STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

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

State of West Virginia,
Plaintiff Below, Respondent

vs.) No. 22-682 (Raleigh County CC-41-2020-F-338)

Barry Granville Wiley,
Defendant Below, Petitioner

MEMORANDUM DECISION

Petitioner Barry Wiley appeals the order of the Circuit Court of Raleigh County, entered on July 27, 2022, sentencing him to terms of imprisonment for: (1) ten to twenty-five years for his conviction of second-degree sexual assault (W. Va. Code § 61-8B-4); (2) ten to twenty years for his conviction of sexual assault by a parent, guardian, custodian, or person in a position of trust (W. Va. Code § 61-8D-5(a)); and (3) one to five years for his conviction of conspiracy (W. Va. Code § 61-10-31).[1] Upon our review, we determine that oral argument is unnecessary and that a memorandum decision is appropriate. See W. Va. R. App. Proc. 21.

Background

In 2019, a school counselor in Raleigh County contacted the school resource officer (a local sheriff's deputy) after a student reported that she had been sexually assaulted by Mr. Wiley (the student's mother's boyfriend).[2] The student told the counselor, specifically, that Mr. Wiley licked her vagina, and she later reiterated this report to the school resource officer. The student also reported to the counselor that when she told her mother about the assault, the mother told her that if she (the daughter) "had sex with him then we could live with him."[3] The school resource officer initiated an investigation that led to the joint indictment of Mr. Wiley and the student's

[1] Mr. Wiley is represented on appeal by Gary A. Collias. Respondent State of West Virginia appears by Attorney General Patrick Morrisey and Assistant Attorney General William E. Longwell.

[2] We will refer to the student as "the student" or "the daughter" throughout this decision.

[3] The trial testimony is replete with testimony showing that Mr. Wiley attempted to establish ongoing simultaneous sexual relationships with the mother and the daughter, who were homeless and staying in a family member's unheated home. The mother expressed concern about the winter months, and Mr. Wiley, who had a potentially terminal disease, offered to name the mother as a beneficiary in his will and bequeath his home to her in exchange for the daughter's "losing her virginity" to him.

mother in 2020.[4] Mr. Wiley was tried and convicted by a jury in 2022, then sentenced as described above.

On appeal, Mr. Wiley asserts two assignments of error. He argues, first, that the circuit court erred in denying his motion for judgment of acquittal on all counts and, second, that the circuit court erred in denying his motion to sequester the school resource officer, who remained at counsel table through the trial.

Sufficiency of the Evidence

In his first assignment of error, Mr. Wiley argues that the evidence presented at trial was insufficient to support the jury's verdict of guilty on each charge levied against him in the indictment and the circuit court, therefore, should have granted his motion for judgment of acquittal on all counts. "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)." *State v. Juntilla*, 227 W. Va. 492, 497, 711 S.E.2d 562, 567 (2011). In further explanation, we have 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." Syl. Pt. 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Id. at 494, 711 S.E.2d at 564, Syl. Pt. 1.

Mr. Wiley's first assignment of error is three-fold. He argues that he was entitled to a judgment of acquittal on the charge of conspiracy because there was no evidence of an agreement made between him and the mother; that he was entitled to a judgment of acquittal on the charge of second-degree sexual assault because there was insufficient evidence of the necessary element of "penetration"; and that he was entitled to a judgment of acquittal on the charge of sexual assault by a parent, guardian, custodian, or person in a position of trust because there was insufficient evidence to establish his position as a custodian or trusted person. We find that sufficient evidence was presented to the jury to support a conviction for each of the charged crimes.[5]

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[4] The mother pled guilty to one count of conspiracy, and her conviction is not at issue in this appeal.

[5] We note that Mr. Wiley presented no evidence in the defensive stage of the trial. His arguments in support of this assignment of error depend to a great extent on his assertions that the mother's testimony and the daughter's report of assault are unreliable. We find no inherent unreliability in the evidence and we are, therefore, not persuaded to invade the jury's province.

1.

Mr. Wiley was convicted of criminal conspiracy under West Virginia Code § 61-10-31. In order for the State to obtain a conviction under this section, "'"it must show that the defendant agreed with others to commit an offense against the State and that some overt act was taken by a member of the conspiracy to effect the object of that conspiracy." Syl. Pt. 4, *State v. Less*, 170 W.Va. 259, 294 S.E.2d 62 (1981).' Syl. Pt. 3, *State v. Burd*, 187 W.Va. 415, 419 S.E.2d 676 (1991)." Syl. Pt. 5, in part, *State v. Minigh*, 224 W.Va. 112, 680 S.E.2d 127 (2009). The State effectively met its burden of proof when it presented the mother as a witness at trial and allowed her to explain what happened after Mr. Wiley informed her that he "wanted [the mother] to ask her [daughter] if she would have sex" when the daughter was thirteen years old:

> A: I went into the bedroom. She was laying down. I laid down beside her and I just said, do you want to have sex and lose your virginity to Barry?
>
> Q: What on earth did she say?
>
> A: She said no.
>
> Q: Well, someone in the house had some sense. So did you indicate to her why it would be a good idea for her to have sex with him?
>
> A: No. I just asked her and she said no and I left the room.
>
> Q: Then what happened?
>
> A: I told him she said no, and he said something and I told him he could talk to her.

Mr. Wiley disputes that he and the mother had a "meeting of the minds" when these events transpired. It is apparent, however, that the two minds were indeed united. Mr. Wiley told the mother that he wished to have sexual relations with the minor daughter—an undeniably illegal act—and that he wished for the mother to facilitate his desire. The mother immediately acted on petitioner's wish. The two, thus, agreed to initiate criminal activity in an egregious display of an explicit, spoken agreement. We have explained that an "agreement may be inferred from the words and actions of the conspirators, or other circumstantial evidence, and the State is not required to

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See Syl. Pt. 4, *State v. Ayers*, 179 W. Va. 365, 369 S.E.2d 22 (1988) ("'A conviction . . . may be had on the uncorroborated testimony of the female, and unless her testimony is inherently incredible her credibility is a question for the jury.' Syl. pt. 4, *State v. Green*, 163 W.Va. 681, 260 S.E.2d 257 (1979).")

show the formalities of an agreement." *Less*, 170 W. Va. at 265, 294 S.E.2d at 67 (citations omitted). Mr. Wiley's conduct clearly exceeded the minimum standard to evince an agreement.

2.

Mr. Wiley was also convicted under West Virginia Code § 61-8B-4, which provides in relevant part:

> (a) A person is guilty of sexual assault in the second degree when:
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> (1) Such person engages in sexual intercourse or sexual intrusion with another person without the person's consent, and the lack of consent results from forcible compulsion; or
>
> (2) Such person engages in sexual intercourse or sexual intrusion with another person who is physically helpless.

Mr. Wiley argues that the State failed to prove "penetration," or sexual intercourse or intrusion, to support a conviction under this section.

The mother continued her description of events in her trial testimony, explaining that after she gave Mr. Wiley permission to "talk" to the daughter, he went into the bedroom and remained there for approximately ten to fifteen minutes, after which the daughter left the room "screaming . . . you licked me twice." The daughter clarified during a forensic interview (that was played for the jury) conducted by the Children's Advocacy Center ("CAC") that Mr. Wiley had licked her "no-no square," a descriptor she used to indicate her vagina, according to the recorded interview. When the daughter testified at trial, however, she testified that Mr. Wiley licked her "butt." The daughter was given the opportunity to explain the discrepancy between her initial report and her testimony, and she explained, "It has been three years and I'm not 100 percent clear. I don't remember it as well as I did."

Mr. Wiley argues that the only evidence that he licked the daughter's vagina was presented through the daughter's earlier "hearsay" statements that were trumped by her own trial testimony that Mr. Wiley licked her "butt," which is not a sexual organ. Though Mr. Wiley characterizes the daughter's earlier statements to the counselor, the school resource officer, and the CAC interviewer as "hearsay" in conclusory fashion, he does not argue that he objected to the admission of those statements. Furthermore, we find no indication that he challenged those statements, or that they did, in fact, constitute inadmissible hearsay.[6] Regardless, the daughter was subjected to cross-examination and the testimony was properly weighed by the jury. We find no error.

[6] Hearsay, of course, is a statement "a party offers in evidence to prove the truth of the matter asserted in the statement." W. Va. R. Evid. 801. The school counselor testified (without objection) that the student, when asked why her friends had encouraged her to approach the counselor, told her that petitioner "licked me below . . . he licked my vagina." The school resource officer did not testify about the specific contact reported by the student but instead explained that after he spoke with the student, he had concerns about her well-being that led him to interview

3.

Finally, Mr. Wiley was convicted of sexual assault by a parent, guardian, custodian, or person in a position of trust in violation of West Virginia Code § 61-8D-5(a). To convict, the State had to prove that a qualifying act of sexual abuse was performed by a specified class of individual.[7] Mr. Wiley denies that he is a member of one of the statutorily specified classes; those are "parent[s], guardian[s] or custodian[s] of or other person[s] in a position of trust in relation to a child under his or her care, custody or control." Mr. Wiley argues that he does not meet this definition because the daughter was not "under his care, custody, or control" at the time of the assault.

Crucially, "[t]he question of whether a person charged with a crime under West Virginia Code § 61-8D-5 (2010) is a custodian or person in a position of trust in relation to a child is a question of fact for the jury to determine." Syl. Pt. 4, *State ex rel. Harris v. Hatcher*, 236 W. Va. 599, 760 S.E.2d 847 (2014). Mr. Wiley does not assert that the jury was not properly instructed on this crime. Moreover, ample evidence was placed before the jury that the mother, a conspirator, imbued trust of Mr. Wiley to her daughter at his urging. We find no error.

Witness Sequestration

In his second assignment of error, Mr. Wiley argues that the court erred because it allowed the school resource officer to remain at counsel table after Mr. Wiley moved for his sequestration or, alternatively, that the circuit court should have required the State to call the school resource officer as its first witness.

> "The question as to which witnesses may be exempt from a sequestration of witnesses ordered by the court lies within the discretion of the trial court, and unless the trial court acts arbitrarily to the prejudice of the rights of the defendant the exercise of such discretion will not be disturbed on appeal." Syllabus point 4, *State v. Wilson*, 157 W. Va. 1036, 207 S.E.2d 174 (1974).

Syl. Pt. 10, *State v. Boyd*, 238 W. Va. 420, 796 S.E.2d 207 (2017). However,

> "'[i]t is within the judicial discretion of the trial court to permit a witness for the state, who is familiar with the facts on which the prosecuting attorney relies to establish the guilt of the accused, to be present in court during the trial to aid him in conducting the examination of other witnesses.' Point 5, syllabus, *State v. Hoke*,

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petitioner. The CAC interviewer explained that she interviewed the daughter, and the recorded interview was then played for the jury and admitted into evidence without objection. This Court has previously allowed a videotaped interview of a child to be admitted under the residual exception to the hearsay rule. *See In re J.S.*, 233 W. Va. 394, 407, 758 S.E.2d 747, 760 (2014).

[7] The qualifying acts of abuse are defined as "engag[ing] in or attempt[ing] to engage in sexual exploitation of, or in sexual intercourse, sexual intrusion or sexual contact."

> 76 W. Va. 36 [84 S.E. 1054 (1915)].” Syllabus Point 5, *State v. Wilson*, 157 W. Va. 1036, 207 S.E.2d 174 (1974).

Syl. Pt. 2, *State v. Banjoman*, 178 W. Va. 311, 359 S.E.2d 331 (1987).

The school resource officer who conducted the investigation was the witness in the best position to assist the assistant prosecuting attorney. Though Mr. Wiley requested the officer's sequestration at the beginning of the trial and, when his motion was denied, suggested that the officer should be made to testify before other witnesses, Mr. Wiley ultimately conceded that the State's representative witness is not required to present as the first witness in every circumstance. Though the representative witness might "ordinarily be called first" this custom may be set aside if "the judge's considered opinion" leads to the conclusion that it is not necessary to order the sequence of the State's witnesses. *Banjoman*, 178 W. Va. at 317, 359 S.E.2d at 337.[8] There is no evidence that the court erred in allowing the State to depart from custom, and we find that the court did not abuse its discretion.

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 C. Haley Bunn

DISSENTING:

Justice William R. Wooton

Wooton, Justice, dissenting:

I dissent to the majority's resolution of this case. I would have set this case for oral argument to thoroughly address the error alleged in this appeal. Having reviewed the parties' briefs and the issues raised therein, I believe a formal opinion of this Court was warranted, not a

[8] The circuit court asked Mr. Wiley's counsel whether it was his understanding that the investigating officer, if not sequestered, should testify first. Counsel responded that "[t]he rules don't require it but case law states that it's customary. . . ."

memorandum decision. Accordingly, I respectfully dissent.