry concerning evidence of the origin of the gun.[2] Officer Brown stated that he did not "know where he [the Appellant] got the gun. We have no witness to that." However, prior police questioning of witnesses had revealed that one witness, specifically the Appellant's friend Mr. Hodge, had stated that he thought Mr. Sears had brought the gun to the confrontation.

The Appellant filed a pretrial motion to dismiss the indictment, and the trial court examined Officer Brown's testimony and the surrounding factual issues. The trial court found no intentional misrepresentation in Officer Brown's answer to the grand juror's question. On appeal, the Appellant raises a Constitutional Due Process claim, contending that he should have been permitted to cross-examine the officer, presented as a chain of custody witness at trial, concerning the allegedly false response during the grand jury proceedings. On the contrary, the State contends that Officer Brown's answer was accurate and that the trial court's evidentiary ruling did not constitute an abuse of discretion.

Upon review by this Court, we find that Officer Brown's statement was not untruthful, that the trial court did not abuse its discretion in disallowing cross-examination on that issue at trial, and that the Appellant's rights were not thereby prejudiced. Moreover, even if an abuse of discretion in this evidentiary ruling had occurred, the State correctly emphasizes that reversal is not required where substantial rights are not affected. *See State v. Marple*, 197 W.Va. 47, 51, 475 S.E.2d 47, 51 (1996) ("Even if we find the circuit court abused its discretion, the error is not reversible unless the defendant was prejudiced."). The underlying information the Appellant sought to obtain concerning conflicting evidence on the issue of the origin of the gun was introduced at trial through the testimony of Mr. Hodge. The jury was ultimately presented with that evidence.

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[2]The question was posed as follows: "You said he [the Appellant] went and obtained the gun. Was there a witness that he went and obtained the gun?"

Second, the Appellant contends that he was improperly denied the right to introduce evidence that Mr. Sears had a bag of methyldioximethamphetamine [hereinafter "MDMA" or "Ecstasy"] in his rectal cavity at the time of his death. The toxicology report, however, did not indicate the presence of Ecstasy in Mr. Sears' bloodstream. Thus, Mr. Sears was transporting the drug in this manner at the time of his death. In an attempt to introduce evidence regarding the potential for heightened aggression in chronic abusers of Ecstasy, the Appellant sought to introduce evidence of the Ecstacy and the expert testimony of Dr. Carl Ryan Sullivan, III,[3] and the trial court prohibited such testimony. The trial court held a hearing on this issue outside the presence of the jury in which Dr. Sullivan was extensively questioned by the State and Appellant's counsel. The trial court concluded that evidence regarding the potential for heightened aggression in chronic abusers was inadmissible under *Gentry v. Mangum*, 195 W. Va. 512, 466 S.E.2d 171 (1995). Rule 702 of the West Virginia Rules of Evidence governs the admissibility of expert testimony on issues involving scientific, technical, or involve other specialized knowledge, and *Gentry* and its progeny present guidelines for the admissibility of such evidence.

The State contends that the existence of the Ecstasy has no relevance to the issues of fact surrounding the fatal confrontation; that the defense lacks sufficient evidence regarding Mr. Sears' alleged chronic use to justify introduction of expert testimony on the alleged effects of chronic abuse; and that the existence of a bag of Ecstasy in Mr. Sears' rectal cavity would be deemed unfairly prejudicial in a Rule 403 balancing test.[4]

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[3]Dr. Sullivan is a professor of psychiatry and the vice-chair of the Department of Behavioral Medicine Psychiatry at West Virginia University. He is also a certified addiction specialist and has an active practice in addiction psychiatry. The conclusions of this Court regarding the admissibility of the subject matter of his proferred testimony are not in any manner premised upon his qualifications as an expert.

[4]Rule 403 of the West Virginia Rules of Evidence is succinctly explained in syllabus point nine of *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994), as follows:

> Although Rules 401 and 402 of the West Virginia Rules of Evidence strongly encourage the admission of as much evidence as possible, Rule 403 of the West Virginia Rules of Evidence restricts this liberal policy by requiring a balancing of interests to determine whether logically relevant is legally relevant evidence. Specifically, Rule 403 provides that although relevant, evidence may nevertheless be excluded when the danger of unfair prejudice, confusion, or undue delay is

(continued...)

This Court agrees with the contentions of the State on this issue and finds no prejudicial error in the trial court's exclusion of the evidence regarding Ecstasy or the expert testimony regarding the potential for heightened aggression in chronic abusers. While the Appellant emphasizes the value of the evidence as support for his contention that Mr. Sears was the unyielding first aggressor, he offers no evidence supporting the underlying premise of Mr. Sears' chronic abuse. Specifically, the trial court addressed the issue of the definition of chronic abuse with Dr. Sullivan during the in camera hearing and ascertained that "chronic" abuse could be defined as "at least three months" or possibly six months of regular use. Defense counsel thereafter stated that his only proffer regarding evidence of Mr. Sears' chronic abuse would be "limited" and that "[i]t will not, I don't think, satisfy your three months."

We do not, however, turn this issue on the admissibility of the evidence through the testimony of Dr. Sullivan as an expert. Instead, we note that there was no controversy at trial regarding the issue of which individual was the first aggressor. Even if the trial court erred in excluding the testimony of Dr. Sullivan, other compelling evidence on the issue of first aggressor was admitted. The State acknowledged during trial that Mr. Sears was the first aggressor and in fact presented extensive witness testimony evidencing that fact. Given the limited probative value of the Ecstasy evidence, a Rule 403 balancing test, weighing the probative value against the possible unfair prejudice, would justify the exclusion of the evidence of the bag of Ecstasy in the rectal cavity in this particular instance.

Finally, the Appellant contends that he was improperly denied the right to introduce evidence that Mr. Sears had previously beaten several girlfriends. The trial court concluded, and this Court agrees, that the Appellant offered the evidence under Rule 405(b) of the West Virginia Rules of Evidence, allowing evidence of specific acts in some circumstances to prove violent character. The attacks in question, occurring thirteen and twenty-three months prior to this shooting, were determined to be inadmissible because the Appellant did not have knowledge of such prior acts at the time of the shooting.

Although the Appellant argues that this Court has abandoned the requirement that the defendant must have prior knowledge of the acts in order to introduce them under Rule 405(b), syllabus point three of *State v. Woodson*, 181 W.Va. 325, 382 S.E.2d 519

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[4](...continued)
disproportionate to the value of the evidence.

(1989) clearly contemplates such a prerequisite. "Under 405(b) of the West Virginia Rules of Evidence, a defendant in a criminal case who relies on self-defense or provocation may introduce specific acts of violence or threats made against him by the victim, and if the defendant has knowledge of specific acts of violence against third parties by the victim, the defendant may offer such evidence."[5]

The issue of admissibility of evidence of Mr. Sears' prior mistreatment of girlfriends was a discretionary ruling by the trial court. This Court has consistently held that " '[r]ulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion.' *State v. Louk*, 171 W.Va. 639, [643], 301 S.E.2d 596, 599 (1983)." Syl. Pt. 2, *State v. Peyatt*, 173 W.Va. 317, 315 S.E.2d 574 (1983). Based upon the fact that the Appellant did not have knowledge of the specific instances at the time of the shooting, this Court finds no error in the trial court's refusal to admit the evidence.

For the foregoing reasons, this Court finds no error in the trial court's determinations and affirms the conviction and sentence.

Affirmed.

ISSUED: February 17, 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

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[5]The Appellant cites *State v. Mitchell*, 214 W.Va. 516, 590 S.E.2d 709 (2003), for the proposition that the standard of *Woodson* has in some manner been relaxed. However, this Court did not, in *Mitchell's* expositions on general reputation evidence or elsewhere, alter the requirements for the introduction of specific acts of violence under Rule 405(b) of the West Virginia Rules of Evidence.