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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. 23-294 (Jefferson County CC-19-2022-F-31)

Marques Robinson,
Defendant Below, Petitioner

MEMORANDUM DECISION

Petitioner Marques Robinson appeals his convictions and sentences for burglary; attempted strangulation, suffocation, or asphyxiation; assault; battery; and unlawful restraint as reflected in the Circuit Court of Jefferson County's January 24, 2023, sentencing order.[1] The petitioner asserts that the circuit court erred in denying his motion for a judgment of acquittal when his convictions were not supported by the evidence and in ordering his sentences to run consecutively, which he claims was disproportionate and unconstitutional. 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 Jefferson County Grand Jury returned a seven-count indictment against the petitioner in January 2022, charging him with burglary; attempted second-degree sexual assault; first-degree sexual abuse; attempted strangulation, suffocation, or asphyxiation; assault; battery; and unlawful restraint. The petitioner's jury trial began in October 2022. The victim, J.B., testified that she and the petitioner went to high school together but lost touch until the summer of 2021, when they reconnected through social media. J.B. learned that the petitioner was experiencing some difficulties and offered to let him stay in her spare bedroom for two weeks to help him get back on his feet. According to J.B., the petitioner arrived in the early morning hours of October 11, 2021.[2] J.B. stated that nearly immediately, the petitioner made sexual advances and touched J.B.'s breasts and thighs, which she resisted. Later that same day, J.B. gave the petitioner her laptop to use and let him take her debit card to buy himself a new cellphone, expecting that he would return within

[1] The petitioner appears by counsel B. Craig Manford, and respondent appears by Attorney General John B. McCuskey and Deputy Attorney General Andrea Nease Proper. Because a new Attorney General took office while this appeal was pending, his name has been substituted as counsel. We use initials where necessary to protect the identity of the victim in this case. *See* W. Va. R. App. P. 40(e).

[2] There are some discrepancies within the record as to when the petitioner first arrived at the home, but it was sometime within October 9-11, 2021.

a few hours. However, the petitioner did not return as expected, and J.B. grew increasingly frustrated and concerned that the petitioner had not returned with her debit card. Eventually, J.B. texted the petitioner and told him that the living situation was not working out and not to return to the home.

J.B. testified that sometime in the early morning hours of October 12, 2021, the petitioner returned to the home, and J.B. told him to leave. J.B. stated that the petitioner did not comply and, instead, laughed at her and made sexual advances towards her. After the petitioner refused to leave, J.B. called 9-1-1 around 4:30 a.m. because she "needed help getting him out." Police arrived at J.B.'s home and told the petitioner to leave the residence. Afterwards, J.B. and the petitioner exchanged texts, and she repeatedly told the petitioner she would not allow him back in the home, stating that she did not feel safe.

J.B. testified that several hours later, the petitioner entered J.B.'s home through the back door. J.B. admitted that she did not immediately call 9-1-1 because she was shocked, and she realized that the petitioner was abusing drugs. J.B. stated that she locked herself in a bedroom and, after she had not heard anything in quite some time, went into the living area where she found the petitioner lying on her living room floor with "some stuff coming out of his mouth." Believing the petitioner had overdosed, J.B. again called 9-1-1. The petitioner was removed from the home and taken to a hospital by ambulance.

After the petitioner was taken to the hospital, J.B. and a friend went for a walk. J.B. testified that upon arriving back at her home, she found the petitioner in her living room. J.B. told the petitioner to leave her home, and a scuffle ensued in which J.B. kicked the petitioner and used pepper spray on him. J.B. then called 9-1-1 for the third time, and police arrived and escorted the petitioner from the home. J.B. stated that she collected all of the petitioner's belongings, placed them in a trash bag, set them outside the home, and texted the petitioner with instructions to collect his property. J.B. claimed that the petitioner responded that he still had possession of J.B.'s laptop, and the two texted back and forth for several hours regarding how the petitioner would return the laptop. The text messages, which were submitted into evidence, indicated that J.B. repeatedly told the petitioner to return the laptop by either giving it to her neighbor or placing it in her mailbox, and the petitioner refused, stating that he wanted access to the home to collect some sunglasses. J.B. refused to allow the petitioner entry to the home and offered to mail him his sunglasses.

J.B. testified that she spent the evening of October 13, 2021, at her boyfriend's home and returned to her own home around noon on October 14, 2021. J.B. observed the petitioner standing under a tree in her yard and told him to leave. J.B. thought the petitioner turned to leave but as she was unlocking her front door, the petitioner "pushed [her] from behind really hard" and "entered the apartment with" her. J.B. stated that she fell to her stomach and a struggle ensued. The petitioner repeatedly told J.B. that she needed to "submit" and tried to take her clothes off. J.B. testified that she was able to get to her couch but that the petitioner held her down such that her "head was kind of into the couch." J.B. testified that the petitioner eventually put his hand over her mouth because she was screaming for help and put his hand down her pants and touched her vagina. J.B. stated that she "couldn't get much air" and believed that the petitioner was going to rape and kill her, and she discreetly began recording the incident on her cellphone, noting that she "wanted people to know what happened." The recording was admitted into evidence and published

to the jury. J.B. testified that the encounter ended once police arrived at her home and knocked. The petitioner told the officer that everything was fine, but J.B. was able to make enough noise, despite the petitioner's hand over her mouth, that an officer entered the home, observed what was happening, and arrested the petitioner. J.B. stated that she sustained a couple of broken toes and some scratches from the incident. On cross-examination, J.B. admitted to deleting some text messages between the petitioner and herself that were not "favorable" to her position.

The State presented several other witnesses to corroborate J.B.'s account of the events that occurred. Jeff Polczynski, the Director of Communications and Custodian of Records, testified to the relevant 9-1-1 calls that had been placed and authenticated the call detail reports, which were entered into evidence. Corporal Robin J. Mahoney testified that she responded to a 9-1-1 call placed by J.B. around 4:20 a.m. on October 12, 2021. Cpl. Mahoney testified that J.B. wanted the petitioner to leave her home, and that both she and another officer instructed the petitioner to leave. Cpl. Mahoney stated that the petitioner seemed impaired, with "pinpoint pupils and a slurred speech," and that the petitioner kept saying that he would come back to J.B.'s residence. Deputy Christian Hockman testified that he responded to a 9-1-1 call placed by J.B. at around 7:30 a.m. on October 12, 2021. Deputy Hockman stated that when he arrived, Emergency Medical Services workers were treating the petitioner for a suspected overdose and that the petitioner was transported by ambulance to a hospital. However, Deputy Hockman testified that he had to respond to the home again that same day following a 9-1-1 call placed by J.B. around 12:47 p.m. Deputy Hockman stated that J.B. had used pepper spray on the petitioner, and that he and other officers instructed the petitioner to leave the premises and helped the petitioner pack some belongings in his car.

Edward Glass, J.B.'s upstairs neighbor, testified that on October 14, 2021, he met the petitioner while taking out his trash and that they spoke for a few minutes. Afterwards, Mr. Glass went back inside his home. About ten to fifteen minutes later, Mr. Glass heard J.B. screaming for help from inside her apartment, and Mr. Glass called 9-1-1. Corporal Glen W. Kilmer and Deputy Darrell Cox testified to responding to Mr. Glass' 9-1-1 call and arresting the petitioner. According to Deputy Cox, upon arriving at J.B.'s residence, he noticed that the door was left open. He approached, knocked on the door, and identified himself. Deputy Cox testified that he heard a male say something like "we're okay" followed by a muffled sound. Deputy Cox knocked again, and the male stated something like "we're fine." However, Deputy Cox then heard a female voice asking for help. Deputy Cox stated that he entered the home and found the petitioner standing over J.B. with his left hand covering her mouth and pushing her back into the couch. Deputy Cox testified that he placed the petitioner into custody. Deputy Cox's body camera footage was admitted into evidence, as were still shots taken from the footage.

Following the State's case-in-chief, the petitioner moved for a judgment of acquittal, which the court denied. The petitioner testified on his own behalf. Generally, the petitioner characterized J.B.'s behavior as vacillating between calm and angry, and he stated that she would repeatedly tell him to leave but then allow him back into the home. Regarding the events of October 14, 2021, the petitioner stated that he returned to J.B.'s home to drop off her laptop and retrieve some of his own belongings. The petitioner stated that he was speaking with Mr. Glass at the back of the property when he heard J.B. pull into the driveway. The petitioner testified that he rounded the building and that J.B. saw him, waved, and let him enter the home. The petitioner began gathering

his belongings and carrying them to his car when, suddenly, J.B. started screaming and, unbeknownst to him, recording him on her phone. The petitioner claimed that he panicked because the police had already been there several times and told him to leave, so he placed his hand over J.B.'s mouth and asked her to stop. The petitioner admitted that he may have used the word "submit," but not in a sexual way, stating that it was verbiage he had learned from Narcotics Anonymous meetings he had previously attended. The petitioner denied holding J.B. down, covering her mouth such that she could not breathe, and touching her vagina.

After deliberations, the jury found the petitioner guilty of burglary; attempted strangulation, suffocation, or asphyxiation; assault; battery; and unlawful restraint. The jury found the petitioner not guilty of first-degree sexual abuse and attempted second-degree sexual assault. The petitioner again moved the court for a judgment of acquittal, which was denied. At a sentencing hearing held on January 6, 2023, the court denied the petitioner's request for alternative sentencing and sentenced him to not less than one nor more than fifteen years of imprisonment for his burglary conviction and not less than one nor more than three years of imprisonment for his attempted strangulation, suffocation, or asphyxiation conviction, to be served consecutively. The court also sentenced him to six months in jail for his assault conviction, twelve months in jail for his battery conviction, and one year in jail for his unlawful restraint conviction, to be served concurrently with each other but consecutively to his other sentences. The petitioner now appeals.

In the petitioner's first assignment of error, he argues that the circuit court erred by denying his motions for a judgment of acquittal. According to the petitioner, the State failed to present sufficient evidence of the elements of each of the crimes of which he was convicted, and no rational jury could have found the petitioner guilty beyond a reasonable doubt.[3] Challenging the sufficiency of the evidence to support a conviction is a heavy burden. Syl. Pt. 9, in part, *State v. Stone*, 229 W. Va. 271, 728 S.E.2d 155 (2012) (quoting Syl. Pt. 3, in part, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995)). This Court reviews "all the evidence . . . in the light most favorable to the prosecution" and credits "all inferences and credibility assessments that the jury might have drawn in favor of the prosecution." *Stone*, 229 W. Va. at 274, 728 S.E.2d at 158, Syl. Pt. 9, in part. We will only set aside a verdict "when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt." *Id.* In sum, "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. Juntilla*, 227 W. Va. 492, 711 S.E.2d 562 (2011).

Upon our review, we conclude that the petitioner has not met his burden of establishing that the evidence was insufficient to support his convictions. First, the petitioner contests that the jury could have found him guilty of burglary, taking issue with J.B.'s credibility and the circumstantial quality of some of the evidence. We find the petitioner's claims to be without merit. West Virginia Code § 61-3-11(a) (2018) provides, in part, that "[a]ny person who breaks and enters, or enters without breaking, a dwelling house or outbuilding adjoining a dwelling with the intent to commit a violation of the criminal laws of this state is guilty" of burglary. Here, the jury heard testimony from J.B. that the petitioner pushed her from behind so that he could enter inside

[3] The petitioner concedes that the State presented sufficient evidence upon which a jury could conclude that a battery occurred. Accordingly, we do not address this issue.

and immediately forced her to the floor. She also testified that the petitioner pushed her into the couch and placed his hand over her mouth, which impacted her ability to breathe. Further, Deputy Cox testified that when he entered the home, he observed the petitioner standing over J.B., covering her mouth with his hand and pushing her into the couch. The jury was also shown Deputy Cox's body camera footage, as well as a video of the incident taken by J.B. on her cellphone. Accordingly, a reasonable jury could have found that the petitioner forced his way into the home with the intent to batter J.B. While the petitioner attacks J.B.'s credibility and certain circumstantial evidence, we note that "there is no qualitative difference between direct and circumstantial evidence," *Guthrie*, 194 W. Va. at 669, 461 S.E.2d at 175, and it is within the exclusive province of the trier of fact to "decide the credibility of witnesses [and] weigh evidence[.]" *Id.* at 669 n.9, 461 S.E.2d at 175 n.9 (citation omitted). Therefore, we conclude that the State presented sufficient evidence upon which the jury could find that the petitioner committed burglary.

Regarding attempted suffocation, the petitioner argues that the State failed to prove that the petitioner's act of placing his hand over J.B.'s mouth restricted her normal breathing, as evidenced by the fact that Deputy Cox was able to hear her muffled voice before he entered the home. Pursuant to West Virginia Code § 61-2-9d(b), "[a]ny person who strangles, suffocates or asphyxiates another without that person's consent and thereby causes the other person bodily injury or loss of consciousness is guilty of a felony[.]" The term "'suffocate' means knowingly and willfully restricting the normal breathing or circulation of blood by blocking the nose or mouth of another[.]" *Id.* § 61-2-9d(a). Further, the term "'bodily injury' means substantial physical pain, illness or any impairment of physical condition[.]" *Id.* Here, the evidence demonstrated that the petitioner placed his hand around J.B.'s mouth and restricted her normal breathing. The petitioner himself admitted to placing his hand over J.B.'s mouth, and J.B. testified that she had a hard time breathing due to the petitioner's hand covering her mouth and sustained some broken toes and scratches from the encounter. While the petitioner attempts to invalidate J.B.'s testimony, credibility determinations will not be disturbed by this Court. *See Guthrie*, 194 W. Va. at 663, 461 S.E.2d at 169, Syl. Pt. 3, in part (holding that "[c]redibility determinations are for a jury and not an appellate court."). Accordingly, we reject the petitioner's claim that the State failed to present any evidence upon which the jury could find that he knowingly and willfully attempted to restrict J.B.'s normal air flow by blocking her mouth. Based on the forgoing, we conclude that the State presented sufficient evidence for the court to find the petitioner guilty of attempted suffocation.

Next, the petitioner concedes that sufficient evidence was presented to prove he committed a battery, but claims that there was no evidence that he placed the victim in fear of receiving a bodily injury to support a conviction of assault. The petitioner contends that the body camera footage depicting him standing over J.B. and telling her to submit would not have given "a reasonable person the impression that a battery or other physical contact was imminent." We disagree. West Virginia Code § 61-2-9(b) provides that a person is guilty of committing assault when he or she "unlawfully attempts to commit a violent injury to the person of another or unlawfully commits an act that places another in reasonable apprehension of immediately receiving a violent injury[.]" Here, J.B. testified that the petitioner pushed her into the home and forced her to the ground and then into the couch, leading her to believe that he was attempting to rape her. She also testified that she was afraid that the petitioner was going to kill her, which prompted her to initiate a recording on her cellphone so that "people [would] know what

happened." Accordingly, it cannot be said that the State failed to present sufficient evidence upon which a jury could find that the petitioner placed J.B. in reasonable apprehension of immediately receiving a violent injury.

Lastly, the petitioner contends that the State failed to present sufficient evidence to support a conviction for unlawful restraint. Although he admits that the police body camera footage is "problematic" to his position, the petitioner nevertheless argues that the footage depicts the petitioner repeatedly telling J.B. not to touch him and that he is not touching or hurting her. He further points out that he testified that J.B. could have moved from the couch at any point. West Virginia Code § 61-2-14g(a) provides, in part, that a person is guilty of committing unlawful restraint when he or she

> without legal authority intentionally restrains another with the intent that the other person not be allowed to leave the place of restraint and who does so by physical force or by overt or implied threat of violence or by actual physical restraint but without the intent to obtain any other concession or advantage[.]

Here, testimony and the camera footage showed that J.B. repeatedly asked the petitioner to let her go, and J.B. testified that it was only after Deputy Cox entered the home that the petitioner removed his hand from her mouth, stepped aside, and allowed her to leave the couch. Accordingly, a reasonable jury could have found that the petitioner's actions of standing over J.B., holding his hand to her mouth, and not moving until law enforcement arrived on the scene were sufficient to meet the elements of unlawful restraint.

In sum, it cannot be said that the record contains no evidence from which the petitioner's guilt beyond a reasonable doubt could be found, and as such, we conclude that the circuit court did not err in denying the petitioner's motions for a judgment of acquittal. *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.").

The petitioner also assigns as error the circuit court's decision to order the petitioner to serve his sentences for burglary and attempted suffocation consecutively to each other and to his other sentences, rather than concurrently. According to the petitioner, the imposition of consecutive sentences was excessive, disproportionate, and shocking to the conscience of the court and society, especially given the petitioner's lack of a violent criminal history.

Our analysis of this issue is guided by Syllabus Point 4 of *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982), which provides that "[s]entences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review." Impermissible factors include "race, sex, national origin, creed, religion, and socioeconomic status." *State v. Moles*, No. 18-0903, 2019 WL 5092415, at *2 (W. Va. Oct. 11, 2019) (memorandum decision) (citation omitted). Here, the petitioner does not contend that his sentences were outside the statutory limits, nor does he contend that the court considered an impermissible factor. As such, the petitioner's sentences are not subject to appellate review. Although the petitioner argues that his consecutive sentences are unconstitutionally

disproportionate to the crimes he committed, our constitutional proportionality standards are "basically applicable to those sentences where there is either no fixed maximum set by statute or where there is a life recidivist sentence." Syl. Pt. 4, in part, *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981). Because this case involves neither, we need not apply proportionality principles. *See State v. Allen*, 208 W. Va. 144, 156, 539 S.E.2d 87, 99 (1999). Moreover, we note that by statute, sentences for two or more offenses will run consecutively unless a circuit court, in its discretion, provides that the sentences run concurrently. W. Va. Code § 61-11-21. Accordingly, we find that the petitioner is entitled no relief in this regard.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: July 30, 2025

CONCURRED IN BY:

Chief Justice William R. Wooton
Justice Tim Armstead
Justice C. Haley Bunn
Justice Charles S. Trump IV