STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 11-1120 (Fayette County 11-F-48)

Charles K. Stone,
Defendant Below, Petitioner

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

MEMORANDUM DECISION

Petitioner, Charles K. Stone, by counsel, Wayne King, appeals the Circuit Court of Fayette County's order that denied his motion to set aside the verdict and to award a new trial or judgment of acquittal, and his "Sentencing and Commitment Order" for his convictions of conspiracy, daytime burglary, and robbery in the second degree. Both orders were entered on June 28, 2011. Respondent, the State of West Virginia, by counsel, Jacob Morgenstern, filed a summary response.

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.

On November 13, 2010, petitioner Charles Stone, along with James A. Scott Jr. and Erica D. Carr, conspired to steal money from James Myers, an eighty-one-year-old man in poor health who lived alone in a trailer in Smithers, West Virginia. At about 5:00 a.m. that morning, Ms. Carr called the victim on the phone and pretended to be a Fayette County police dispatcher. She told the victim that there had been a disturbance near his residence, that police officers were en route, that he should stay on the phone with her, and open the door when the officers arrived. When the victim opened his door to admit the "officers," petitioner and Mr. Scott rushed into the victim's trailer, knocked the victim to the floor, and yelled at him. Petitioner and Mr. Scott were wearing dark clothes, hoods, and gloves and had handkerchiefs over their faces. Petitioner and Mr. Scott removed items from the victim's trailer and then rejoined Ms. Carr. Petitioner, Mr. Scott, and Ms. Carr were later arrested for the crime.

Petitioner was indicted on five counts: conspiracy, daytime burglary, robbery in the second degree, petit larceny, and impersonation of a law enforcement officer. Petitioner's case initially came on for trial on March 15, 2011, but the circuit court was forced to declare a mistrial when a juror suffered a stroke. Before a second trial could be scheduled, the victim died without having given any sworn testimony about the crime. However, the victim had given a statement to

the police before his death that was reduced to writing and made part of the police record. Petitioner's second trial began on May 12, 2011.

The State presented three witnesses at trial: Ms. Carr, Mr. Scott, and Police Officer Richard M. Brown. Ms. Carr testified (1) that as she listened on the phone, she heard petitioner tell the victim to "sit the f--k down;" (2) that, after the crime, petitioner told her that he had "pushed the old f--ker down and watched him," and then had gone through some drawers in the trailer's kitchen while Mr. Scott got money and pills from the bedroom; (3) that, after petitioner and Mr. Scott had committed the crime, they returned with about $150, a bottle of Darvocet, and two blank checks; and (4) that all three used the money to buy crack cocaine which they shared. Mr. Scott corroborated Ms. Carr's testimony and added that both he and petitioner had been in the victim's trailer and participated in the robbery. Police Officer Brown testified to the victim's poor health and meager living conditions.

On four separate occasions during the trial, petitioner asked the circuit court to admit the victim's statement to the police. On two of those occasions, petitioner argued that the victim's statement fell within the hearsay exceptions found in Rule 803(6), the business record exception, and Rule 803(8), the public record or report exception of the West Virginia Rules of Evidence. On all four occasions, the circuit court sustained the State's hearsay objections.

Prior to submitting the case to the jury, the State dismissed the petit larceny charge. The jury found petitioner guilty on the remaining four counts.

Petitioner now appeals the Circuit Court of Fayette County's orders that denied his post-trial motions and sentenced him to not less than one nor more than five years in prison for conspiracy; not less than one nor more than ten years in prison for daytime burglary, not less than five nor more than eighteen years in prison for robbery in the second degree; and a fine of $100 for the impersonation of a law enforcement officer. The sentences for conspiracy and daytime burglary were ordered to be served consecutively. The sentences for conspiracy and burglary were ordered to run concurrently with petitioner's sentence for robbery in the second degree.

FAILURE TO ADMIT VICTIM'S STATEMENT TO THE POLICE

Petitioner's first assignment of error is that the circuit court erred in denying his motion to admit the deceased victim's statement to the police. Petitioner argues that the victim's statement proves that Ms. Carr's testimony was inconsistent with Mr. Scott's testimony. Ms. Carr testified that petitioner, who is Caucasian, told her that he had remained in the living room with the victim while Mr. Scott, who is African American, searched the victim's bedroom. The victim's statement to the police, that the man who stayed with him in the living room was "white," thus comported with Ms. Carr's testimony. Conversely, Mr. Scott testified that he had stayed in the living room with the victim while petitioner went into the trailer's bedroom to steal the victim's money and checks. Petitioner argues that without the victim's statement, he was unable to effectively cross-examine Ms. Carr and Mr. Scott or to impeach their testimony. Thus, he claims that he was denied his right to confront witnesses against him pursuant to the Sixth Amendment of the United States Constitution and Section 14, Article III of the West Virginia

Constitution. Petitioner does not address whether the victim's statement is hearsay, but argues that it should have been admitted because the victim was unavailable for trial, the State had access to the statement, and the statement was taken by agents of the State.

In Syllabus Point 1, of *State v. Shrewsbury*, 213 W.Va. 327, 582 S.E.2d 774 (2003), the Court set forth its standard of review of evidentiary questions.

> "'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.' *State v. Louk*, 171 W.Va. 639, [643,] 301 S.E.2d 596, 599 (1983)." Syl. Pt. 2, *State v. Peyatt*, 173 W.Va. 317, 315 S.E.3d 574 (1983).

Rule 801(c) of the Rules of Evidence, defines "'[h]earsay' [as] a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Because petitioner wanted to use the victim's statement to prove that a "white" man stayed with the victim during the robbery, the victim's statement is clearly hearsay, and as such, was inadmissible. Furthermore, because the statement was inadmissible hearsay, the circuit court did not violate petitioner's right to confront witnesses against him by denying its admission.

Petitioner's second assignment of error is that the circuit court should have admitted the victim's statement under the hearsay exceptions found within Rule 803(6), Rule 803(8), or the catchall provision of Rule 803(24). Petitioner however fails to state the elements contained within these rules and fails to argue how the victim's statement to the police comports with the rules. Accordingly, we find that the circuit court did not abuse its discretion in finding that the victim's statement was not admissible under Rules 803(6), (8) or (24).

DENIAL OF MOTION FOR A JUDGMENT OF ACQUITTAL

Petitioner's third assignment of error is that the circuit court erred in denying petitioner's motion for a judgment of acquittal because the State did not prove that petitioner committed robbery in the second degree. Specifically, petitioner argues that the State did not prove that petitioner placed the victim "in fear of bodily injury." At trial, the circuit court denied petitioner's motion because, based on the evidence, the jury could reasonably find that the victim was "in fear of bodily injury" during the robbery.

To sustain a conviction for robbery in the second degree, West Virginia Code § 61-2-12(b), the State must prove the following (with emphasis added):

> Any person who commits or attempts to commit robbery by placing the victim in *fear of bodily injury* by means other than those set forth in subsection (a) of this section or any person who commits or attempts to commit robbery by the use of any means designed to temporarily disable the victim…is guilty of robbery in the second degree and, upon conviction thereof, shall be confined in a correctional facility for not less than five years nor more than eighteen years.

In Syllabus Point 3 of *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995), the Court held, in part, as follows:

> 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.

After careful examination of the record on appeal, we find – in the light most favorable to the prosecution – that Ms. Carr and Mr. Scott's testimony regarding petitioner's behavior on the night of the crime satisfied each element for a conviction of robbery in the second degree. As a result, the circuit court did not err in denying petitioner's motion for a judgment of acquittal on the charge of robbery in the second degree.

Petitioner's fourth and final assignment of error is that neither Ms. Carr nor Mr. Scott testified that petitioner had committed a crime. As noted above, viewed in the light most favorable to the prosecution, the evidence in the record on appeal was more than sufficient to show that petitioner had committed the crimes of which he was convicted.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: November 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