

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

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

vs) No. 11-0780 (Logan County 08-F-100)

**Tony Ritchie, Defendant Below,
Petitioner**

FILED

April 13, 2012

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Tony Ritchie, by counsel Gina Stanley, appeals the Circuit Court of Logan County's order entered April 20, 2011, sentencing him to serve two to ten years in prison following a jury conviction of malicious assault. The State of West Virginia, by counsel Michele Bishop, has filed a response.

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 of Appellate Procedure.

On May 6, 2007, petitioner and a man named Jason Hodge got into a physical fight over a debt while at a private home. Both were injured but only Hodge went to the hospital where he was treated by emergency room physician, Dr. Robert Long, for a laceration to the left side of his face and a laceration to his back. Hodge told hospital personnel that a knife had caused these injuries. Thirty stitches were required to close Hodge's back wound which was five to six inches long. Dr. Long did not stitch the facial wound, which was six to eight inches long, transferring Hodge to another hospital for treatment by a maxillofacial surgeon.

The accounts of the fight that caused Hodge's injuries were conflicting at trial. Hodge testified that petitioner began a verbal argument with him about some money Hodge owed him. When petitioner put his finger in Hodge's face, Hodge hit petitioner. Petitioner got up and went out of the room. Several minutes later, petitioner returned and Hodge testified that "he come straight at me." Petitioner said "You shouldn't have hit me" and swung at Hodge with a clenched fist. Hodge testified that he saw the end of a blade when Defendant swung at him and it cut his face. Hodge testified that he was then struck in the back as he tried to defend himself. Hodge testified that the two

were never rolling around on the floor, no knick-knacks were broken during the fight, and he was not cut by any such debris.

Petitioner testified that he and Jason Hodge discussed the unpaid debt and then Hodge punched him in the face. After that, they went to the floor and were fighting there until Kevin Baisden broke it up. While they were on the floor they were in contact with broken debris and the fight lasted several minutes. Petitioner denied using a weapon during the fight, indicating that he used no object other than his fists in fighting with Hodge. He testified that he was surprised when Hodge punched him because they were not arguing. He testified that he did not know if Hodge was injured in the fight, never saw him bleeding, and Hodge did not act like he was injured. Under cross-examination, petitioner testified that the other men who were present, Kevin Baisden and Jason Adkins, were wrong in their testimony on several points.

Jason Adkins testified that the verbal fight over money got his attention when the voices got loud. He saw Hodge hit petitioner. He testified that they were fighting in the floor. Adkins saw petitioner leave the room after the two were separated. He testified that he did not see petitioner come back into the living room. Adkins testified that Hodge and petitioner were fighting on top of broken objects, both hitting each other. To his knowledge there was no knife or other weapon used by petitioner or Hodge. Adkins testified that he did not see what caused Hodge's wounds.

Kevin Baisden testified that he heard Hodge and petitioner verbally fighting and then saw Hodge hit petitioner one time. Petitioner then got up and went to the kitchen. Hodge and Adkins stayed in the living room with Baisden. Petitioner then came back into the living room. After petitioner re-entered the living room, petitioner went to Hodge, with petitioner's hands at his side balled into fists. Petitioner then hit Hodge who was sitting down. They were then wrestling on the chair. Baisden did not testify about seeing a knife. He testified that he did not notice them going to the floor during the fight and never saw anything in petitioner's hands.

Dr. Long, the emergency room physician who treated Hodge, testified over defense objection that the wounds to Hodge looked like they had been caused by a knife and were consistent with the history that Hodge gave of being cut by a knife as the margins of the wound did not appear to be jagged. Dr. Long discounted that glass was a likely cause of the wounds, stating that if it were glass it would have had to have been used in a cutting motion.

The petitioner's theory at trial was that Hodge's injuries came from rolling on glass from objects broken during their fight. The jury convicted petitioner of malicious assault and the circuit court sentenced petitioner to two to ten years in prison.

Refusal to give jury instruction

Petitioner argues that the circuit court erred in refusing to give a jury instruction offered by petitioner which read as follows: "To constitute a 'wound', within the meaning of this section [referencing West Virginia Code § 61-2-9] an injury must have been inflicted with a weapon, other

than a part of the human body, and must include a complete parting or breaking of the skin.” The circuit court refused to give this instruction because the circuit court concluded that a wound for purposes of malicious assault was not limited to those created by a weapon. The circuit court offered to give an instruction indicating that the wound must include a breaking of the skin, which offer was refused by the defense.

““The formulation of jury instructions is within the broad discretion of a circuit court, and a circuit court's giving of an instruction is reviewed under an abuse of discretion standard. A verdict should not be disturbed based on the formulation of the language of the jury instructions so long as the instructions given as a whole are accurate and fair to both parties.’ Syllabus point 6, *Tennant v Marion Health Care Foundation, Inc.*, 194 W.Va. 97, 459 S.E.2d 374 (1995).” Syl. Pt. 2, *Matheny v. Fairmont General Hosp. Inc.*, 212 W.Va.740, 575 S.E.2d 350 (2002).

In the case at bar, the petitioner’s theory was that Hodge was cut by broken glass, not a knife. The circuit court gave State’s Instruction No. 6 that defined the term deadly weapon and State’s Instruction No. 5 that told the jury that they might infer malice from the use of a deadly weapon. Petitioner argues that this placed before the jury the State’s theory of the use of a knife, but not the defense’s theory of broken glass as the modality of Hodge’s injuries, unfairly prejudicing the defense.

The State argues that the circuit court did not err in refusing to give the instruction, asserting that the same phrase of “shoot, stab, cut or wound” found in West Virginia Code § 61-2-9 has been interpreted by this Court in the context of West Virginia Code § 61-2-10 not to require the use of a weapon. *State v. Lockhart*, 200 W.Va. 479, 486, 490 S.E. 2d 298, 305 (1997). In any event, the State represents that the circuit court gave Defendant’s Instruction No. 3 that specifically required the jury to find that Mr. Hodge had been “cut with a knife.” The Court concludes under the facts and circumstances of the instant case that the circuit court did not err in refusing the proffered instruction.

Gruesome Pictures

Over defense objection, the State introduced several photographs depicting Hodge’s facial and back injuries. The circuit court allowed this evidence, finding that the pictures of Hodge’s wounds were not gruesome and were relevant. Petitioner argues that the circuit court abused its discretion and erred in allowing the admission of these photographs as they were gruesome and their admission unfairly prejudiced him pursuant to Rule 403 of the West Virginia Rules of Evidence.

The State responds that the photographs are not gruesome. Hodge’s facial wounds had already been cleaned by the time that the police took the photos in question. The circuit court found that the photographs were relevant to show the nature and extent of the injuries to Hodge. The State argues that the photographs were not more prejudicial than probative and, therefore, were properly admitted into evidence.

In *State v. Derr*, 192 W.Va.165, 451 S.E.2d 731 (1994), this Court recognized that the admissibility of photographs, over an objection because of their gruesomeness, must be determined on a case-by-case basis pursuant to Rules 401-403 of the West Virginia Rules of Evidence. Specifically, in Syllabus Point 10 of *State v. Derr*, the Court stated:

Rule 401 of the West Virginia Rules of Evidence requires the trial court to determine the relevancy of the exhibit on the basis of whether the photograph is probative as to a fact of consequence in the case. The trial court then must consider whether the probative value of the exhibit is substantially outweighed by the counterfactors listed in Rule 403 of the West Virginia Rules of Evidence. As to the balancing under Rule 403, the trial court enjoys broad discretion. The Rule 403 balancing is essentially a matter of trial conduct, and the trial court's discretion will not be overturned absent a showing of clear abuse.

The Court concludes that the circuit court did not err in finding the photographs to be relevant. The nature of Hodge's wounds and their cause was a central element in this case. The circuit court acted within its discretion in concluding that their probative value exceeded the risk of unfair prejudice.

Refusal to excuse two jurors challenged for cause

Petitioner next argues that the circuit court abused its discretion and erred in refusing to strike for cause two jurors, Doris Winter and Robyn Workman, who had both worked at one time or another with State witness Dr. Long. Winter, a registered nurse, worked at Logan General in the recovery room when Dr. Long was doing his residency. Winter indicated that she would give Dr. Long's testimony no more consideration than that of a stranger and that she could be fair to both sides. The circuit court held that her answer was given without "hesitation or reflection" and denied petitioner's motion to strike.

The other juror, Robyn Workman, is a lab technician who, at times, works in the emergency room under Dr. Long's supervision. She indicated that she sometimes calls in critical lab results to Dr. Long. She sometimes sees Dr. Long at their respective children's sporting events. Workman had not seen Dr. Long for about six months at the time of the voir dire because she was working day shift. The circuit court denied the motion to strike because the court found that Workman would listen to what Dr. Long had to say but she would make up her own mind as to the truth.

The State argues that the circuit court acted within its discretion in denying the motions to strike Winter and Workman as there was no showing of actual bias. The State argues that petitioner has shown little or no relationship between Winter and Workman and Dr. Long. Petitioner had the burden of proof as to striking the witnesses for cause. The State notes that both Winter and Workman testified during voir dire that they would reach their own conclusions and not give any particular regard to the testimony of Dr. Long.

“An appellate court only should interfere with a trial court’s discretionary ruling on a juror’s qualification to serve because of bias only when it is left with a clear and definite impression that a prospective juror would be unable to faithfully and impartially to apply the law.” Syl. Pt. 6, in part, *State v. Miller*, 197 W.Va. 588, 476 S.E. 2d 535 (1996). The Court concludes that the circuit court did not err in denying the motions to strike these jurors for cause.

Refusal to exclude the testimony of Dr. Long

Finally, petitioner argues that the circuit court erred in permitting Dr. Long to give expert testimony regarding the wounds’ consistency with use of a knife. Petitioner argues that this improperly bolstered the credibility of witnesses that supported the theory of the prosecution.

The State argues that the circuit court did not abuse its discretion in holding that Dr. Long was qualified to opine as to the cause of the wounds in question. Dr. Long, an emergency room doctor and the co-director of the emergency room, had more than six years of service in the emergency room and had frequently seen knife wounds. He was well-qualified to opine as to the source of the wounds.

“The admissibility of testimony by an expert witness is a matter within the sound discretion of the trial court, and the trial court's decision will not be reversed unless it is clearly wrong.” Syl. pt. 6, *Helmick v. Potomac Edison Co.*, 185 W.Va. 269, 406 S.E.2d 700 (1991). Under the facts and circumstances of the case at bar, the Court finds no abuse of discretion by the circuit court.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: April 13, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh