

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**State of West Virginia,
Plaintiff Below, Respondent**

vs) **No. 11-0377** (Marion County 10-F-36)

**Kendrick Vinson,
Defendant Below, Petitioner**

FILED
December 2, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Kendrick Vinson appeals the circuit court's order sentencing him to serve one to five years in the state penitentiary; two to ten years in the state penitentiary; and twelve months in the regional jail, following his conviction by jury of sexual abuse in the first degree (a lesser included offense); assault during the commission of a felony; and battery (a lesser included offense). This appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The State has filed its response. Petitioner has filed a reply.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

Petitioner was indicted on charges of sexual assault in the second degree and malicious assault against two different women, and assault during the commission of a felony against a male victim.¹ Petitioner was alleged to have had consensual sex with the female victim, but later became angry with her and assaulted her. In the midst of the assault, the male victim is alleged to have walked into the room, and he and petitioner began to fight. Petitioner threw the male victim backwards onto a pool table, injuring the victim's back in the process. After this incident, the female victim attempted to shower and leave, but while she was showering, petitioner entered the shower stall nude, at which time his penis made

¹One charge of sexual assault and one charge of malicious assault regarding a different female victim were dismissed after the indictment and prior to trial.

contact with her vagina. Both victims testified at trial. Petitioner was found guilty of two lesser included offenses (sexual abuse in the first degree and battery), and found guilty of assault during the commission of a felony.

On appeal, petitioner argues that there was insufficient evidence to support a guilty verdict on a charge of assault during the commission of a felony. Petitioner also argues that there was insufficient evidence to support a guilty verdict on a charge of sexual abuse in the first degree. This Court has held:

A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, 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. To the extent that our prior cases are inconsistent, they are expressly overruled.

Syl. Pt. 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995). Petitioner argues that the charge of assault during the commission of a felony requires wounding, which petitioner defines as some breaking of the skin. The State argues that a breaking of the skin is not necessary, as the male victim testified that he had an injured back as a result of petitioner's assault on him, and the jury clearly felt that the back injury was a result of the assault. This Court finds sufficient evidence to sustain the conviction of assault during the commission of a felony.

Petitioner next argues that the female victim's testimony was not credible and therefore was insufficient to sustain a conviction of sexual abuse in the first degree. "'The jury is the trier of the facts and in performing that duty it is the sole judge as to the weight of the evidence and the credibility of the witnesses.'" Syl. Pt. 2, *State v. Bailey*, 151 W.Va. 796, 155 S.E.2d 850 (1967)." Syl. Pt. 2, *State v. Martin*, 224 W.Va. 577, 687 S.E.2d 360 (2009). The female victim testified regarding the attack, and the jury clearly determined that her testimony was credible enough to convict the petitioner. This Court finds no error in this conviction.

Finally, petitioner argues that West Virginia Code § 62-12-26 (2009) violates the due process clauses of the West Virginia and federal constitutions. However, this Court has

determined that “[t]he terms of the statute neither infringe upon a criminal defendant’s right to jury determination of relevant factual matters, nor are the provisions of the statute regarding conditions of unsupervised release unconstitutionally vague.” Syl. Pt. 9, in part, *State v. James*, 227 W.Va. 407, 710 S.E.2d 98 (2011). Thus, the requirement that petitioner be placed under extended supervision is not unconstitutional.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: December 2, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Thomas E. McHugh