STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs.) No. 11-0917 (Marion County 10-F-123)

Cecil Clyde Simons,
Defendant Below, Petitioner

FILED
April 16, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Marion County, wherein the circuit court, by order entered June 2, 2011, sentenced petitioner to consecutive sentences of a determinate term of five years of incarceration for the crime of use of obscene matter with intent to seduce a minor and a term of not less than twenty, nor more than twenty, years of incarceration for the crime of sexual abuse by a parent, guardian, or custodian following a jury trial.[1] The appeal was timely perfected by counsel, Scott A. Shough, with petitioner's appendix accompanying the petition. The State, by counsel Laura Young, has filed its response.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the appendix 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 appendix 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.

At approximately 2 a.m. on December 27, 2008, Melissa Tetrick, petitioner's neighbor, heard pounding at her door and found a young boy, D.G., asking for help and to use her phone. The child was not wearing shoes or a coat, and he told Ms. Tetrick that a man had tried to rape him and that he had run to her house because it was the first one with lights on. After Ms. Tetrick called the police, the child hid in an outbuilding and Ms. Tetrick noticed petitioner driving up and down the road approximately twenty times. The child at issue was sixteen at the time of the incident, and had been staying with petitioner in order to perform odd jobs for him to earn a four-wheeler. According to the victim's testimony, after arriving at petitioner's home they talked and watched a movie. However, the victim testified that petitioner later stated that he sleeps naked, and started to remove

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[1]During the proceedings below, petitioner admitted to being a recidivist. Pursuant to West Virginia Code § 61-11-18(a), the minimum term of petitioner's indeterminate sentence for sexual abuse by a parent, guardian, or custodian was therefore doubled from ten years of incarceration to twenty years of incarceration.

his clothes. At one point, according to D.G., petitioner laid down on a love seat directly across from him, completely naked, and masturbated for approximately forty-five minutes. According to the victim, during this time he was formulating a plan to leave because he was worried that he would be sexually assaulted, especially in light of petitioner's repeated statements regarding "getting a piece of ass off [the victim]," and the fact that petitioner was much larger than he was. When petitioner eventually went into his bedroom and told the child to join him when he was ready, D.G. saw his opportunity to escape. He ran out of the house, leaving behind his shoes, coat, and anything else not on his person for fear that petitioner would catch him if he attempted to gather his things. On June 8, 2010, petitioner was indicted below for the following crimes: (1) one count of use of obscene matter with the intent to seduce a minor; (2) two counts of sexual abuse by a parent, guardian, or custodian; and, (3) one count of sexual abuse in the first degree. Following a jury trial, petitioner was convicted of one count of use of obscene matter with intent to seduce a minor and one count of sexual abuse by a parent, guardian, or custodian, and was sentenced to consecutive sentences of a determinate term of five years of incarceration and a term of not less than twenty, nor more than twenty, years of incarceration. On appeal, petitioner alleges the following assignments of error: (1) that the circuit court erred in failing to dismiss count I of the indictment as a matter of law; (2) that the evidence set forth by the State was insufficient as a matter of law to establish his guilt; and, (3) that the circuit court erred in allowing photographs of petitioner's residence and outbuilding into evidence. These assignments of error and the State's responses thereto are addressed in turn below.

"'The Supreme Court of Appeals reviews 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)." Syl. Pt. 1, *State v. James*, 227 W.Va. 407, 710 S.E.2d 98 (2011). Petitioner first argues that the circuit court erred in failing to dismiss Count I of the indictment charging him with use of obscene matter with intent to seduce a minor because West Virginia Code § 61-8A-4 requires some sort of visual, audio, or physical item being displayed, while it was alleged only that petitioner displayed his naked body to the child. Petitioner argues that there was no other material of any nature that the victim complained of being exposed to, and further that petitioner denied engaging in the alleged conduct and that there was no evidence to corroborate the victim's statements. Additionally, while the statute in question contemplates a person's body as satisfying the "obscene matter" component of the crime, petitioner argues that he did not perform a public exhibition or become naked for consideration as the statute requires. In short, petitioner argues that he should have more appropriately been charged with indecent exposure based on the allegations. The State argues in response that West Virginia Code § 61-8A-4 is sufficiently broad to incorporate the human body into the definition of "matter" when the same is used with the intent to seduce a minor. The State cites to the definition of "matter" in that article as including a live performance or any exhibition performed before an audience of one or more in support of the argument that petitioner was appropriately charged with this crime. Further, the fact that a separate misdemeanor statute exists regarding indecent exposure does not bar the legislature from including the display of the human body engaged in sexually explicit conduct and using sexually explicit language in the statute governing the use of obscene matter with the intent to seduce a minor. This Court agrees, and declines to find error in the circuit court's denial of petitioner's motion to dismiss Count I of the indictment.

"'This Court's standard of review concerning a motion to dismiss an indictment is, generally, *de novo*. However, in addition to the *de novo* standard, where the circuit court conducts an evidentiary hearing upon the motion, this Court's 'clearly erroneous' standard of review is invoked concerning the circuit court's findings of fact.' Syl. Pt. 1, *State v. Grimes*, [226] W.Va. [411], [701] S.E.2d [449] (2009)." Syl. Pt. 2, *State v. Elswick*, 225 W.Va. 285, 693 S.E.2d 38 (2010). Based upon a review of the statute under which petitioner was charged, it is obvious that the display of the human body can constitute obscene matter for the purposes of this crime. As noted above, West Virginia Code § 61-8A-1(h) defines "matter" to include any "live exhibition performed for consideration or before an audience of one or more." Further, as the State argues, the fact that the crime of indecent exposure exists does not preclude the petitioner's conviction for the crime of use of obscene matter with the intent to seduce a minor. This is especially true when the petitioner's intent is taken into consideration. Petitioner's conduct went well beyond the simple display of his sexual organs, which constitutes indecent exposure under West Virginia Code § 61-8-9(a). Based upon the victim's testimony, it is obvious that the petitioner's intent in displaying the obscene material at issue here was to seduce the child. As such, the circuit court did not err in denying petitioner's motion to dismiss Count I of the indictment because petitioner's naked body and his sexual explicit actions and speech constitute obscene matter for the purposes of West Virginia Code § 61-8A-4.

As to petitioner's second assignment of error, he argues that there was simply no evidence to corroborate the victim's testimony in this matter and that the evidence was therefore insufficient to support his conviction. Petitioner argues that the child's version of events changed at various points below, including on the night of the incident, during a later interview, and during his trial testimony. Petitioner argues that the child admitted to being concerned about his niece, who he had visited in the hospital on the night in question, but that the child failed to tell either the responding officer or the West Virginia Department of Health and Human Resources ("DHHR") worker who interviewed him that he had left petitioner's residence to return to the hospital. Petitioner also argues that the child's trial testimony was the first time he ever stated that petitioner said "I hope you don't mind if I sleep naked" on the night of the incident. Petitioner further argues that the child's testimony regarding the removal of his boots is suspect, and also calls into question the child's testimony concerning the fact that he did not leave the residence sooner despite having left the house earlier in the night. In short, petitioner argues that the child lied to improve his story after being confronted about the illogical conduct on his part. Petitioner argues that the evidence manifestly did not support a conviction and that corroboration should have been required.

In response, the State argues that it was the petitioner's version of events that the jury found inherently incredible, in that he argued that a child ran into the winter night without shoes or a jacket, calling for help, and then reported the sordid events to multiple parties and maintained that story for more than two years simply because the petitioner refused to give him a ride to the hospital. The State argues that corroboration was unnecessary to convict petitioner in this matter, and that the jury obviously found the witness credible in reaching its verdict. In response to petitioner's allegations of inconsistencies regarding the child's testimony, the State argues that the slight variations concerning his boots and the fact that he did not tell anyone he previously left the petitioner's

residence are not material. Further, the State argues that the child did not modify his story after being confronted with illogical conduct, as petitioner argues. In contrast, the State argues that the child was incapable of being impeached, and that all the material elements of the two crimes for which petitioner was convicted were met by the child's testimony. Upon review of the evidence presented, the Court agrees.

"'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.' Syllabus Point 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995)." Syl. Pt. 1, *State v. Malfregeot*, 224 W.Va. 264, 685 S.E.2d 237 (2009). Upon review of the testimony below, it is apparent that the evidence was sufficient to support petitioner's convictions for both use of obscene matter with intent to seduce a minor and sexual abuse by a parent, guardian, or custodian. West Virginia Code § 61-8A-4 defines the crime of use of obscene matter with intent to seduce a minor as follows:

> Any adult, having knowledge of the character of the matter, who knows that a person is a minor and distributes, offers to distribute or displays by any means any obscene matter to the minor, and such distribution, offer to distribute, or display is undertaken with the intent or for the purpose of facilitating the sexual seduction or abuse of the minor.

As noted above, the child at issue, who was sixteen at the time of the incident, testified in detail as to petitioner's actions in regard to masturbating in his presence and declaring his intention to have sexual intercourse with the child. Based upon this testimony alone, the evidence was sufficient to support petitioner's conviction for the crime of use of obscene matter with intent to seduce a minor. Further, West Virginia Code § 61-8D-5(a) states, in relevant part, as follows:

> If any . . . custodian of or other person in a position of trust in relation to a child under his or her care, custody or control, shall . . . attempt to engage in sexual exploitation of, or in sexual intercourse, sexual intrusion or sexual contact with, a child under his or her care, custody or control, . . . then . . . custodian or person in a position of trust shall be guilty of a felony.

Again, based solely on the victim's testimony, the elements of the crime of sexual abuse by a parent, guardian, or custodian have clearly been met. A review of the testimony below shows that the petitioner was the only adult present on the evening in question, making him the de facto custodian for the child. Additionally, as outlined above, petitioner clearly attempted to engage in sexual

intercourse with the child. Simply put, petitioner's argument in support of this assignment of error is without merit.

This Court has previously held that "'[a] conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible, the credibility is a question for the jury.' Syl. pt. 5, *State v. Beck*, 167 W.Va. 830, 286 S.E.2d 234 (1981)." Syl. Pt. 1, *State v. Haid*, – W.Va. –, 721 S.E.2d 529 (2011). Based upon this prior holding and our review of the testimony below, it is clear that the child's account of the incident is not inherently incredible. As such, the testimony required no corroboration. We have held that "'[t]he 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). Based upon petitioner's convictions below, it is apparent that the jury judged the victim's testimony as credible in reaching its conclusion. As such, we decline to disturb petitioner's convictions on appeal.

Lastly, petitioner argues that the circuit court erred in allowing photographs of his residence to be introduced into evidence because the photographs were taken just prior to trial in August of 2010, and the alleged crime occurred in December of 2008. According to petitioner, the time elapsed between these events should have precluded their entry into evidence, because the State offered no evidence to authenticate the photographs beyond the testimony of the victim, who petitioner argues lacks credibility. The State argues in response that the admission of photographs is within the circuit court's discretion, and that such photographs are admissible if identified by someone familiar with the scene. The victim identified certain immovable objects as being substantially similar as they were in December of 2008, and he further identified physical locations, such as the door he ran out of and an outbuilding. The State notes that petitioner has not alleged that he was harmed in any way by the introduction of the photographs, and even if the admission was deemed error, it would undoubtedly be harmless error. "'To be admissible, photographs must be offered for some relevant purpose and must have probative value which outweighs any prejudicial effect; however, admission of a photograph is a matter largely within the discretion of a trial court and will not be reversed absent a clear showing of abuse of that discretion.' Syllabus point 3, *State v. Reed*, 166 W.Va. 558, 276 S.E.2d 313 (1979)." Syl. Pt. 3, *State v. Dye*, 171 W.Va. 361, 298 S.E.2d 898 (1982). Upon review of the record, the Court agrees with the State that the photographs were relevant in regard to the victim identifying the scene of the incident, and further the photographs were properly authenticated during his testimony. As such, they were properly admitted, and their admission does not constitute an abuse of discretion. For these reasons, the Court declines to find that an abuse of discretion occurred in regard to this assignment of error.

For the foregoing reasons, we affirm the circuit court's sentencing order.

Affirmed.

ISSUED: April 16, 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