FILED
August 27, 2024
C. CASEY FORBES, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

v.) No. 23-33 (Clay County CC-08-2022-F-11)

Robert M.,
Defendant Below, Petitioner

MEMORANDUM DECISION

Petitioner Robert M. appeals the Circuit Court of Clay County's January 4, 2023, sentencing order following his convictions for three counts of sexual abuse by a parent, guardian, custodian, or person in a position of trust to a child; three counts of first-degree sexual assault; three counts of incest; and one count of first-degree sexual abuse.[1] The petitioner raises a double jeopardy claim and asserts that the evidence was insufficient to support his convictions. Upon our review, finding no substantial question of law and no prejudicial error, we determine that oral argument is unnecessary and that a memorandum decision affirming the circuit court's order is appropriate. *See* W. Va. R. App. P. 21(c).

The Clay County Grand Jury returned a ten-count indictment against the petitioner in March 2022. Counts I through III charged, respectively, sexual abuse by a parent, guardian, custodian, or person in a position of trust to a child; first-degree sexual assault; and incest between July 12, 2017, and July 12, 2018. Counts IV through VI charged, respectively, the same three crimes, allegedly committed between July 13, 2018, and July 12, 2019. Counts VII through IX likewise charged, respectively, the same three crimes, allegedly committed between July 13, 2019, and July 12, 2020. Lastly, Count X charged first-degree sexual abuse between July 2019 and August 2019.

The petitioner's jury trial on these charges began on July 26, 2022. The petitioner's victim, who was eleven years old at the time of trial, testified that she and the petitioner, her grandfather, would frequently go alone to the victim's great grandmother's house to feed her great grandmother's cat. There, the petitioner would "rape" her. Explaining what she meant by "rape," the victim testified that the petitioner "would put his thing into mine." She stated further that he touched her breasts, placed his mouth on her breasts and lips, touched her buttocks with "[h]is pee-

[1] The petitioner appears by counsel Daniel K. Armstrong. The State appears by Attorney General Patrick Morrisey and Deputy Attorney General Andrea Nease Proper. We note that initials are used where necessary to protect the identities of those involved in this case. *See* W. Va. R. App. P. 40(e).

pee and . . . hands," and "put his pee-pee in [her] butt." She recalled seeing something "white" come out of the petitioner's penis on some occasions. The victim testified that the sexual offenses she described began when she was six years old and occurred more than once at that age. She said that the offenses continued while she was seven years old, occurring more than once. But after turning eight, the victim recalled the conduct occurring only once. The victim eventually disclosed the assaults/abuse to her mother, and the victim's mother contacted law enforcement.

The victim's mother corroborated the victim's account of being alone with the petitioner on multiple occasions, beginning when the victim turned six, on July 12, 2017. Although the victim's mother did not think anything of it at the time because she trusted the petitioner (her father-in-law), she recalled the petitioner coming upstairs from his basement "extremely out of breath." The victim followed the petitioner, displaying a "face of . . . fear," and then retreated to a back bedroom. The victim's mother also recalled seeing a "dark residue" in the victim's underwear, which she suspected could be blood. Ultimately, though, the victim's mother was not alarmed because, she rationalized, "kids [are] messy."

The victim's sister, who was sixteen at the time of trial, testified that she once observed the victim sitting on a bed at the petitioner's house after the petitioner had walked out of the bedroom. The victim's sister walked into the bedroom, and the victim said, "I think I'm ready." The victim's sister asked the victim what she was ready for, and the victim reportedly responded, "To see Pawpaw's pee-pee." The victim's sister thought at the time that the victim was merely being "ridiculous."

Dr. Sharon Istfan, a pediatrician who specializes in child abuse and neglect, testified that she examined the victim and observed a "couple of . . . clefts" to her hymen, which "is a marker of some type of penetration that had torn the tissue [and] had healed back." Maureen Runyon, who interviewed the victim and was recognized as an expert in forensic interviewing, testified that the victim disclosed the petitioner's sexual offenses to her and provided details that were beyond the knowledge of a child, including positions and physical characteristics of the petitioner's penis.[2]

The petitioner and his wife testified on the petitioner's behalf. They described various medical conditions that purportedly prevented the petitioner from obtaining or maintaining an erection, but they both were unable to offer any reason why the victim would lie about the petitioner's crimes.[3]

After deliberating, the jury found the petitioner guilty of each count charged in the indictment. The circuit court sentenced the petitioner to the statutorily prescribed terms of incarceration, and this appeal followed.[4]

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[2] The investigating officer and the victim's father also testified for the State.

[3] The petitioner's son and grandson also testified on his behalf.

[4] The court sentenced the petitioner to not less than ten nor more than twenty years of incarceration for each sexual abuse by a parent, guardian, custodian, or person in a position of trust to a child conviction; not less than twenty-five nor more than one hundred years for each first-

In the petitioner's first assignment of error, he argues that the first-degree sexual assaults charged in Counts II, V, and VIII were lesser included offenses of the corresponding sexual abuse by a parent, guardian, custodian, or person in a position of trust charges contained within Counts I, IV, and VII. He also argues that Count X, charging first-degree sexual abuse, was a lesser included offense of the sexual abuse by a parent, guardian, custodian, or person in a position of trust charge contained in Count VII. As a result, he claims, his convictions and sentences on all counts violated the prohibition against the imposition of multiple punishments for the same offense.

Indeed, the double jeopardy clause contained within the West Virginia Constitution prohibits, among other things, "multiple punishments for the same offense." Syl. Pt. 2, in part, *State v. Gill*, 187 W. Va. 136, 416 S.E.2d 253 (1992) (quoting Syl. Pt. 1, *Conner v. Griffith*, 160 W. Va. 680, 238 S.E.2d 529 (1977)). But whether sentences for either first-degree sexual assault or first-degree sexual abuse and sexual abuse by a parent, guardian, custodian, or person in a position of trust arising from the same acts are, in fact, "multiple" is a question that this Court has previously considered and resolved against the stance taken by the petitioner. In *Gill*, we began by holding that "[a] claim that double jeopardy has been violated based on multiple punishments imposed after a single trial is resolved by determining the legislative intent as to punishment." 187 W. Va. at 138, 416 S.E.2d at 255, Syl. Pt. 7. Then, we observed that West Virginia Code § 61-8D-5(a), which criminalizes sexual abuse by a parent, guardian, custodian, or person in a position of trust to a child, specifies that "[i]n addition to any other offenses set forth in this code, the Legislature hereby declares a separate and distinct offense under this subsection." *Gill*, 187 W. Va. at 138, 416 S.E.2d at 255, Syl. Pt. 9, in part. As such, we held that the Legislature "has clearly and unequivocally declared its intention that sexual abuse involving parents, custodians, or guardians . . . is a separate and distinct crime from general sexual offenses, W.Va.Code, 61-8B-1, *et seq.*, for purposes of punishment." *Gill*, 187 W. Va. at 138, 416 S.E.2d at 255, Syl. Pt. 9, in part. Accordingly, the petitioner's convictions and sentences for the general sexual offenses of first-degree sexual assault (found in West Virginia Code § 61-8B-3) and first-degree sexual abuse (found in West Virginia Code § 61-8B-7) along with the correlative sexual abuse by a parent, guardian, custodian, or person in a position of trust convictions and sentences pose no double jeopardy issue, and this assignment of error lacks merit.

In the petitioner's second and final assignment of error, he argues that there was insufficient evidence to support his convictions. He asserts that "only testimony was offered, not a single exhibit was offered into evidence by the State," and he contends that the failure to admit Dr.

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degree sexual assault conviction; not less than five nor more than fifteen years for each incest conviction; and not less than five nor more than twenty-five years for his first-degree sexual abuse conviction. *See* W. Va. Code §§ 61-8D-5, 61-8B-3, 61-8-12, & 61-8B-7. The court ordered that the sentences imposed for Counts I through III be served concurrently, that the sentences for Counts IV through VI be served concurrently, and that the sentences for Counts VII through IX be served concurrently, but it ordered that the sentences imposed for those grouped counts be served consecutively to the other grouped counts. The court also ordered that the sentence for Count X be served concurrently with all other sentences, and it ordered that the petitioner serve ten years of extended supervision following his release from incarceration. *See id.* § 62-12-26.

Istfan's medical report and a video of the victim's interview with Ms. Runyon violated Rule 1002 of the West Virginia Rules of Evidence (the "best evidence" rule).[5] He also states that the investigating officer "had no direct knowledge as to the location of the crimes," that the victim's mother "had no direct knowledge of any assault," and that Dr. Istfan's findings were not "conclusive evidence that a child has been sexually assaulted." The petitioner argues that the testimony "does not conclusively establish a timeframe for these incidents, nor does it provide any supporting evidence for [the victim's] testimony." Finally, the petitioner also claims that it remains undisputed that he was unable to sustain an erection.

When reviewing the sufficiency of the evidence to support a conviction, "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, in part, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995). The petitioner, however, has not identified a single evidentiary deficiency in the State's proof on the elements it bore the burden of proving.[6] Instead, his arguments reveal only his dissatisfaction with the weight and credibility of the evidence. But this Court may not weigh the evidence or make determinations on credibility as those are functions left exclusively to the jury. *Id.* at 669 n.9, 461 S.E.2d at 175 n.9 (citation omitted) ("An appellate court may not decide the credibility of witnesses or weigh evidence as that is the exclusive function and task of the trier of fact."). Although the failure to identify any element that was not proved by the State is fatal to the petitioner's claim, we nevertheless observe that the victim testified to the petitioner's—her grandfather's—sexual contact of and sexual intercourse with her on multiple occasions, occurring when she was six, seven, and eight years old and under his general supervision. While her testimony alone could support his convictions, there was also corroborative evidence from the victim's mother and sister, Dr. Istfan, and Ms. Runyon.[7] *See* Syl. Pt. 5, *State v. Beck*, 167 W. Va. 830, 286 S.E.2d 234 (1981)

[5] Rule 1002 provides that "[a]n original writing, recording, or photograph is required in order to prove its content unless these rules or a state statute provides otherwise."

[6] To the extent that the petitioner's assertion that the State failed to "conclusively establish a timeframe" suggests a lack of evidence of either the victim's age or his own sufficient to establish first-degree sexual assault or first-degree sexual abuse under the circumstances presented here, we note that the victim testified to how old she was when the petitioner sexually assaulted and abused her, and the petitioner was unquestionably older than fourteen at the time he offended, having been married for fifty-five years at the time of trial. *See* W. Va. Code § 61-8B-3(a)(2) (specifying that one is guilty of first-degree sexual assault when he/she is at least fourteen years old and "engages in sexual intercourse or sexual intrusion" with another who is younger than twelve); *id.* § 61-8B-7(a)(3) (specifying that one is guilty of first-degree sexual abuse when he/she is at least fourteen and "subjects another person to sexual contact" who is younger than twelve). Otherwise, "time is not an element of sexually based offenses, and therefore need not be . . . proved at trial." *Frank A. v. Ames*, 246 W. Va. 145, 170, 866 S.E.2d 210, 235 (2021) (citation omitted).

[7] We need not discuss the merits (or lack thereof) of the petitioner's "best evidence" argument concerning Dr. Istfan's report or the recording of the victim's interview (or whether, in any event, the admission of those items would have presented other evidentiary issues) because, first, the petitioner does not tie his argument to any evidentiary deficiency; and second, the

("A conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible, the credibility is a question for the jury."). It cannot be said that the record contains no evidence from which the petitioner's guilt beyond a reasonable doubt could be found, so, like his first, this assignment of error lacks merit. *See Guthrie*, 194 W. Va. at 663, 461 S.E.2d at 169, Syl. Pt. 3, in part ("[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.").

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: August 27, 2024

CONCURRED IN BY:

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

petitioner did not raise Rule 1002 below. *See State v. Todd C.*, --- W. Va. ---, --- S.E.2d ---, 2023 WL 7179191, *8-*9 (2023) (declining to consider the petitioner's Rule 1002 claim because he did not raise it below). In fact, at least with respect to the video of the victim's interview, the petitioner signaled his intent to object to its admission, remarking, "I think we've got foundational issues."