STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
January 25, 2024
C. CASEY FORBES, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Wilfred H.,
Petitioner Below, Petitioner

vs.) No. 22-0506 (Randolph County 19-C-64)

Donnie Ames, Superintendent,
Mt. Olive Correctional Complex,
Respondent Below, Respondent

MEMORANDUM DECISION

Petitioner Wilfred H. appeals the order of the Circuit Court of Randolph County, entered on June 3, 2022, denying his amended and supplemental petitions for habeas corpus relief.[1] On appeal, petitioner argues three assignments of error: (1) ineffective assistance of counsel because his attorney did not object to the circuit court's response to a jury question about identical charges in the indictment; (2) counts 4, 5, and 6 of that indictment were identically worded and the lack of specificity was unconstitutional; and (3) the prosecutor made improper statements during closing arguments. Upon our review, we find no substantial question of law and no prejudicial error. We determine that oral argument is unnecessary and that a memorandum decision is appropriate. *See* W. Va. R. App. P. 21.

The allegations against petitioner involved sexual offenses against his then minor cousin M.A.H. A note between M.A.H., then thirteen years old, and a friend at school was intercepted by school personnel. The note disclosed the alleged abuse, and that it had begun when M.A.H. was nine years old. School personnel reported the note, and police investigated. During the investigation, M.A.H. identified petitioner as her abuser and, in addition to extensive sexual assault allegations, asserted petitioner took nude pictures of her. Petitioner was interviewed at his home as part of the investigation, and that interview was recorded. Petitioner denied assaulting M.A.H., and he consented to police officers taking possession of a computer hard drive and a cellular

[1] We use initials where necessary to protect the identities of those involved in this case. *See* W. Va. R. App. P. 40(e). Petitioner appears by counsel Gary A. Collias. Respondent appears by Attorney General Patrick Morrisey and Assistant Attorney General Mary Beth Niday. Petitioner was previously incarcerated at Tygart Valley Regional Jail and Correctional Facility but is now incarcerated at Mt. Olive Correctional Complex. The appropriate public officer has been substituted pursuant to Rule 41(c) of the West Virginia Rules of Appellate Procedure.

telephone. An examination of petitioner's phone allegedly revealed clothed pictures of M.A.H. that she posted on her social media account and a single picture of a topless female whose face was blurred out. In October 2014, petitioner was indicted on sixty-one counts: thirty-seven counts of first-degree sexual assault, twenty-three counts of third-degree sexual assault, and one count of display of obscene material to a minor.

Background

1. Trial

The case proceeded to trial in January 2016, but resulted in a mistrial because the jury was unable to reach a unanimous verdict.[2] In petitioner's second trial, the topless picture was published to the jury during the victim's testimony. After the State rested its case, petitioner made a motion for mistrial based on the State's failure to establish a proper chain of custody for that picture prior to publication to the jury. Petitioner also moved to dismiss all counts of the indictment, arguing the State did not prove these counts with sufficient and specific evidence. The court denied the motion related to the indictment. Regarding the topless picture, the court denied the motion for mistrial based on publication of the topless picture, reasoning that the victim identified it in her testimony, but ruled that the State did not adequately present evidence of the chain of custody for the phone and so instructed the jury to "totally disregard [M.A.H.'s] identification of that [topless] picture, totally disregard anything concerning the cell phone or the picture of the cell phone or her identif[ication] of this picture. That is no longer part of this case." The prosecutor asked for clarification regarding whether references to the pictures obtained during the police investigation during closing argument would violate the court's ruling and specifically sought permission to discuss petitioner's response to allegations that he had pictures of the victim during a pre-arrest interview. The court responded that did not violate the court's ruling regarding the topless picture. During closing argument, the prosecutor stated "Things that you heard. You heard the defendant's voice inflection on his denials. You heard him not outright deny that pictures were taken. He just denied having them. In fact, he stated, 'I don't have none of those pictures.' And then later said, 'I don't have none.'"

During deliberations, the jury submitted a written question to the court asking why the charges related to counts 4, 5, and 6 of the indictment[3] "read the same." After discussion with

[2] During this trial, the State dismissed counts 2, 7, 59, 60, and 61.

[3] These counts charged sexual assault in the first degree, a felony, and charged that petitioner, "on, about, or between November 16, 2007, through July 15, 2010, … did unlawfully and feloniously, and being eighteen years of age or more at the time of offense, engage in sexual intercourse or sexual intrusion with another person who was younger than twelve years of age and was not married to that person …." The counts go on to state that the petitioner "did unlawfully and feloniously, and being eighteen years of age or more at the time of the offense engage in oral sexual intercourse with a juvenile identified by the initials M.A.H., …, who was younger than twelve years of age at the time, was unable to consent because of her age, and was not married to that person…."

counsel and without objection, the court responded to the jury that these counts charged three occurrences of the sexual intercourse as "defined by contact between the sex organ of the [petitioner]… and the mouth of [M.A.H.], and that such contact occurred on or about or between November 16th, 2007, and July 15th, 2010." As part of its response to the jury's question, the court provided a hypothetical example of speeding multiple times during a month and how that would be reflected with three charges having identical language in an indictment. The court also explained that in such a situation additional information could be provided in a bill of particulars as part of the pleadings, but that was not part of the information given to the jury.[4] After deliberations, the jury convicted petitioner on five counts of first-degree sexual assault, two counts of third-degree sexual assault, and one count of display of obscene matter to a minor. The jury did not reach a verdict on the remaining counts.

Petitioner filed post-trial motions, which were denied. He was sentenced on or about December 19, 2016, and is currently serving his sentence. Petitioner appealed his conviction, asserting ten assignments of error, including alleging that the denial of his motion for mistrial based on publication of the topless picture to the jury was error. This Court affirmed his conviction in a memorandum decision *State v. Wilfred H.*, No. 17-0170, 2018 WL 3005947 (W. Va. June 15, 2018)(memorandum decision).

2. Habeas corpus proceeding

Petitioner, then self-represented, filed a petition for writ for habeas corpus relief and was then appointed counsel. His counsel filed an amended petition that raised, among other things, the prosecutor's reference during closing argument to petitioner's response to questions related to pictures of the victim during a police interview as improper in two ways: as a comment on petitioner's failure to testify and as a reference to the excluded topless picture. Petitioner also filed a supplemental petition raising, among other things, ineffective assistance of counsel and substantive constitutional issues related to the language of counts 4, 5, and 6 of the indictment.

Petitioner's trial counsel, Jeremy Cooper, testified at the omnibus habeas corpus hearing. Regarding Mr. Cooper's failure to object and agreement to the judge's response to the jury question regarding the identical language in counts 4, 5, and 6, Mr. Cooper testified that he did not view the court's response to the jury as an issue because he did not anticipate a mixed verdict in the case. Instead, Mr. Cooper thought the jury would either believe petitioner or believe the victim on the issues. He also testified that the State indicated they were going to have to prove three separate incidents of that type alleged during the time frame specified in the indictment. He believed this narrowed it down and so he did not leave it out of the agreement on the bill of particulars. Mr. Cooper agreed the court's response to the jury's question did not state that the three identical counts

[4] Petitioner filed a motion for a bill of particulars in this case, which was resolved by agreement with a "Stipulated Agreement on Defendant's Motion for Bill of Particulars." The agreement addressed counts 4, 5, and 6 of the indictment together, providing that the State alleged "contact between [petitioner's] sex organ and the mouth of the victim, M.A.H. … thereby constituting sexual intercourse as defined by West Virginia Code, on at least three different occasions occurring between November 16, 2007 and July 15, 2010."

of evidence had to be specific and individualized. Mr. Cooper admitted the court's response could have been clearer, and he was unaware of the case law that supported a double jeopardy attack on identical counts. Mr. Cooper also testified that he did not remember why he did not object during closing argument to the State's reference to the petitioner's interview that referenced allegations that he took pictures of the victim. Mr. Cooper guessed that he did not object because the victim had separately testified about petitioner taking pictures, and the prosecutor did not go into specific details about the topless picture.

The circuit court denied the amended and supplemental petitions for writ of habeas corpus on all grounds raised. Relevant to this appeal, reviewing the claim that the indictment language was vague and resulted in double jeopardy and notice violations, the court found the petitioner was given proper notice by identifying the victim, the offenses committed, and the dates on which the offenses were committed. In evaluating petitioner's claim of ineffective assistance of counsel related to trial counsel's failure to object to the court's response to the question from the jury regarding identical language in three of the indictment counts, the court found petitioner's trial counsel did not provide ineffective assistance because he reasonably believed the jury would either believe the victim or the petitioner, and this was not objectively deficient or prejudicial to petitioner. Regarding the prosecutor's statements during closing argument, the court found that the prosecution did not specifically or directly refer to petitioner's failure to testify at trial, and the jury could reasonably infer that the prosecutor's comments about the picture refer to the statements made in the police interview. The court further found that the jury was instructed not to draw any inference from petitioner's failure to testify. The court concluded there was no constitutional violation regarding the claimed prejudice of improper statements by the prosecutor. The court also considered the prosecutor's remarks regarding the pictures on the grounds of prejudice and found petitioner's rights were not violated based on prejudice by the statements related to the picture.

Appeal from Denial of Petition for a Writ of Habeas Corpus

Petitioner appeals the circuit court's order on three issues: sufficiency of the indictment, ineffective assistance of counsel, and improper remarks during closing argument by the prosecutor. "We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review." Syl. Pt. 1, in part, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006).

1. Sufficiency of the indictment

To evaluate petitioner's first assignment of error, in which he argues that his trial counsel provided ineffective assistance of counsel by approving the circuit court's insufficient response to the jury's double jeopardy question, we must first address the issue raised in petitioner's second assignment of error, that counts 4, 5, and 6 of the indictment, which contained identical charging language, were constitutionally insufficient due to a lack of specificity.[5] "Generally, the

[5] In the proceeding before the circuit court, petitioner included additional grounds for his claim of ineffective assistance of counsel, including his trial counsel's failure to object to the prosecutor's closing remarks mentioning prohibited photographs. On appeal, his brief to this Court

sufficiency of an indictment is reviewed *de novo*. An indictment need only meet minimal constitutional standards, and the sufficiency of an indictment is determined by practical rather than technical considerations." Syl. Pt. 2, *State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996). If an indictment "substantially follows the language of the statute, fully informs the accused of the particular offense with which he is charged and enables the court to determine the statute on which the charge is based," it is generally sufficient. Syl. Pt. 1, in part, *State v. Mullins*, 181 W. Va. 415, 383 S.E.2d 47 (1989) (quoting Syl. Pt. 3, *State v. Hall*, 172 W. Va. 138, 304 S.E.2d 43 (1983)). In addition, we have held

> "An indictment is sufficient under Article III, § 14 of the West Virginia Constitution and W. Va. R.Crim. P. 7(c)(1) if it (1) states the elements of the offense charged; (2) puts a defendant on fair notice of the charge against which he or she must defend; and (3) enables a defendant to assert an acquittal or conviction in order to prevent being placed twice in jeopardy." Syl. Pt. 6, *State v. Wallace*, 205 W.Va. 155, 517 S.E.2d 20 (1999).

Syl. Pt. 5, *State v. Haines*, 221 W. Va. 235, 654 S.E.2d 359 (2007).

Upon our review of the record on appeal and West Virginia law, counts 4, 5, and 6 of the indictment are sufficient. The indictment counts 4, 5, and 6 cite and substantially follow the language of the relevant statutes – West Virginia Code § 61-8B-3(a)(2) and West Virginia Code § 61-8B-3(c). The counts identified the victim as M.A.H.; described the sexual offenses at issue, specifically oral sexual intercourse; and set out a time period for the offenses, November 16, 2007, through July 15, 2010. Although petitioner contends we should require greater specificity as set forth in *Valentine v. Konteh*, 395 F.3d 626 (6th Cir. 2005), we have consistently declined to do so and do not find a reason to depart from our precedent under the circumstances in this case. *See Ballard v. Dilworth*, 230 W. Va. 449, 455-56, 739 S.E. 2d 643, 649-50 (2013) (discussing the *Valentine* case and finding it nonbinding on this Court). Further, in *Dilworth* we quoted, with approval, the dissent in *Valentine* that explained "'no [U.S.] Supreme Court case has ever found the use of identically worded and factually indistinguishable indictments *unconstitutional*.' *Valentine*, 395 F.3d at 639 (Gilman, J., dissenting) (emphasis in original)." *Dilworth*, 230 W. Va. at 457, 739 S.E.2d at 651. Petitioner's argument that *Russell v. U.S.* 369 U.S. 749 (1962), and *U.S. v. Kingrea*, 573 F.3d 186 (4th Cir. 2009), require a different result in this case is unavailing because every essential element of the offense is reflected in each of the three counts and a time period is provided in each count. We agree with the circuit court that in this case, counts 4, 5, and 6 provide reasonable notice to petitioner as to the charges and sufficient protection against potential double jeopardy given the detail supplied.

2. Ineffective assistance of counsel

Having determined that the indictment was constitutionally sufficient with regard to the language in counts 4, 5, and 6, we turn to petitioner's argument that his trial counsel was ineffective based on his agreement with, and failure to object to, the circuit court's response to the jury

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only identifies the issue of a failure to object to the circuit court's response to the jury's question regarding identical indictment language as ineffective assistance of counsel.

question as to why these three counts were identically worded in the presented charges. We evaluate whether petitioner's trial counsel was ineffective and his performance deficient "under an objective standard of reasonableness" and consider whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Syl. Pt. 5, in part, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). Further,

> [i]n reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.

Miller, 194 W. Va. at 6-7, 459 S.E.2d at 117-18, Syl. Pt. 6. When evaluating counsel's performance, we "'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]'" *Id.* at 15, 459 S.E.2d at 126 (quoting *Strickland*, 466 U.S. at 689).

Here, petitioner alleges that the circuit court's response to the jury's question regarding identically worded charges was confusing and that his trial counsel should have objected, not agreed, to the response provided. At the omnibus hearing, trial counsel testified that he thought the jury would either believe petitioner or believe the victim and so he did not view the court's response as a problem. Trial counsel also testified that, in his view, the jury was instructed that "if they find that it happened three (3) different times, then they can make three (3) separate findings of guilt. So, you know, I thought that that, more or less, covers or disallows the jury from making three (3) findings of guilt based on a single incident." Based on the circuit court's response and trial counsel's testimony regarding his thought process and strategy, we cannot find that Mr. Cooper's performance objectively falls outside of the wide range of reasonable professional assistance. Further, the circuit court plainly instructed the jury that counts 4, 5, and 6 charged three separate occurrences during a period of time. The circuit court further instructed the jury that the State had to overcome the presumption of innocence and prove beyond a reasonable doubt each element of the offenses charged. Therefore, there was no reasonable probability that petitioner was prejudiced by trial counsel's agreement and failure to object to the circuit court's response to the jury's question.

3. Remarks in closing argument by prosecutor

Finally, petitioner argues that the prosecutor made improper comments during closing argument when discussing his recorded interview with the police prior to his arrest, that came in to evidence by stipulation and without objection. Part of that recorded interview involved questions, and petitioner's response to those questions, related to pictures of the victim. As stated above, as part of closing argument, the prosecutor referenced the recorded interview and stated "You heard the defendant's voice inflection on his denials. You heard him not outright deny that pictures were taken. He just denied having them." It appears undisputed that the portions of the

recorded interview published to the jury were not incriminating and were a denial of guilt prior to petitioner's arrest. In this appeal, all of petitioner's arguments regarding the closing argument of the prosecutor involve the same remarks discussing petitioner's response to questions interview involving pictures of the victim during that recorded interview that occurred prior to his arrest.[6] The prosecutor expressly sought, and was granted, permission to reference that portion of the interview involving pictures prior to her closing argument. Before this Court, petitioner argues that his constitutional right to a fair trial was violated because the challenged remarks amounted to a comment on his silence, before trial[7] and during, and also as an improper and prejudicial reference to excluded evidence, i.e., the topless picture.

Petitioner contends the challenged remarks of the prosecutor were an unconstitutional and prejudicial comment on his silence. We addressed a similar issue in *Coleman v. Binion*, 242 W. Va. 1, 829 S.E.2d 1 (2019).[8] There, we stated

> This Court has recognized that, "[r]emarks made by the State's attorney in closing argument which make specific reference to the defendant's failure to testify, constitute reversible error and defendant is entitled to a new trial." Syl. pt. 5, *State v. Green*, 163 W. Va. 681, 260 S.E.2d 257 (1979). In other words,
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> > "[i]t is prejudicial error in a criminal case for the prosecutor to make statements in final argument amounting to a comment on the failure of the defendant to testify." Syllabus Point 3, *State v. Noe*, 160 W. Va. 10, 230 S.E.2d 826 (1976), *overruled on other grounds by State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).
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> Syl. pt. 4, *State v. Murray*, 220 W. Va. 735, 736, 649 S.E.2d 509, 510 (2007). Nevertheless, "[a] judgment of conviction *will not be reversed* because of improper remarks made by a prosecuting attorney to a jury *which do not clearly prejudice*

[6] As noted by the circuit court in its ruling on the exclusion of the topless picture and explanation to the jury of that ruling, there is no count charging petitioner with a crime based on the excluded topless picture.

[7] The issue of whether the prosecutor's comments improperly involved pre-trial silence in addition to a claimed indirect reference to a failure to testify does not appear to have been specifically raised below and was not specifically ruled on by the circuit court; however, we note that the recorded police interview, in this case prior to his arrest, and the closing remarks of the prosecutor regarding that interview also align closely to the issues presented in *Coleman v. Binion*, 242 W. Va. 1, 829 S.E.2d 1 (2019). Further, there is no dispute that the recorded interview referenced by the prosecutor in the challenged remarks occurred prior to petitioner's arrest. In the circumstances presented in this case, the remarks did not involve constitutional protection of silence. *See State v. Hoard*, 248 W. Va. 428, 438, 889 S.E.2d 1, 11 (2023) (discussing cases finding no constitutional protection of silence occurring prior to arrest or issuance of *Miranda* warnings).

[8] Unlike *Coleman*, however, before this Court petitioner does not assert this alleged error as a basis for his claim of ineffective assistance of counsel.

> *the accused or result in manifest injustice*." Syl. pt. 5, *State v. Ocheltree*, 170 W. Va. 68, 289 S.E.2d 742 (1982) (emphasis added). *Accord* Syl. pt. 1, *State v. Adkins*, 209 W. Va. 212, 544 S.E.2d 914 (2001).

Coleman, 242 W. Va. at 12, 829 S.E.2d at 12. *See also* Syl. Pt. 1, *State v. McClure*, 163 W. Va. 33, 253 S.E.2d 555 (1979) ("'In a criminal case, where the defendant has exercised his right not to testify, statements of the prosecuting attorney, in his argument of the case before the jury, that there had been no denial of the testimony introduced by the State, without specific reference to the failure of the defendant to testify, does not come within the inhibition of Code, 57-3-6, ...' Part, Point 3, Syllabus, *State v. Simon*, 132 W.Va. 322, 52 S.E.2d 725 (1949).").

In *Coleman*, as in this case, the petitioner exercised his right to not testify during the trial. *Id*. at 8-9, 829 S.E.2d at 8-9. In *Coleman*, the jury heard "evidence from several sources that, following the shooting, Mr. Coleman repeatedly claimed that the shooting [of his wife] was an accident." *Id*. at 8, 829 S.E.2d at 8. During closing argument, the State argued that the shooting was not an accident and that Mr. Coleman's explanation did not fit the physical facts of the case. *Id*. at 10, 829 S.E.2d at 10. Mr. Coleman's trial counsel, during argument, referred to a video recording of Mr. Coleman's police interview containing his explanation of the incident. *Id*. at 10-11, 829 S.E.2d at 10-11. The State in its rebuttal, responded that the entirety of the police interview should be considered, and it also highlighted what it characterized as Mr. Coleman's inconsistent statements in the interview, emphasizing what Mr. Coleman *did not tell* the police in that interview. *Id*. at 11, 829 S.E.2d at 11. Here, petitioner also alleges that the prosecutor's emphasis on what he did not say in his recorded statement was constitutionally improper.

The circuit found that the prosecution's remarks did not violate Article III, Section V of the West Virginia Constitution or West Virginia Code § 57-3-6 and that his right to a fair trial was not violated due to the prosecution's remarks during closing argument. We agree. The prosecutor's challenged remarks did not specifically and directly refer to petitioner's failure to testify. The remarks referenced the lack of a denial in a recorded interview prior to petitioner's arrest. Here, as in *Coleman*, when taken in context, the comments were references to petitioner's recorded statements, statements that had been presented to the jury. Assuming there was an issue with the remarks, here, as in *Coleman*, the jury received adequate instructions to cure any misunderstanding. For example, the jury was instructed in multiple instances regarding the burden of proof and its role as the factfinder. Specifically, the jury was instructed "[t]he fact that [petitioner] did not go upon the witness stand and testify on his own behalf is not evidence, and you should entirely disregard and not discuss it or draw any inference therefrom." The jury was also instructed that, "if the evidence as to the existence of a particular fact is equally susceptible to two reasonable interpretations, one which is consistent with the guilt of the defendant and the other is consistent with the innocence, you are not at liberty to adopt the theory or interpretation which incriminates him, but you must adopt a theory or conclusion with his innocence and acquit him." The jury was instructed that closing arguments were the attorney's opportunity to "advocate for their clients" and that it was the sole judge of the weight of the evidence. Therefore, we find no error because the prosecutor's comments during closing did not clearly prejudice petitioner or result in manifest injustice.

In addition to the above, petitioner also argues that because the challenged remarks

reference a portion of the recorded statement where petitioner was asked about pictures of the victim, the prosecutor was improperly referencing excluded evidence, i.e. the topless picture. The trial court gave permission to the State to reference that portion of the recorded statement and held it did not violate the ruling excluding the topless picture. We agree that the challenged comments were not an improper reference to that excluded evidence. The prosecutor's remarks pointed out the petitioner's statement regarding pictures generally and, at trial, the victim testified that petitioner took pictures of her. The excluded picture was not referenced specifically, either by the prosecutor or in the recorded interview. Further, the jury was properly instructed by the trial court to disregard the topless picture, separately and in addition to the jury instructions discussed above. Therefore, the comments of the prosecutor challenged by petitioner did not clearly prejudice him or result in manifest injustice.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: January 25, 2024

CONCURRED IN BY:

Chief Justice Tim Armstead
Justice Elizabeth D. Walker
Justice John A. Hutchison
Justice William R. Wooton
Justice C. Haley Bunn