IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2002 Term

FILED
June 27, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 30030

RELEASED
June 28, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee

v.

BETHEL HATCHER,
Defendant Below, Appellant

Appeal from the Circuit Court of Summers County
Honorable Robert A. Irons, Judge
Criminal Action No. 98-F-63

REVERSED AND REMANDED

Submitted: April 3, 2002
Filed: June 27, 2002

Darrell V. McGraw, Jr.
Attorney General
Allen H. Loughry, II
Senior Assistant Attorney General
Charleston, West Virginia
Attorneys for Appellee

Jeffry A. Pritt, Esq.
Union, West Virginia
Patrick I. Via, Esq.
Law Office of Jesse O. Guills, Jr.
Lewisburg, West Virginia
Attorneys for Appellant

The Opinion of the Court was delivered PER CURIAM.

JUSTICE MAYNARD dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. "'A motion to set aside a verdict and grant a new trial on the ground that a juror subject to challenge for cause was a member of the jury which returned it, must be supported by proof that the juror was disqualified, that movant was diligent in his efforts to ascertain the disqualification and that prejudice or injustice resulted from the fact that said juror participated in finding and returning the verdict. Such facts must be established by proof submitted to the court in support of the motion, and not from evidence adduced before the jury upon the trial.' Syl., *Watkins v. Baltimore and Ohio Railroad Company et al*., 130 W.Va. 268 [43 S.E.2d 219] (1947)." Syllabus Point 2, *State v. Dean*, 134 W.Va. 257, 58 S.E.2d 860 (1950).

2. "Although premeditation and deliberation are not measured by any particular period of time, there must be some period between the formation of the intent to kill and the actual killing, which indicates the killing is by prior calculation and design. This means there must be an opportunity for some reflection on the intention to kill after it is formed." Syllabus Point 5, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

3. "In criminal cases where the State seeks a conviction of first degree murder based on premeditation and deliberation, a trial court should instruct the jury that murder in the first degree consists of an intentional, deliberate, and premeditated killing which means that the killing is done after a period of time for prior consideration. The duration of that period cannot be arbitrarily fixed. The time in which to form a deliberate and premeditated design varies as the minds and temperaments of people differ and according to the circumstances in

which they may be placed. Any interval of time between the forming of the intent to kill and the execution of that intent, which is of sufficient duration for the accused to be fully conscious of what he intended, is sufficient to support a conviction for first degree murder. To the extent that *State v. Schrader*, 172 W.Va. 1, 302 S.E.2d 70, (1982), is inconsistent with our holding today, it is expressly overruled." Syllabus Point 6, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Per Curiam:

We reverse this case based on the appellant being denied a fair trial because of a juror's failure to respond fully and honestly to questions propounded on *voir dire*, and the trial court's failure to provide a proper curative instruction following a misstatement of the law by the prosecuting attorney in the closing argument.

I.

The appellant Bethel Hatcher was convicted of first degree murder on February 2, 2000, in the Circuit Court of Summers County. The jury recommended mercy. Specifically, the appellant was convicted of murdering Phyllis Rogers, with whom he had lived and who disappeared in late 1992. Her remains were discovered in 1994; the appellant was arrested and charged with her murder in 1998.[1]

The evidence against the appellant was a mixture of circumstantial and forensic evidence and alleged inculpatory statements to third parties by the appellant. Taken together, the evidence was certainly sufficient to support a conviction; but the evidence was also strongly controverted at trial. One of the third parties to whom the defendant allegedly made inculpatory statements was a person who was in jail with the appellant; another was a former girlfriend who admitted to drug use. The forensic evidence against the appellant was

[1]The appellant has raised pre-indictment delay as error; we find this assignment to be without merit.

challenged by the defense in part on the grounds that early investigation of the victim's disappearance did not discover the evidence.

In short, the defendant's challenge to the prosecution's case was substantial, and the jury could have found that the evidentiary challenge raised a reasonable doubt as to the defendant's guilt. It is in this context that we discuss two of the appellant's assignments of error.

II.

The basis for the first assignment is the fact that one of the jurors who convicted the appellant did not disclose in *voir dire* that the juror's mother had been murdered in a domestic violence situation, and further did not disclose that one of the State's witnesses against the appellant was the same police officer who had investigated the juror's mother's murder. The appellant learned of these circumstances after his conviction and raised them in a motion for a new trial, which the court denied.

This juror was asked during *voir dire*, along with the other members of the prospective jury panel, if he "ever had a friend or family member who has been a victim of a crime of violence?" Although three other potential jurors disclosed that relatives had been the victims of domestic violence or murder, the juror in question said nothing. This juror later also disclosed that he knew the police officer in question who was listed as a possible State witness, but when asked how, the juror simply said that the police officer was a life-long neighbor and acquaintance. The juror made no mention of the police officer's role in

investigating the juror's mother's death.

It may be conceivable that the juror in question did not understand the direct question about family members being the victims of violence, even after other jurors spoke up with answers. It may also be conceivable that the juror simply forgot to mention the police officer's role in investigating his mother's murder. But the weight of the evidence in the record strongly suggests that the juror failed to honestly disclose circumstances that might cause the juror to be disqualified; or at the least that would give rise to further inquiry by defense counsel, and perhaps a peremptory strike from the jury panel.

In Syllabus Point 2 of *State v. Dean*, 134 W.Va. 257, 58 S.E.2d 860 (1950), this Court stated:

> "A motion to set aside a verdict and grant a new trial on the ground that a juror subject to challenge for cause was a member of the jury which returned it, must be supported by proof that the juror was disqualified, that movant was diligent in his efforts to ascertain the disqualification and that prejudice or injustice resulted from the fact that said juror participated in finding and returning the verdict. Such facts must be established by proof submitted to the court in support of the motion, and not from evidence adduced before the jury upon the trial." Syl., *Watkins v. Baltimore and Ohio Railroad Company et al*., 130 W.Va. 268 [43 S.E.2d 219] (1947).

Based on this syllabus point,[2] we conclude that in the instant case the presence

[2]In the instant case, the juror's association with the investigating police officer in connection with a similar crime of violence against the juror's family member was a condition that would ordinarily be disqualifying. The appellant's counsel was diligent in seeking to ascertain facts that would support the disqualification, and we feel that prejudice could be concluded from the presence of a juror with such a background. This could especially be true with a juror who had not been questioned about the effects of their background on their ability

on the jury of a juror who for whatever reason failed to disclose highly important and potentially disqualifying information despite a direct inquiry about that information denied the defendant a fair trial.

The appellant also assigns as error certain remarks of the prosecutor in the prosecutor's closing argument. The prosecutor argued to the jury in closing that "premeditation can be formed in an instant," going so far as to put this phrase on a slide that was projected on a screen to the jury during closing argument. Defense counsel promptly objected to this argument. The circuit court told the jury that the prosecutor was merely stating what the prosecutor thought the law was, and the jury was not bound by that statement, but by the law as the judge had charged the jury. The judge pointed out that the jury would have a copy of the charge in the jury room. The judge did not instruct the jury as to what the correct law was.

The prosecutor then resumed his argument, and told the jury that the court's written instructions did in fact say that premeditation could be formed in an instant. This statement was erroneous. The court's instructions, in fact, the parties agree, tracked this Court's decision in *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995), where we held in Syllabus Points 5 and 6:

> 5. Although premeditation and deliberation are not measured by any particular period of time, there must be some period between the formation of the intent to kill and the actual killing, which

---

to decide the case fairly, and who had not revealed the disqualifying information. This met the *State v. Dean* test.

> indicates the killing is by prior calculation and design. This means there must be an opportunity for some reflection on the intention to kill after it is formed.
>
> 6. In criminal cases where the State seeks a conviction of first degree murder based on premeditation and deliberation, a trial court should instruct the jury that murder in the first degree consists of an intentional, deliberate, and premeditated killing which means that the killing is done after a period of time for prior consideration. The duration of that period cannot be arbitrarily fixed. The time in which to form a deliberate and premeditated design varies as the minds and temperaments of people differ and according to the circumstances in which they may be placed. Any interval of time between the forming of the intent to kill and the execution of that intent, which is of sufficient duration for the accused to be fully conscious of what he intended, is sufficient to support a conviction for first degree murder. To the extent that *State v. Schrader*, 172 W.Va. 1, 302 S.E.2d 70, (1982), is inconsistent with our holding today, it is expressly overruled.
>
> We went on in *Guthrie* to say that:
>
> This means there must be an opportunity for some reflection on the intention to kill after it is formed. The accused must kill purposely after contemplating the intent to kill. Although an elaborate plan or scheme to take life is not required, our *Schrader's* notion of *instantaneous* premeditation and momentary deliberation is not satisfactory for proof of first degree murder. . . . To speak of premeditation and deliberation which are *instantaneous*, or which take no appreciable time, is a contradiction in terms. It deprives the statutory requirement of all meaning and destroys the statutory distinction between first and second degree murder.

194 at 657, 461 S.E.2d at 181 (emphasis added).

While it is possible that the circuit court "could have cured the error if the Judge had responded to counsel's objection with a strongly-worded corrective statement," *State v.*

Starr, 158 W.Va. 905, 911, 216 S.E.2d 242, 246 (1975), that did not occur in this case. Rather, the court left it to the jury to decide whether the prosecutor had correctly stated the law, based on the written charge that the jury took to the jury room.

We have never held that the fact that the law is correctly stated in a written charge that the jury takes to the jury room will cure a serious and repeated misstatement of the law by a prosecutor in closing argument. In the instant case, the element of premeditation was not indisputably shown by the State's evidence. The jury could well have relied on the prosecutor's repeated erroneous statements of the law (and the projected message on a screen) in deciding the issue of premeditation. It is likely, therefore, that the defendant was prejudiced by the prosecutor's misstatement of the law. The defendant's counsel properly preserved this error by means of contemporaneous objection and a later motion for a new trial. This assigned error, therefore, in addition to the fact of the juror who did not disclose material and potentially disqualifying evidence in response to direct inquiries, requires the reversal of the appellant's conviction.

The appellant's other assignments of error are either also without merit or moot in light of our ruling herein.

III.

The appellant's conviction is reversed and this case is remanded to the Circuit Court of Summers County.

Reversed and Remanded.