FILED
October 21, 2025
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. 23-518 (Greenbrier County CC-13-2022-F-82)

Timothy W.,
Defendant Below, Petitioner

MEMORANDUM DECISION

Petitioner Timothy W. appeals the Circuit Court of Greenbrier County's April 12, 2023, sentencing order, entered upon his conviction for two counts of sexual abuse by a parent, guardian, custodian, or person in position of trust to a child; one count of incest; and one count of third-degree sexual assault.[1] The petitioner alleges that the circuit court erred in denying his proposed jury instruction regarding unconsciousness. 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.

In the early months of 2022, the petitioner and his girlfriend of thirteen years, Arenda D., moved into a home in Greenbrier County with their seven-year-old daughter, M.W.; four-year-old son, B.W.; and Arenda's two children from her previous relationship with the petitioner's brother, fourteen-year-old H.W. and sixteen-year-old T.W. On April 24, 2022, H.W. told her father, Michael W., that the petitioner had touched her during the early hours of that morning, and he called law enforcement. Corporal Matthew Doss of the Greenbrier County Sheriff's Department conducted a preliminary interview of H.W., scheduled a juvenile forensic interview for her, and also interviewed the petitioner.[2] During her forensic interview, H.W. did not report that the petitioner had inserted his penis into her vagina, but she later revealed this information to her therapist and law enforcement. In response to these new revelations, H.W. attended a follow-up juvenile forensic interview in August 2022.

A Greenbrier County grand jury indicted the petitioner for three counts of sexual abuse by

[1] The petitioner appears by counsel Paul S. Detch. The State of West Virginia appears by Attorney General John B. McCuskey and Deputy Attorney General Andrea Nease. 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 identities of those involved in this case. *See* W. Va. R. App. P. 40(e).

[2] The appendix record does not contain a transcript of H.W.'s or the petitioner's interviews.

a parent, guardian, custodian, or person in position of trust to a child; two counts of incest; and two counts of third-degree sexual assault. Before trial, the petitioner filed his proposed jury instructions, with "Instruction No. 1" stating,

> The jury is instructed that one who engages in what would otherwise be criminal conduct is not guilty of a crime if he does so in a state of unconsciousness or semi-consciousness.
>
> Unconsciousness (or automatism) is not part of the insanity defense[] but is a separate claim which may eliminate the voluntariness of a criminal act. The burden of proof on this issue, once raised by the defense, remains on the State to prove the act was voluntary beyond a reasonable doubt.
>
> That is to say, that once the defendant, Timothy J. W[.], has raised the defense that he lacked intent because he was asleep at the time the alleged event occurred that it is the burden of the State to prove beyond a reasonable doubt that the act was voluntary.

The petitioner's jury trial began on January 10, 2023. Michael W., Detective Doss, and Sydney Hopkins testified concerning their interactions with H.W. after her report of sexual abuse. H.W. also testified, stating that she went to bed at about 3:00 a.m. on April 24, 2020, and she was sleeping in the bed that she shared with her sister, M.W., when she was awakened by the petitioner, positioned behind her, touching her buttocks and breast. H.W. stated that the petitioner pulled her leggings and underwear down and inserted his finger and then his penis into her vagina. H.W. further stated that she was frozen in shock about what was happening. M.W. was sleeping on pillows, above H.W.'s head, during the assault. H.W. remembered M.W. saying, "Ouch," at one point while the petitioner was touching her, and the petitioner responding to that exclamation by saying, "Sorry." H.W. additionally testified that she did not know why M.W. had uttered the exclamation. H.W. stated that the petitioner's assault ended with him pulling her leggings and underwear back up. The petitioner then rose from the bed, went to the bathroom, and then went into the garage area. H.W. said that, after the petitioner left for the garage area, she got out of bed and tried to tell her mother what had happened, but the petitioner came into the room before she had the opportunity to speak. Later that day, H.W. told her father that the petitioner had touched her. When asked by the prosecutor why she did not initially report that the petitioner had put his penis in her vagina, H.W. responded that she "still cared about him. He was there for me. . . . He was like a father figure."

During cross-examination, H.W. acknowledged that she had not been forthcoming during the first forensic interview about all the details of the assault. Defense counsel questioned H.W. about a portion of her forensic interview during which she had stated,

> My little sister said ouch. And I don't know why. He, like, sorry. So I thought [the petitioner] was asleep. And I was, I was confused. It was like, well maybe he thinks I'm my mom or something. . . . I could have sworn that he was awake. And then he continued after he said sorry. And then he went to the bathroom[.]

H.W. acknowledged that she had previously made this statement and explained that she had said it because she was confused about whether the petitioner was asleep during the assault. H.W. testified that she was still confused, "I don't know if he was awake or sleeping. I don't know." But on redirect, she clarified that her confusion stemmed from the fact that the petitioner was "an important person in [her] life[,] [a]nd it was hard to believe that he d[id] it." H.W. acknowledged that part of her wanted to believe that the petitioner was asleep because that would make it "easier for [her] to understand" how he could have done something that she "would've never expected." The State asked unequivocally, "Was he asleep, [H.W.]?" She answered, "I don't think he was."

H.W.'s mother, Arenda D., testified as a defense witness. Arenda stated that, on the day in question, she had been unpacking moving boxes when the petitioner went to bed, and she remained awake throughout the night. Arenda said that her older and younger sons were already asleep when the petitioner went to bed, and H.W. went to bed in the early morning hours, leaving only her youngest daughter, M.W., still awake. Sometime later, M.W. told Arenda that she was too scared to lie down by herself, and H.W.'s presence in their shared room provided no comfort because she was already asleep. M.W. woke the petitioner and asked him to come to her room and stay with her until she fell asleep. Arenda stated that the petitioner rose from his bed and laid down in the girls' bedroom. Arenda testified that she looked into the bedroom on three separate occasions after the petitioner and M.W. went to bed. First, she entered the bedroom to ensure that the petitioner had charged his phone so he would hear his morning alarm for work. Forty-five minutes later, Arenda checked to see if M.W. was awake, and around 4:00 a.m., she took another look to see if M.W. was still awake. Arenda testified that she was in the kitchen the entire morning—one room away from the girls' bedroom, and she remembered several notable things from her check-ins: the girls' bedroom door remained open the entire time; H.W. was always under her own blanket; the petitioner and M.W. were always lying on top of the blanket that was covering H.W.; M.W. was always positioned between the petitioner and H.W.; and the petitioner was sleeping soundly, but M.W. was always awake during each of her check-ins.

The petitioner testified that he went to bed between 11:30 p.m. and midnight and was later awakened by his daughter M.W. asking him to come lie down with her until she fell asleep. The petitioner said he got up from his bed and followed M.W. to the girls' shared bedroom where H.W. was already asleep under the covers on one side of the queen-sized bed. The petitioner recalled Arenda waking him later to ask about his phone's charging and alarm status and next remembers waking to M.W.

> sweating me, like smothering me. Like just hair in my face. Her blankets smothering me. And I woke feeling sick. Like smothering, tangled up with [M.W.] As I was letting her off of me, I pulled her hair on accident. And I said sorry. I went to the bathroom because I honestly didn't know if I was going to puke or not. I felt nauseated.

When asked if he had any recollection of touching H.W. in any manner, the petitioner said,

> The only thing I can think is maybe whenever I was letting [M.W.] down, I could've bumped her or something. I don't know. I was trying to get [M.W.] off of me, and I was feeling sick. So it was kind of like a rush kind of situation. And I did say sorry

to [M.W.] I may have bumped her in the process of waking up feeling nauseated.

On cross-examination, the petitioner admitted that, during his interview, he had told Corporal Doss that the sexual assault could have happened, and that fact disgusted him. The petitioner testified that he had been terribly confused and upset after learning that H.W. said he had sexually assaulted her. The petitioner also admitted to telling Corporal Doss about past occasions, after partying as a young couple, of waking up already having sex with Arenda, but he maintained at trial that he did not touch H.W. The petitioner also acknowledged telling Corporal Doss that H.W. was not a liar. The State asked, "You still don't think she's a liar, do you?" The petitioner responded, "I do now."

After the close of all the evidence, the circuit court heard arguments regarding the petitioner's proffered unconsciousness jury instruction. The court denied the petitioner's requested unconsciousness instruction, stating, "there's no evidence before the Court of a condition or disorder. . . . I don't think it changes your argument in any way. I think that the argument goes to the element of the crime involving intent."

Regarding intent, the circuit court instructed the jury as follows:

> The [c]ourt instructs the jury that one of the elements of each of the crimes charged in the indictment in this case is the element of specific intent; that is to say before the defendant can be guilty as charged, he must have intended to do what he is accused of doing. Intent is a state of mind and therefore not susceptible of proof by tangible or direct evidence but may be proved if at all by circumstances including actions and statements. In this regard you are instructed that in your determination of whether the element of intent has been proved beyond all reasonable doubt, you are to consider all the evidence in this case and all reasonable inferences to be drawn therefrom. You are further instructed that it is permissible for you to infer as a matter of fact that a person intends to do what he does and that he intends to do that which is the immediate and necessary consequence of his act.

The jury convicted the petitioner of two counts of sexual abuse by a parent, guardian, custodian, or person in position of trust to a child, for which the circuit court sentenced him to not less than ten nor more than twenty years for each count; one count of incest, for which the court sentenced him to not less than five nor more than fifteen years; and one count of sexual assault in the third degree, for which the court sentenced him to not less than one nor more than five years, with all sentences to run concurrently.

The petitioner now appeals his convictions and sentences on the basis that the court improperly denied his requested jury instruction. "Whether facts are sufficient to justify the delivery of a particular instruction is reviewed by this Court under an abuse of discretion standard. In criminal cases where a conviction results, the evidence and any reasonable inferences are considered in the light most favorable to the prosecution." Syl. Pt. 12, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994).

The petitioner alleges that the circuit court erred in denying his proffered jury instruction

regarding unconsciousness. In support of his position, the petitioner asserts that there was sufficient evidence to warrant giving the instruction to the jury, based on his, H.W.'s, and Arenda's testimony, and this Court has recognized "that in criminal cases a defendant generally is entitled to a jury charge that reflects any defense theory for which there is a foundation in the evidence." *State v. LaRock*, 196 W. Va. 294, 308, 470 S.E.2d 613, 627 (1996). Moreover, we have held that "[a]n instruction on the defense of unconsciousness is required when there is reasonable evidence that the defendant was unconscious at the time of the commission of the crime." Syl. Pt. 3, *State v. Hinkle*, 200 W. Va. 280, 489 S.E.2d 257 (1996).

In the present case, there was no reasonable evidence that the petitioner was unconscious at the time the crimes were committed, so no instruction on the defense of unconsciousness was required. The petitioner did not testify that he was unconscious at the time he committed the crime. Rather, he maintained that he "didn't do nothing" and that H.W. was lying. He also admitted that he was awake when he apologized to M.W., which, according to H.W., occurred in the middle of the sexual assault. H.W. testified that the petitioner was positioned behind her during the sexual assault, pulled down her pants and underwear, placed his finger and then his penis into her vagina, apologized to M.W., pulled her pants and underwear back up, and then exited the bed. She did not testify that he was asleep. Although. H.W. agreed on cross-examination that she had previously *speculated* about whether the petitioner was asleep, she later explained that her speculation was simply an attempt to understand why such "an important person" in her life did something she "would've never expected." She made clear that she "[did not] think he was asleep." Likewise, Arenda's testimony fails to provide evidentiary support for an unconsciousness instruction because she only conducted sporadic checks into the girls' bedroom and did not continuously observe the petitioner while he was in bed with the victim. In other words, that Arenda observed the petitioner asleep at some other time when he was not committing the sexual assault does not supply reasonable evidence to support that he was asleep when he sexually assaulted H.W. *See id.* ("An instruction on the defense of unconsciousness is required when there is reasonable evidence that the defendant was unconscious *at the time of the commission of the crime*." (emphasis added)). Because the evidence admitted at the petitioner's trial did not establish a sufficient evidentiary basis to indicate that he was unconscious during the commission of the crimes, the circuit court did not abuse its discretion in denying his request for such an instruction. *See Derr*, 192 W. Va. at 181, 451 S.E.2d at 747 ("[A] trial court can refuse an instruction not raised by sufficient evidence." (citing *State v. Gum*, 172 W. Va. 534, 309 S.E.2d 32 (1983))).

The petitioner additionally asserts that the circuit court's denial of his requested jury instruction constituted reversible error because the issue of unconsciousness was not adequately addressed in the jury charge as a whole. The Court has stated:

> A trial court's refusal to give a requested instruction is reversible error only if: (1) the instruction is a correct statement of the law; (2) it is not substantially covered in the charge actually given to the jury; and (3) it concerns an important point in the trial so that the failure to give it seriously impairs a defendant's ability to effectively present a given defense.

Derr, 192 W. Va. at 168, 451 S.E.2d at 734, Syl. Pt. 11. We have further held that "the question of whether a jury was properly instructed is a question of law, and the review is *de novo*." Syl. Pt.

1, in part, *State v. Hinkle*, 200 W. Va. 280, 489 S.E.2d 257 (1996). In the present case, the court instructed the jury on the elements of the charged offenses, including "the element of specific intent," stating that "before the defendant can be guilty as charged, he must have intended to do what he is accused of doing." We conclude that the court's charge to the jury substantially addressed the issue of whether the petitioner intentionally engaged in the behavior for which he was convicted, and the instructions, "as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law." Syl. Pt. 4, in part, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: October 21, 2025

CONCURRED IN BY:

Chief Justice William R. Wooton
Justice Charles S. Trump IV
Justice Thomas H. Ewing
Senior Status Justice John A. Hutchison

DISSENTING:

Justice C. Haley Bunn

Bunn, 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 errors 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 memorandum decision. Accordingly, I respectfully dissent.