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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. 23-457 (Marion County CC-24-2021-F-133)

Antonio Devon Cottingham,
Defendant Below, Petitioner

MEMORANDUM DECISION

Petitioner Antonio Devon Cottingham appeals his conviction and sentence as set forth in the Circuit Court of Marion County's June 27, 2023, sentencing order, for possession of a firearm by a prohibited person, wanton endangerment, and use or presentation of a firearm during the commission of a felony.[1] The petitioner asserts that the evidence was insufficient to support his convictions and that his recidivist sentence is unconstitutionally disproportionate. 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).

In February 2021, the petitioner was arrested after he shot Rondell White and Duane Martin following a gathering at a residence on Walnut Avenue in Fairmont, West Virginia. Upon arrest, officers read the petitioner his *Miranda* rights, which he waived, and the petitioner indicated that he had a gun in his possession on the evening of the shooting and had disposed of it somewhere between the residence on Walnut Avenue and his mother's house. The Marion County Grand Jury returned a five-count indictment against the petitioner in June 2021, charging him with attempted murder of Mr. White, possession of a firearm by a prohibited person, wanton endangerment, malicious wounding of Mr. Martin, and use or presentation of a firearm during the commission of a felony. The petitioner filed pre-trial motions to suppress his statement to law enforcement regarding his possession of a gun on the evening of the shooting, but the court denied the motion and found the petitioner's statement was admissible.

The petitioner's jury trial commenced on September 7, 2022. Mr. White testified that he attended a gathering on Walnut Avenue in February 2021 with a friend, Floyd Jones. Mr. White testified that Mr. Jones had brought a gun that evening and that upon arriving at the gathering, the petitioner patted Mr. Jones down, confiscated the gun, and refused to return the gun to either Mr.

[1] The petitioner appears by counsel Christopher M. Wilson, 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.

Jones or Mr. White. Mr. White stated that he and the petitioner went out onto the porch of the home, and Mr. White attempted to coax the petitioner into returning the gun. The petitioner refused, stating "I can't give it back . . . with these bullets in it." The petitioner then suddenly shot the gun four times, striking Mr. White once in the hand and once in the back. Mr. White testified that he did not believe that the petitioner intended to kill him and opined that the petitioner was acting strange and "wasn't right in his head at the time."

Mr. Jones testified that he was inside the home on Walnut Avenue when he heard four gunshots ring out. Mr. Jones stated that he ran outside and saw Mr. White on the ground and that Mr. White told him, "[Y]our cousin shot me." However, Mr. Jones denied bringing a gun to the gathering that evening, denied seeing anyone with a gun, and denied that the petitioner was his cousin. Another attendant at the gathering, Joni Weaver, testified that she had observed the petitioner with a gun that evening almost immediately after hearing gunshots but did not see him shoot the gun. Ms. Weaver stated that the petitioner appeared stunned and fled the scene.

Andrew Zicafoose, a neighbor, testified that he observed law enforcement officers respond to a situation across the street during the evening of February 7, 2021. Mr. Zicafoose stated that he had several security cameras around his property and that he reviewed footage from that evening showing two people walking through the parking lot of a business located across the street. The surveillance footage showed a plume of smoke appearing, projectiles striking the pavement, and two persons running away from the scene.

Officer Shawn Tracy of the Fairmont Police Department testified that he responded to the scene and attempted to locate persons who had fled the area following the shooting. Officer Tracy stated that he contacted a female named Amber Bailey, who advised that she and her boyfriend, Duane Martin, had been walking through a parking lot on Walnut Avenue when gunshots were fired in their direction. Ms. Bailey told Officer Tracy that Mr. Martin fled the scene following the shots and that she believed he had been injured. Officer Tracy then located Mr. Martin, who confirmed Ms. Bailey's account and showed Officer Tracy what appeared to be a gunshot wound just above the knee on his left leg. Several officers testified about collecting evidence, such as pictures of the scene and the injuries sustained by Mr. White and Mr. Martin, Mr. Zicafoose's surveillance footage, and Mr. White's clothing, all of which was admitted into evidence and published for the jury.

Detective William Matthew Pigott of the Marion County Sheriff's Office testified regarding his investigation of the petitioner as the suspect, the petitioner's arrest, and the petitioner's statement that he had a gun on the evening of the shooting but had disposed of it on the way to his mother's house. Det. Pigott stated that an individual named Cody Sprouse found a gun along a route between the residence on Walnut Avenue and the petitioner's mother's home and turned it into the Marion County Sheriff's Department. Det. Pigott's investigation further revealed that the petitioner had a prior conviction for distribution of .34 grams of cocaine base, which disqualified him from possessing or acquiring a firearm or ammunition. The petitioner's statement was admitted into evidence and published for the jury.

Farrah Machado, an expert in forensic sciences and primer gunshot residue, testified that the petitioner's clothing tested positive for gunshot residue, but that samples from the petitioner's

hands and face were negative. Ms. Machado explained that gunshot residue is more easily removed from skin than fabric, which could explain the discrepancy. She also stated that the gunshot residue on the clothing could have been transferred by coming into contact with something with gunshot residue on it.

Following the State's case-in-chief, the petitioner advised the court that he would not be presenting any evidence. The circuit court, without prompting from either the State or the petitioner, noted that it was "going to let all five of these counts go to the jury." The court opined that there was "scant evidence" of malicious wounding and wanton endangerment, but found that the State "presented a prima facia case, albeit perhaps a minimal prima facie case[.]" The court advised the petitioner that he could present a motion for a judgment of acquittal on the record while the jury deliberated, but he did not.

Ultimately, the jury found the petitioner guilty of possession of a firearm by a prohibited person, wanton endangerment, and use or presentation of a firearm during the commission of a felony. The jury found the petitioner not guilty of attempted murder and malicious wounding. Subsequently, the State filed a recidivist information, noting that the petitioner had a prior 2007 felony conviction for distribution of .34 grams of cocaine base, a 2012 felony conviction for conspiracy to commit a felony, and a 2016 felony conviction for felon in possession of a firearm.

The petitioner's recidivist trial was held in April 2023. Officer Reed Moran testified to the petitioner's most recent convictions that led to the filing of the recidivist information. He further stated that he performed a background check of the petitioner, which led to the discovery of the petitioner's three prior felony convictions. Joseph Antolock of the West Virginia State Police Bureau of Criminal Investigation testified that in 2006 and 2007, he was involved in a controlled buy of cocaine base from the petitioner, and the petitioner pled guilty to distribution of .34 grams of cocaine base in a federal district court. Lieutenant Matthew Love of the Marion County Sheriff's Office testified that he arrested the petitioner for his participation in the delivery of cocaine in 2011 or 2012 and that the petitioner ultimately pled guilty to conspiracy to commit a felony. Officer Tyler Hall of the Fairmont Police Department testified that he initiated a traffic stop of the petitioner's vehicle in 2015, and that the petitioner attempted to flee the scene and pointed a firearm at another officer during pursuit. According to Officer Hall, the petitioner was convicted in federal district court of being a felon in possession of a firearm. Certified copies of the petitioner's convictions were admitted into evidence, and after deliberations, the jury found the petitioner was the person found guilty of these prior offenses.

Following the recidivist trial, the circuit court sentenced the petitioner to five years of imprisonment for wanton endangerment and ten years of imprisonment for use or presentment of a firearm during the commission of a felony, to be served concurrently to each other but consecutively to the recidivist life sentence the court imposed for his conviction of possession of a firearm by a prohibited person. This appeal followed.

In his first assignment of error, the petitioner argues that the evidence presented at trial was insufficient to support his convictions for possession of a firearm by a prohibited person, wanton endangerment, and presentation of a firearm during the commission of a felony. Pointing to the circuit court's statements after the close of evidence that minimal evidence had been presented in

support of some claims, the petitioner claims that no reasonable jury could have found him guilty beyond a reasonable doubt.

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) (quoting *Guthrie*, 194 W. Va. at 663, 461 S.E.2d at 169, Syl. Pt. 1, in part).

Upon our review, we conclude that the petitioner has not met his burden of establishing that the evidence was insufficient to support his convictions. Regarding possession of a firearm by a prohibited person, the petitioner claims that, although he stipulated to being a prohibited person, there was insufficient evidence that he unlawfully possessed a firearm. The petitioner contends that the testimony at trial only demonstrated that he took a gun from Mr. Jones because the petitioner did not want any weapons at the party, which he alleges "does not lend itself to what an ordinary person would consider to be 'possession' of a firearm[.]" West Virginia Code § 61-7-7(b)(2) prohibits any person "[w]ho has been convicted in this state or any other jurisdiction of a felony controlled substance offense involving a Schedule I controlled substance other than marijuana, a Schedule II or a Schedule III controlled substance" from possessing a firearm. Here, the petitioner stipulated to being a prohibited person, and he has failed to provide any legal authority to support his assertion that removing the firearm from Mr. Floyd's person did not constitute possession. On review of the evidence presented at trial, we conclude that sufficient evidence was presented to demonstrate that the petitioner exercised physical possession of a firearm when he removed the gun from Mr. Floyd's body, refused to return it, and subsequently discharged the firearm. As such, we find no merit to the petitioner's claims that the State failed to present sufficient evidence to support a conviction of possession of a firearm by a prohibited person.

Regarding his wanton endangerment conviction, the petitioner claims that the State failed to prove that the petitioner knew Ms. Bailey or Mr. Martin were within the vicinity, or that he "had any issues" with them, when he fired the gun, and he highlights the circuit court's statement that the State presented scant evidence of wanton endangerment. West Virginia Code § 61-7-12 provides that a person is guilty of wanton endangerment involving a firearm when he or she "wantonly performs any act with a firearm which creates a substantial risk of death or serious bodily injury." Viewed in the light most favorable to the State, we find sufficient evidence was presented for the jury to conclude that petitioner fired four gunshots in a residential neighborhood within proximity of other homes and businesses, which created a substantial risk of death or serious bodily injury. The jury heard evidence that petitioner forcibly removed the gun from Mr. Floyd, went outside on the porch of the home on Walnut Avenue, and discharged the gun four times. It is

of no moment that the petitioner did not know Mr. Martin or Ms. Bailey were walking nearby because the statute does not require such specific knowledge. Further, the petitioner's firing of the weapon resulted in injuries to two people, and the evidence showed that other people ran from the scene to seek shelter. Considering these circumstances, the jurors could reasonably find that the petitioner's actions with the firearm created a substantial risk of death or serious bodily injury. Thus, we conclude this argument concerning sufficiency of evidence is without merit.

Lastly, the petitioner contends that because there was insufficient evidence to support his wanton endangerment conviction, there was likewise insufficient evidence to support his conviction for use or presentation of a firearm during the commission of a felony. However, because we have already established that the State presented sufficient evidence to support a conviction for wanton endangerment, we find this argument to be without merit. West Virginia Code § 61-7-15a provides that "[a]s a separate and distinct offense, and in addition to any and all other offenses provided for in this code, any person who, while engaged in the commission of a felony, uses or presents a firearm shall be guilty of a felony[.]" As noted above, the petitioner removed a firearm from Mr. Floyd, despite being prohibited from possessing said firearm, and fired the weapon four times in close proximity to other persons, homes, and businesses, causing injury to two people.

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, so 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.").

The petitioner next argues that the circuit court's imposition as a life sentence in response to his conviction as a recidivist violates constitutional proportionality principles. According to the petitioner, his prior convictions for conspiracy to commit a felony, distribution of cocaine base, and felon in possession of a firearm did not involve actual violence, the threat of violence, or a substantial impact on any victim and, as such, his life recidivist conviction is unconstitutionally disproportionate.

We review "sentencing orders . . . under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." Syl. Pt. 1, in part, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997). "Where the issue involves the application of constitutional protections, our review is de novo." *State v. Patrick C.*, 243 W. Va. 258, 261, 843 S.E.2d 510, 513 (2020) (citations omitted). Furthermore, "Article III, Section 5 of the West Virginia Constitution, which contains the cruel and unusual punishment counterpart to the Eighth Amendment of the United States Constitution, has an express statement of the proportionality principle: 'Penalties shall be proportioned to the character and degree of the offence.'" Syl. Pt. 8, *State v. Vance*, 164 W. Va. 216, 262 S.E.2d 423 (1980). We ordinarily limit proportionality reviews to 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).

Under West Virginia's recidivist statute,

> [w]hen it is determined, as provided in § 61-11-19 of this code, that such person shall have been twice before convicted in the United States of a crime punishable by imprisonment in a state correctional facility which has the same or substantially similar elements as a qualifying offense, the person shall be sentenced to imprisonment in a state correctional facility for life[.]

W. Va. Code § 61-11-18(d) (2022). We have explained that "when reviewing the appropriateness of a life recidivist sentence, we consider the nature of the triggering offense and whether the prior offenses involved actual or threatened violence." *State v. Horton*, 248 W. Va. 41, 47, 886 S.E.2d 509, 515 (2023). More specifically,

> [f]or purposes of a life recidivist conviction under West Virginia Code § 61-11-18(c), two of the three felony convictions considered must have involved either (1) actual violence, (2) a threat of violence, or (3) substantial impact upon the victim such that harm results. If this threshold is not met, a life recidivist conviction is an unconstitutionally disproportionate punishment under Article III, Section 5 of the West Virginia Constitution.

Syl. Pt. 12, *State v. Hoyle*, 242 W. Va. 599, 836 S.E.2d 817 (2019).

We conclude that the petitioner's life recidivist sentence is not constitutionally disproportionate. The triggering offense, possession of a firearm by a prohibited person, involved actual violence and harm to the victims. The petitioner discharged a gun four times, injuring two people. Further, in looking at the predicate felonies, we find that they each involved the threat of violence or harm to a victim. Testimony regarding the petitioner's 2016 conviction for possession of a firearm by a prohibited person demonstrated that the petitioner fled from officers on foot after a traffic stop and pointed a firearm at a pursuing officer. While the petitioner claims that possession of a firearm by a prohibited person is not an inherently violent crime, we have rejected this argument on multiple occasions. *See State v. Keith D.*, No. 18-0479, 2021 WL 2580721, at *2 (W. Va. June 23, 2021) (memorandum decision) ("We have . . . found that possession of a firearm by a prohibited person carries the inherent threat of violence." (citing *State v. Gaskins*, No. 18-0575, 2020 WL 3469894 (W. Va. June 25, 2020) (memorandum decision))); *Duke v. Ames*, No. 21-0324, 2022 WL 1693676, at *6 (W. Va. May 26, 2022) (memorandum decision) ("Here, petitioner's conviction for felony possession of a deadly weapon by a prohibited person unquestionably involves a serious crime that endangers the public and carries an inherent threat of violence." (internal quotation marks omitted)). Further, the other predicate felonies were related to the distribution or delivery of cocaine, which we have previously found involves the threat of violence or substantial impact on the victim. *State v. Costello*, 245 W. Va. 19, 857 S.E.2d 51 (2021); *see also State v. Norwood*, 242 W. Va. 149, 158, 832 S.E.2d 75, 84 (2019) (stating that "heroin is illegal, and is a silent scourge that has saturated our State" and, thus, "[t]he delivery and ultimate use of heroin carries with it an inherent risk of violence to a person"); *Gaskins*, 2020 WL 3469894, at *4 (likening cocaine to heroin, citing the "substantial impact on the victim of the crime . . . due to [the drug's] often fatal nature to its users").

Accordingly, because the triggering offense involved actual violence, as well as actual harm to two victims, and because the predicate felonies involved the threat of violence or harm to

a victim, the *Hoyle* threshold is satisfied. Therefore, we conclude that the sentenced imposed by the circuit court was not an unconstitutionally disproportionate punishment.

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