No. 30030 - State of West Virginia v. Bethel Hatcher

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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Maynard, Justice, dissenting:

I believe the circuit court did not commit reversible error during the appellant's first-degree murder trial. Therefore, I respectfully dissent.

Preliminarily, I note that I am troubled by the majority's statement that they considered the appellant's assignments of error in the context of the appellant's "substantial" challenge to the prosecution's case. By this the majority refers to the witness who was in jail with the appellant to whom the appellant made inculpatory remarks; the witness who was a former girlfriend of the appellant and admitted to drug use; and the evidence against the appellant was discovered sometime after the "early investigation." I believe one could interpret the majority's remarks to mean that if the appellant had not "substantially challenged" the prosecution's case, the Court might have reached a different result. Undoubtedly, this Court has invaded the province of the jury and disregarded its own ruling which states that "'[c]redibility determinations are for a jury and not an appellant court.' Syllabus Point 3, in part,

State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995)." Syllabus Point 2, in part, *State v. Vetromile*, No. 29703, May 2, 2002.[1]

The appellant complains that a potential juror failed to "honestly disclose" that his mother had been murdered in a domestic violence dispute eighteen years earlier when the prospective jury panel was asked during voir dire, "Have any of you ever had a friend or family member who has been a victim of a crime of violence?" The majority summarily concludes without much discussion that in this case the failure to disclose constitutes reversible error. I disagree. The majority utterly failed to apply the two-part test enunciated by the United States Supreme Court in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556, 104 S.Ct. 845, 850, 78 L.Ed.2d 663, 671 (1984), which states

> that to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.

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[1]This Court has also consistently held that "'"[w]ith regard to evidence bearing on any material issue, including the credibility of witnesses, the trial judge should not intimate any opinion, as these matters are within the exludsive province of the jury." Syllabus Point 4, in part, *State v. Burton*, 163 W.Va. 40, 254 S.E.2d 129 (1979).' Syllabus point 5, *State v. Harris*, 169 W.Va. 150, 286 S.E.2d 251 (1982)." Syllabus Point 7, *State v. Leep*, No. 30018, June 19, 2002.

The question propounded to the juror is overbroad. The Fourth Circuit's analysis in *United States v. Jones*, 608 F.2d 1004, 1007 (4th Cir. 1979), is apropos:

> It is well established that a trial court may exercise broad discretion in conducting the voir dire of the jury, and particularly in phrasing the questions to be asked. The fact that a juror or his relative has been the victim of some crime, unrelated to the offense being tried, is, we think, only minimally relevant to the question of that juror's impartiality. Indeed, if the mere fact that a juror or his relative had been the victim of some crime unrelated to that being tried constituted grounds for discharge, it would become difficult, if not impossible, to assemble a jury panel. In the instant case, defendant does not suggest that any particular juror was actually subject to an influence adversely affecting his impartiality. As a consequence, it was not an abuse of discretion to refuse to ask the prospective jurors whether they or any of their relatives had been the victims of any crime.

The facts in *Fitzgerald v. Greene*, 150 F.3d 357 (4th Cir. 1998), are similar to the facts in the case *sub judice*. Fitzgerald was on trial for robbery, murder, abduction, and rape. His conviction was affirmed on appeal. He then filed a petition for writ of habeas corpus in the Fourth Circuit contending that James Bradshaw's presence on the jury deprived him of a fair and impartial jury, in part, because Bradshaw failed to disclose during voir dire that his granddaughter had been molested when asked if he or any member of his family had been the victim of a rape, robbery, or abduction. Bradshaw answered no and agreed that he could render a fair verdict. Later, during jury deliberations, Bradshaw disclosed that he had no sympathy for rapists because his granddaughter had been molested. After the verdict was announced, the jury foreman reported the incident to the court. After completing a post-trial hearing during which

the trial court was satisfied that Fitzgerald suffered no prejudice from Bradshaw's presence on the jury, Fitzgerald's motion for a mistrial was denied. The Fourth Circuit denied Fitzgerald's petition. In the case at bar, the prospective juror simply remained silent when asked if any member of his family had been the victim of a crime. He was not asked if any member of his family had been murdered.

Pursuant to Syllabus Point 4 of *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995), in West Virginia "'[t]he true test as to whether a juror is qualified to serve on the panel is whether without bias or prejudice he can render a verdict solely on the evidence under the instructions of the court. (Citation omitted.)' Syllabus Point 4, *State v. Audia*, 171 W.Va. 568, 301 S.E.2d 199 (1983)." Even if the juror in question had disclosed that his mother had been murdered, he could not have been removed for cause absent a showing of bias or prejudice. The trial court was satisfied that none of the jurors who were selected to serve on the panel in the appellant's case were biased or prejudiced. I would defer to the sound discretion of the trial court.

Furthermore, I believe the jury was properly instructed regarding the meaning of "premeditation." The appellant admits that "[t]he jury in this case was instructed consistently with the requirements of *Guthrie*." He, nonetheless, complains because the prosecutor stated during closing arguments that premeditation could be formed in an instant. Upon objection, the judge immediately informed the jury to disregard the prosecutor's

comments and to rely on the legal definitions supplied by the court in the jury instructions. In this instance, the trial court responded in an entirely proper manner.

Because I do not believe there was an abuse of discretion, I respectfully dissent to the majority opinion.