STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 11-0341 (Brooke County 09-F-84 and 10-F-30)

Nick Ryniawec,
Defendant Below, Petitioner

FILED
June 22, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Nick Ryniawec appeals from the Brooke County Circuit Court's "Sentencing Order" dated January 24, 2011, sentencing petitioner to a cumulative penitentiary sentence of not less than 201 nor more than 410 years for his convictions of nineteen counts of sexual abuse by a custodian, one count of first degree sexual abuse, and one count of second degree sexual assault. Petitioner is represented on appeal by his counsel, Edward Lee Gillison Jr. Respondent State of West Virginia is represented by its counsel Laura Young.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, 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.

Petitioner was indicted in two separate cases on multiple sex offenses. In Case No. 09-F-84, petitioner was charged in Count One with first degree sexual abuse involving S.R.N; Count Two with sexual abuse by a custodian involving S.R.N.; Count Three with second degree sexual abuse involving S.R.N.; Count Four with sexual abuse by a custodian involving S.R.N.; Count Five with second degree sexual assault involving J.H.; Counts Six through Ten with sexual abuse by a custodian involving S.R.N.; Counts Eleven through Twenty-Two with sexual abuse by a custodian involving C.M.; and Counts Twenty-Three through Twenty-Seven with sexual abuse by a custodian involving B.M. In a separate indictment in Case No. 10-F-30, petitioner was charged with three counts of sexual abuse by a custodian involving V.N. Each of the victims was a minor stepdaughter of petitioner at the time of the offenses.

J.H., C.M., and B.M. are sisters, and V.N. and S.R.N. are sisters. The trial court initially granted petitioner's motion to sever the counts as between the sets of sisters. In a subsequent order, however, the trial court reversed that decision and noted that its initial decision to grant the severance was made prior to the return of the indictment in Case No. 10-F-30, which charged petitioner with

three offenses of a similar character, and prior to its consideration of the State's evidence under Rule 404(b) of the West Virginia Rules of Evidence.

Following an *in camera* hearing on the 404(b) evidence, the trial court essentially found that all wrongful conduct as to each victim was admissible as intrinsic evidence as to each victim and was admissible to show petitioner's common scheme to abuse children and his lustful disposition toward children. The trial court would not permit any inquiry into sexual relationships that any victim had, as an adult, with any individual, including petitioner, under the Rape Shield Statute and the Rules of Evidence.[1] The trial court did allow petitioner to question V.N. and S.R.N. about false accusations they had made in approximately 1997, against another man.

Petitioner went to trial and testified in his own behalf. The State indicates that petitioner's primary defense was that he was incapable of performing the various acts of fondling and intercourse, or was absent when they occurred, and that each victim had a motive to lie. Each of the victims testified at trial. The mother of victims S.R.N. and V.N., who was petitioner's wife and living in his home at the time of trial, testified at trial that she believed petitioner's denials concerning the abuse of her daughters.

The jury convicted petitioner on all counts presented to it.[2] The trial court vacated the convictions on Counts Two and Three involving V.N. although it had denied petitioner's request for a judgment of acquittal on those counts at the close of the evidence.[3] The trial court noted that petitioner was not prejudiced by those counts going to the jury because the evidence presented on those counts was admissible as evidence of petitioner's lustful disposition towards children.

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[1]Petitioner wanted to question J.H. as to whether she had consensual relationship with him while she was an adult. Petitioner sought to introduce that evidence to show that J.H. allegedly became irate when he broke off his relationship with her due to his relationship with another woman, which was part of J.H.'s motive to fabricate the allegations against him.

[2]Following the close of the State's case, the trial court dismissed Count 4 involving S.R.N., Counts 21 and 22 involving C.M., and Counts 26 and 27 involving B.M. (all in Case No. 09-F-84), and Count 1 involving V.N. (Case No. 10-F-30) upon motions from the State. Count 3 involving S.R.N. was dismissed prior to jury selection.

[3] Petitioner argued that the State had failed to prove sexual exploitation. Those particular counts charged that petitioner enticed V.N. to show him her breasts. The trial court denied the motion for judgment of acquittal made at the close of the evidence, but said that it would revisit the issue after the jury returned its verdict. After the jury returned its verdict finding petitioner guilty on those two counts, the trial court granted petitioner's motion for acquittal on the basis that "breasts" are not defined as sexual organs under the law.

Severance

Petitioner asserts that the trial court erred by failing to grant his motion for severance because a joint trial on all counts in each indictment was so prejudicial that he was denied a fair trial. Petitioner asserts that under Rule 14 of the West Virginia Rules of Criminal Procedure, the trial court had discretion to order separate trials on the basis that joinder or consolidation was prejudicial. Citing *State v. Milburn*, 204 W.Va. 203, 511 S.E.3d 828 (1998), *cert. denied, Milburn v. West Virginia*, 528 U.S. 832 (1999), petitioner acknowledges that a defendant is not entitled to relief from prejudicial joinder under Rule 14 when evidence of each of the crimes charged would be admissible in a separate trial for the other. Here, however, petitioner argues that evidence of the offenses committed against S.R.N. and V.N. would not have been admissible in a separate trial on the offenses committed against B.M., C.M., and J.H. under Rule 404 of the West Virginia Rules of Evidence, as part of a common scheme or plan, or to show that petitioner had a lustful disposition for children. Petitioner contends that the offenses were not reasonably close in time as between the sets of victims since the offenses involving S.R.N. and V.N. occurred in 1998 through 2001, and the offenses involving B.M., C.M., and J.H. occurred in 2009. Petitioner adds that the offenses were not so similar in nature.

"'Even where joinder or consolidation of offenses is proper under the West Virginia Rules of Criminal Procedure, the trial court may order separate trials pursuant to Rule 14(a) on the ground that such joinder or consolidation is prejudicial. The decision to grant a motion for severance pursuant to W.Va.R.Crim.P. 14(a) is a matter within the sound discretion of the trial court. Syl. Pt. 3, *State v. Hatfield*, 181 W.Va. 106, 380 S.E.2d 670 (1988).' Syllabus Point 1, *State v. Ludwick*, 197 W.Va. 70, 475 S.E.2d 70 (1996)." Syl. Pt. 1, *State v. Rash*, 226 W.Va. 35, 697 S.E.2d 71 (2010). Further, "[a] defendant is not entitled to relief from prejudicial joinder pursuant to Rule 14 of the West Virginia Rules of Criminal Procedures when evidence of each of the crimes charged would be admissible in a separate trial for the other." Syl. Pt. 2, *Milburn*, 204 W.Va. 203, 511 S.E.2d 828.

We believe that the evidence of the crimes committed against one set of sisters would have been admissible in a separate trial of the crimes committed against the other set of sisters. The acts were similar in nature and each involved petitioner's lustful disposition toward children. Having considered the parties' arguments and having reviewed the trial court's ruling on this issue with this standard of review in mind, we find that the trial court did not abuse its discretion in denying the severance.

Rule 404(b) Evidence

Petitioner asserts that the trial court erred by allowing the State to present the testimony of each alleged victim concerning the wrongful acts of petitioner toward that victim as extrinsic evidence in all other counts of each indictment to show his common scheme or plan to sexually abuse and assault children and of his lustful disposition toward children. Petitioner asserts that it was arbitrary and irrational to admit this evidence pursuant to Rule 404(b) because the acts involving each set of sisters occurred at least ten years part.

As we have previously stated, "'[a]s a general rule remoteness goes to the weight to be accorded the evidence by the jury, rather than to admissibility.' *State v. Gwinn*, 169 W.Va. at 457, 288 S.E.2d at 535." *Rash*, at 45, 697 S.E.2d at 81. In *Rash*, we further noted, citing *State v. McIntosh*, 207 W.Va. 561, 534 S.E.2d 757 (2000), that the admissibility of prior bad acts evidence must be determined based upon the facts of the particular case and that "no exact limitation of time can be fixed as to when prior acts are too remote to be admissible." *Rash*, at 45, 697 S.E.2d at 81. With respect to the admission of 404(b) evidence, we have stated, as follows:

> The standard of review for a trial court's admission of evidence pursuant to Rule 404(b) involves a three-step analysis. First, we review for clear error the trial court's factual determination that there is sufficient evidence to show the other acts occurred. Second, we review *de novo* whether the trial court correctly found the evidence was admissible for a legitimate purpose. Third, we review for an abuse of discretion the trial court's conclusion that the "other acts" evidence is more probative than prejudicial under Rule 403. (Citations omittted).

State v. McIntosh, 207 W.Va. 561, 568–69, 534 S.E.2d 757, 764–65 (2000) (quoting *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996)). We have further stated that "'a circuit court abuses its discretion in admitting 404(b) evidence only where the court acts in an "arbitrary and irrational" manner.' *State v. McGinnis*, 193 W.Va. at 159, 455 S.E.2d at 528." *Rash*, at 40, 697 S.E.2d at 76.

We have considered the parties' arguments and the appendix record, including the trial court's "Memorandum Order" entered on October 27, 2010, wherein the court found, inter alia, that the 404(b) evidence was admissible. We find that there was no abuse of discretion in the admission of the 404(b) evidence.

Denial of Post-Verdict Motions for Judgment of Acquittal

Petitioner asserts that the trial court erred by failing to grant his post-verdict motions for judgment of acquittal on Count Two concerning S.R.N. and Count Five involving J.H. Petitioner contends that there was insufficient evidence for the jury to find him guilty on those counts beyond a reasonable doubt. Petitioner argues that he was greatly prejudiced because the dates set forth in the indictment differed from the State's evidence at trial. Petitioner argues that he was deprived of his due process right to present a defense and, in turn, was deprived of his right to a fair trial.

The State argues that the trial court correctly denied petitioner's motions for judgment of acquittal. The State asserts that in *State v. Miller*, 195 W.Va. 656, 466 S.E.2d 507 (1995), the Court concluded that time is not an element of the crime of sexual assault and that the alleged variances did not alter the substance of the charges, notwithstanding the defendant's argument that the lack of specificity in the dates of the offenses prevented him from proffering an alibi defense. The State argues that here, as in *Miller*, time was not of the essence in either the second degree sexual assault of J.H. or the sexual abuse by a custodian involving S.R.N.

Petitioner next asserts that the trial court erred by failing to grant his post-verdict motion for judgment of acquittal on Count One that charged first degree sexual abuse for touching the breasts of S.R.N. without her consent as a result of forcible compulsion. Petitioner asserts that there was insufficient evidence at trial pertaining to the element of forcible compulsion. Petitioner asserts that there was no testimony that S.R.N. showed any "earnest resistence" to the acts, or that she was "struck dumb with fear," or that she uttered a plea for help. *See*, Syl. Pt. 1, *State v. Hartshorn*, 175 W.Va. 274, 332 S.E.2d 574 (1985) ("[w]here evidence conclusively establishes that the victim of a sexual assault offered no resistence to his attacker, was neither struck dumb with fear during the assault, nor attempted to utter any plea for assistance, no 'earnest resistence' to 'forcible compulsion' exists under W.Va. Code § 61-8B-1(1)(a) [1976].")

The State responds that there was sufficient evidence for the jury to conclude that petitioner used forcible compulsion again S.R.N. The State asserts that the trial testimony showed that S.R.N. was a teenager alone in the home with an older and larger assailant, who used physical force to keep her from moving away and continued to hold her while he fondled her. The State notes that S.R.N. testified that she "couldn't move" and that she was "frozen" from which the jury could fairly infer that she was frozen in fear. The State also asserts that because S.R.N. was alone with petitioner at the time, there was no one upon whom she could have called for help.

The Court applies a de novo standard of review to the denial of a motion for judgment of acquittal based upon the sufficiency of the evidence. *State v. LaRock*, 196 W.Va. 294, 304, 470 S.E.2d 613, 623 (1996). As this Court has further explained:

> "The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." Syl. Pt. 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Syl. Pt. 1, *State v. Juntilla*, 227 W.Va. 492, 711 S.E.2d 562 (2011). We have also stated that

> "[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).

Syl. Pt. 2, *State v. McFarland*, 228 W.Va. 492, 721 S.E.2d 62 (2011). Having applied these standards to our review of the evidence adduced at trial, as set forth in the appendix record, and having considered the parties' arguments, the Court concludes that the trial court did not err in denying petitioner's motion for judgment of acquittal on these charges under the facts and circumstances of the case.

Denial of Acquittal at Close of Evidence

Petitioner asserts that the trial court erred by denying his motion for judgment of acquittal at the close of all the evidence as to Counts Two and Three involving V.N. (Case No. 10-F-30).[4] Petitioner asserts that the acts against V.N. did not constitute a crime. The trial court subsequently granted this motion post-verdict. Although the trial court found that he was not prejudiced because the evidence would have been admissible as 404(b) evidence, petitioner argues that it was prejudicial because V.N. was an additional, alleged victim, because he was not given the protections of a proper limiting instruction, and because there was no on-the-record determination that the evidence of the acts against V.N. was relevant and that its probative value substantially outweighed its potential for unfair prejudice.

The State responds that petitioner was not prejudiced; that the evidence of the sexual exploitation of V.N. was properly admitted as intrinsic evidence as to petitioner's conduct involving V.N. and as 404(b) evidence concerning the counts involving the other victims; and that any harm to petitioner was remedied by the post-verdict acquittals. We agree. We find that even if the V.N. evidence had not been presented at trial, there was more than sufficient evidence for the jury to find petitioner guilty of the crimes against the other victims.

Rape Shield Statute

Petitioner asserts that the trial court deprived him of his due process right to present his defense by not allowing him to cross-examine victim J.H. concerning whether she had a consensual sexual relationship with him for money when she was an adult, that she became mad when he ended the relationship, and that this gave her motive to fabricate the instant allegations. The trial court ruled that petitioner would not be allowed to cross-examine J.H. on this issue because of the rape shield statute, West Virginia Code §61-8B-11. Petitioner contends that this evidence was admissible under Rule 404(a)(3) of the West Virginia Rules of Evidence as it was necessary to prevent manifest injustice.

The State responds that the trial court did not err in this regard because such evidence is inadmissible under the rape shield statute in any prosecution where the victim's lack of consent is

[4]Count one involving V.N. in Case No. 10-F-30 was dismissed on the State's motion at the close of the State's case.

based upon incapacity because of age. The State notes that petitioner was charged with sexual abuse by a custodian under West Virginia Code §61-8D-5 where consent or the lack thereof is not an element of the offense because the conduct is a crime even if the child willingly participates in and consents to the behavior. The State adds that because the alleged consensual sexual relationship for money occurred after the events alleged in the indictment, the evidence was irrelevant on the issue of consent. The State asserts that its interest in excluding this evidence outweighed its marginal relevance to petitioner's theory, and that whether the victim had a consensual sexual relationship for money with petitioner as an adult is irrelevant to whether he committed the crimes against her as charged in the indictment.

"'Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion[.]' Syllabus Point 2, *State v. Peyatt*, 173 W.Va. 317, 315 S.E.2d 574 (1983)." Syl. Pt. 4, *State v. Biehl*, 224 W.Va. 584, 687 S.E.2d 367 (2009). We have further stated that

> [t]he test used to determine whether a trial court's exclusion of proffered evidence under our rape shield law violated a defendant's due process right to a fair trial is (1) whether that testimony was relevant; (2) whether the probative value of the evidence outweighed its prejudicial effect; and (3) whether the State's compelling interests in excluding the evidence outweighed the defendant's right to present relevant evidence supportive of his or her defense. Under this test, we will reverse a trial court's ruling only if there has been a clear abuse of discretion.

Syl. Pt. 6, *State v. Guthrie*, 205 W. Va. 326, 518 S.E.2d 83 (1999). Although petitioner contends that the trial court did not give him the opportunity to make an offer of proof, we cannot find in the appendix record where petitioner asked to make such an offer.

While petitioner did not proffer evidence on this issue, the Court understands the general nature of the testimony that he hoped to elicit from J.H. on cross-examination. Having reviewed the hearing transcript on this issue and having considered the parties' arguments, the Court cannot find that the trial court abused its discretion in excluding this evidence under the facts and circumstances of this case.

Prosecutorial Remarks

Petitioner asserts that plain error was committed when the trial court failed to order a mistrial after the prosecutor made several improper remarks during closing argument and the court failed to sua sponte instruct the jury to disregard the prosecutor's statements, all of which denied him his right to a fair trial. Petitioner states that the prosecutor's remarks were misleading, prejudicial, and unsupported by the testimony at trial. Petitioner states that during closing arguments, the prosecutor improperly discussed a charge that had been dismissed on the State's motion at the close of all of the evidence. Petitioner concedes that the trial court interrupted the prosecutor and instructed the jury that it should not consider the prosecutor's argument about the charge that had been dismissed.

Petitioner also asserts, inter alia, that the prosecutor wrongfully referred to him as having admitted to the sexual assault of victim J.H.

Petitioner further asserts that the prosecutor attempted to bolster the credibility of the State's only corroborating witness to support the charges concerning victim J.H. During closing argument, the prosecutor commented that this witness had no possible motive or reason to lie. Petitioner asserts that it was improper for the prosecutor to give his personal opinion concerning the credibility of this witness and that the trial court erred by not sua sponte instructing the jury to disregard the comment.

The State responds that petitioner did not raise any objection at trial to the prosecutor's closing argument. The State asserts that the prosecutor could properly argue the evidence on the dismissed charge because it related to petitioner's guilt as to the remaining counts involving that victim, which were still pending at the time, and was evidence to show his lustful disposition toward his stepdaughters. The State also asserts that it was fair argument for the prosecutor to compare and contrast witness testimony and to note who does and does not have a motive to fabricate. The State adds that petitioner did answer in the affirmative that he had sexually assaulted J.H., although his counsel acted quickly to have him disavow his answer. The State argues that in the context of the entire closing argument, these isolated remarks had little, if any, tendency to mislead the jury and prejudice petitioner and that the strength of the competent proof against petitioner was overwhelming. The State adds that in the event the remarks are deemed to be error, they do not rise to the level of plain error as they did not substantially affect the fairness, integrity, and reputation of the judicial proceedings, and there was no miscarriage of justice.

Because there was no objection at trial, petitioner must prove that the comments constituted plain error. "To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. Pt. 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995). We have further stated that

> [f]our factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.

Syl. Pt. 6, *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995). Upon a review of this matter, we do not find plain error. Even assuming that the prosecutor's comments were improper, given the other evidence at trial, the remarks did not affect petitioner's substantial rights or seriously affect the fairness, integrity, or public reputation of the proceedings. Further, absent the remarks, we believe that the evidence at trial was sufficient to convict.

Cumulative Error

Petitioner asserts that the cumulative error doctrine should be invoked and his convictions reversed given the numerous errors committed below which denied him due process of law. The State responds that none of the errors alleged by petitioner require a reversal, either alone or in combination; that petitioner received a fair trial; and that his convictions should be upheld.

Based upon our review, we find no error in relation to petitioner's various assignments of error. As such, we decline to find that the cumulative error doctrine applies to this matter.

Conclusion

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: June 22, 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