IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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STATE OF WEST VIRGINIA,

Respondent,

v.

Supreme Court No.: 23-535
Circuit Court Case Nos. 22-F-234; 23-F-150

Cabell County, West Virginia

RANDY C. CAIN,

Petitioner.

PETITIONER'S BRIEF

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At Petitioner's trial the alleged victim and sole eyewitness testified by deposition and did not testify that Petitioner used a firearm during an alleged assault and that to her memory she never saw Petitioner with a gun. The state presented testimony about out of court statements made by the alleged victim under the pretense that they were not offered for the truth of the matter asserted.

1) Did the trial court commit reversible error in admitting these statements?
2) If not, did the trial court commit reversible error by not granting the defense request for a limiting instruction to the jury to not consider this testimony for the truth of the matter asserted?

STATEMENT OF THE CASE

Petitioner appeals his convictions for "Use or Presentment of a firearm during the commission of a felony" and "Wanton Endangerment" as the use of a firearm is an element of both charges and the only evidence presented to the jury as to the use of a firearm during the crime was hearsay testimony and the trial court refused to give an instruction to the jury to not consider that testimony for the truth of the matter asserted.

Petitioner was indicted by the September, 2022 term of the Cabell County grand jury for "Malicious Assault," "Use or Presentment of a firearm during the commission of a felony," "Domestic Battery," "Unlawful Restraint," Wanton Endangerment," and "Person prohibited from possessing a firearm."[1] These charges originated from a March, 2022 incident where Petitioner

[1] A.R. 3

was accused of assaulting his mother, Brenda McClellan, at their home.[2] Ms. McClellan and Petitioner were the only persons present during these events.

Ms. McClellan made out of court statements that Petitioner had during this incident kicked her in the shins with steel toed boots and had hit her in the head with a handgun.[3] The Petitioner filed a motion in limine to preclude any statements made by the victim other than her evidentiary deposition.[4] The court the morning of trial ultimately ruled that only the parts of a recorded statement consistent with McClellan's deposition testimony would be admissible.[5] The state did not use that recorded statement.[6]

The alleged victim, Ms. McClellan was in poor health and testified via evidentiary deposition.[7] During that deposition testimony Ms. McClellan testified that Petitioner kicked her in the shins with steel-toed boots and hit her with a small bat-like object and not a gun:

A: He -- he hit me.
Q: And what else?· Let me ask you this.· Did he use any objects when he hit you?
A: Yes.
Q: What did he use?
A: Steel-toed boots.· He kicked my legs.
Q: Did he use any other objects?
A: He used a little tiny thing, like a bat that he hit me on the back.[8]

She later claimed not remembering the presence of guns or use of a gun:

Q: Do you remember if there were any guns in the house?
A: Any what?
Q: Any guns in the house?
A: I don't know of any that there was.
Q: Do you remember if there was ever a gun shot in the house?

[2] A.R. 3
[3] A.R. 490
[4] A.R. 490
[5] A.R. 12
[6] A.R. 12
[7] A.R. 504
[8] A.R. 513

A: I'm not sure about that.· I don't remember that.[9]

The state did not use prior statements for impeachment or to refresh her memory about firearms and the subject wasn't again raised.[10]

At trial, the state submitted evidence that there were firearms found in the home.[11] Also, that there was a hole in a television set that a state witness opined was caused by a firearm.[12] There was no evidence as to the circumstances of the bullet hole in the TV set, just that there was a hole and the officer was of the opinion the hole was caused by a bullet but on cross examination allowed that he had no training and it could have been caused by a drill.[13]

There were two witnesses who gave hearsay testimony about Ms. McClellan's out of court statements. The first was with the state's first witness, Anita Vasquez. During her testimony Ms. Vasquez eventually was asked about an out of court statement from the victim.[14] The state claimed this testimony was for purposes other than to establish the truth of the matter asserted:

A. When she called me and asked me to get the police and come get her, yeah, I was concerned.
Q. And what -- what else in that message made you concerned?
MR. WALL: Your Honor, I'm going to object. Again, this is calling for hearsay.
MS. SAMUELS: It's the effect it had on the listener and why she called 911.
THE COURT: So far I'll allow what she said. I'll allow her to answer the question.[15]

Ms. Vasquez's answers did not involve a firearm until several questions later:

Q. Can you tell me what this is a photograph of?
A. My sister's ear. Behind her ear. She said he hit her in the head with a gun.[16]

…

[9] A.R. 513-4
[10] A.R. 504 et seq.
[11] A.R. 317 et seq.
[12] A.R. 342-3
[13] A.R. 343; A.R. 355
[14] A.R. 174
[15] A.R. 174
[16] A.R. 179

Q. Tell me what we're seeing.
A. That is my sister, and that is behind her ear where she said he --
MR. WALL: I'm going to object again, your Honor. I feel like this is calling for hearsay.
THE WITNESS: She told the police the same thing.
THE COURT: Well, she's identified what it is. I'm going to sustain the objection to anything further as to what she was told.[17]

…

Q. Can you tell me what we're publishing to the jury? What is that a picture of?
A. It's a picture of her shoulder. She said that he hit her.
MR. WALL: I'll object again, your Honor. May we approach?
THE COURT: You may.

(The following proceedings were held at the bar outside of the hearing of the jury with all counsel and the defendant present.)

MR. WALL: I think every bit of her testimony as to how she sustained these injuries is all hearsay. She can testify to the fact that that is an injury, but she doesn't know how it occurred. It's all hearsay.
THE COURT: Yeah. I'm not going to let her go on with describing what was told to her on every occasion. I mean, these pictures would had to have been shown to Ms. McClellan and –
MS. SAMUELS: We did show her -- some of the pictures were shown to her.
THE COURT: So, I mean, you'll be able to get some of that in through that, but I think her continuing to talk about what was told to her I'm not going to allow. She can just identify who it is and what she's seeing. [18]

West Virginia State Trooper Dakota Render also provided hearsay testimony about the use of a firearm:

WITNESS: [W]hen we met her there, she had a voicemail from her sister essentially stating that her son had --
MR. WALL: Your Honor, I'm going to object. This calls for hearsay again.
MR. SHOUB: Your Honor, I'd offer it as effect on the listener. Let him continue a little bit.
THE COURT: I'll let him continue for now.
THE WITNESS: We listened to a voicemail from the complainant's sister that stated her son had pistol-whipped her and fired a gun in the house and that she needed the police.

[17] A.R. 180
[18] A.R. 181-2

MR. WALL: I'm going to object, your Honor. It's hearsay.
MR. SHOUB: I'm going on right now.[19]

Later during the testimony, anticipating that Trooper Render was again going to relate hearsay testimony, defense counsel objected:

MR. WALL: I'm going to object, your Honor. This calls for hearsay.
THE COURT: Response?
MS. SAMUELS: Your Honor, I mean, he's offering up his reaction for -- what she said and what his reaction was based on what she said. I think its effect on listener.
MR. WALL: He can offer her reaction, but the actual things she said, I believe, are hearsay.
THE COURT: I'm going to allow him to testify to this exchange.[20]

At this point Trooper Render gave a detailed description of what the victim allegedly told him, including information about the use of a firearm inconsistent with the victim's testimony.[21]

At the close of the state's case defense counsel moved for a judgment of acquittal on the grounds of insufficiency of evidence.[22] This motion was denied.[23] The defense asked for a limiting instruction[24] and submitted Defendant's Instruction 10 as a proposed instruction.[25] This instruction was refused.[26]

Defendant was acquitted of the unlawful restraint charge and convicted on all other charges.[27] He was sentenced to four to ten years for malicious wounding,[28] six years for use of a firearm during a felony, twelve months for domestic battery, three years for wanton endangerment, and three years for prohibited person in possession of a firearm.[29] The malicious

[19] A.R. 208-9
[20] A.R. 210-1
[21] A.R. 211
[22] A.R. 387-9
[23] A.R. 388-9
[24] A.R. 404-407
[25] A.R. 534
[26] A.R. 408
[27] A.R. 466
[28] Petitioner was subject to the Habitual Offender Act based on his prior felony.
[29] A.R. 501-3

wounding and use of a firearm sentences were ordered to run consecutively with all other sentences to run concurrently with all charges resulting in an effective sentence of five and one half years to sixteen years.[30]

Defendant's motion for a new trial[31] was denied.[32]

SUMMARY OF ARGUMENT

The only evidence of use of a firearm in this case was hearsay testimony. These statements were inadmissible as irrelevant hearsay evidence; and if held admissible as not being offered for the truth of the matter asserted the trial court erred in not granting the defendant's request for a limiting instruction.

STATEMENT REGARDING ORAL ARGUMENT

The assignments of error involve settled law and as such a Rule 19 argument is appropriate.

ARGUMENT

Petitioner is appealing his convictions for "use or presentment of a firearm"[33] and "wanton endangerment."[34] Both of these offenses have as an element the use of a firearm. "Use or Presentment of a firearm during the commission of a felony" is self-explanatory.[35] "Wanton endangerment" as set out in W.Va. Code 61-7-12 requires an act with a firearm "which creates a substantial risk of death or serious bodily injury to another..."[36] For purposes of this argument

[30] A.R. 501-3
[31] A.R. 499
[32] A.R. 501
[33] W.Va. Code 61-7-15a
[34] W.Va. Code 61-7-12
[35] W.Va. Code 61-7-15a
[36] W.Va. Code 61-7-12

these offenses can be treated identically as without the hearsay evidence the state has no evidence of any act committed with a firearm.

1) The hearsay testimony was inadmissible and it's admission was not harmless:

"A trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard."[37] Hearsay evidence is admissible if not being offered for the truth of the matter asserted.[38] However, the purpose for this hearsay evidence must be relevant as to a fact at issue in the case.[39] In *State v. Maynard* officers received an anonymous phone call implicating the defendant in a robbery.[40] The trial court allowed the officers to testify that the call implicated the defendant to show the motive or reasonableness of the officers' further investigations.[41] However, "[S]ince the issue was not relevant to the prosecution, nor the defense, it was error to allow [the officers] to testify about the anonymous phone call which implicated the defendant."[42] This error was ultimately held harmless based on there being sufficient other evidence of the defendant's identity.[43]

In the present case there is testimony about prejudicial out of court statements elicited under the guise of establishing why the testifying witness acted as they did.[44] Similar to *Maynard*, exactly why Ms. Vasquez called the police or why Dakota Render investigated a crime was never at issue. It was a pretense to get otherwise inadmissible prejudicial testimony before a jury.

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[37] Syllabus Point 4, *State v. Rodoussakis*, 204 W.Va. 58, 511 S.E.2d 469 (1998)
[38] *See* Syl Pt 1, *State v. Maynard* 183 W.Va.1, 393 S.E.2d 221 (1990).
[39] *See Id.* at 5, 393 S.E.2d at 225.
[40] *See Id*. at 3-4, 393 S.E.2d at 223-4
[41] *See Id*. at 4, 393 S.E.2d at 224.
[42] *Id*. at 5, 393 S.E.2d at 225.
[43] *See Id*. at 6, 393 S.E.2d at 226.
[44] A.R. 174, 179, 208-211

Part of the state's motivation for this pretense is relevant to whether this error is harmless. There was no other evidence the state could use to show the use of a firearm, a necessary element of both the "use or presentment[45]" and "wanton endangerment[46]" charges.

> Where improper evidence of a nonconstitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury[47].

If the hearsay testimony is removed from the case the state is left with nothing showing that there was a gun used in the crime. Their only witness to the event testified there were no guns used during the crime.[48] There were firearms found at the residence[49] and there was a hole in a television set.[50] No expert testified that any of the wounds were indicative of the use of a firearm. Had the out of court statements not been made it would be unthinkable that the state would have brought a charge that the victim was struck with a gun or that a gun was fired in the residence as there is no context to support them.

2) The Trial Court erred by refusing to give a limiting instruction.

[45] W.Va. Code 61-7-15a
[46] W.Va. Code 61-7-12
[47] Syl. Pt. 3, *State v. Maynard* 183 W.Va. 1, 393 S.E.2d 221 (1990) (citation omitted)
[48] A.R. 514-515
[49] A.R. 317 et seq
[50] A.R. 342-3; 355

Whether a jury instruction is legally required is a question of law subject to a de novo standard of review.[51] The "precise extent and character of any specific instruction will be reviewed only for an abuse of discretion."[52]

If this Court finds the admission of the hearsay evidence is itself not reversible error, the trial court still erred by not instructing the jury to consider these statements only for the purpose for which they were entered into evidence. "If the court admits evidence that is admissible against a party or for a purpose — but not against another party or for another purpose — the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly."[53]

The state in this case responded to hearsay objections by disclaiming the use of the testimony for the truth of the matter asserted.[54] The defense requested the jury to be instructed that the testimony be used only for the proffered purpose.[55] The trial court erred by not giving an instruction.

As there was no other appreciable evidence to establish the use of a gun the prejudice to Petitioner is obvious. Absent use of these hearsay statements there would be no factual basis on which to reach the conclusion that a firearm was used during this crime.

CONCLUSION

Petitioner's convictions for "Use or presentment of a firearm in commission of a felony" and "Wanton endangerment" should be reversed and the case remanded for a new trial for those charges..

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[51] *See* Syl. Pt. 4, *State v. Guthrie*, 194 W.Va 657, 461 S.E.2d 163 (1995)
[52] *Id.*
[53] W.Va. R. Evid 105.
[54] A.R. 174; 208-211
[55] A.R. 404-5

The evidence used to convict Petitioner was allowed before the jury on the pretense that it wasn't being used to convict Petitioner. Either the statements were evidence showing use of a gun, in which case they were inadmissible hearsay, or they weren't used to show use of a gun and as such the jury should have been properly instructed to not take them into account when deliberating.

Respectfully submitted,
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