NO. 35303

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Appellee,

v.

WILLIE SHARP,

Appellant.

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

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BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

I.

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

This is an appeal by Willie Sharp (hereinafter "Appellant") from the December 22, 2008, judgment of the Circuit Court of Cabell County (Cummings, J.), which sentenced him to a term of not less than two years nor more than thirty years in the State penitentiary upon his conviction by a jury of one count of delivery of a controlled substance (crack cocaine) in violation of West Virginia Code § 60A-4-401. On appeal, Appellant claims that the circuit court committed various errors, denying him a fair trial.

II.

STATEMENT OF FACTS

This case involves Appellant's selling crack cocaine in the Fairfield area of Huntington to undercover police officers working in the drug unit. On November 2, 2007 Special Agent Tom

Bevins of the Federal Drug Enforcement Agency (DEA) and Sergeant David Castle were driving in the neighborhood, attempting to make undercover narcotics purchases. (Tr., 32-33, Nov. 24, 2008.) Officer Bevins was working on behalf of the federal agency, assisting the Huntington Police in the area of drug enforcement at the time. (*Id.* at 31.) Special Agent Bevins was driving during this undercover operation. (*Id.* at 33.)

During this undercover police operation, Appellant motioned to the officers, and when they pulled over, he told them he did not have any narcotics at this time but could subsequently provide drugs to them. (*Id.* at 33-34.) It was then agreed that Appellant would get in the car with the officers and direct them to an area where he could provide them the narcotics. (*Id.* at 34.) Appellant was dropped off around the 1700-block of Tenth Street, and the police officers came back to the area approximately ten to fifteen minutes later. (*Id.* at 35-36.) When the police officers came back, Sergeant Castle made the hand-to-hand exchange of a rock of crack cocaine with Appellant. (*Id.* at 48.) Special Agent Bevins testified that Sergeant Castle rolled down his window, and Appellant handed him a substantial amount of crack cocaine. (*Id.* at 36.) David Castle explained to Appellant that they were seeking to buy a rock of crack cocaine for $20, so the latter took the rest out of the officer's hand and left him with one rock. Sergeant Castle gave Appellant a marked $20 bill, and the transaction was completed. (*Id.* at 36, 40-41.) During this transaction Sergeant Castle was using a small, concealed camera known as a Hawk to record the entire transaction. (*Id.* at 50-51.)

Officer Paul Hunter of the Huntington Police Department was the security and surveillance support to the undercover officers, viewing the transaction. (*Id.* at 70.) Based on his viewing of the video and an investigation, Officer Hunter was able to identify Appellant as Willie Sharp. (*Id.* at

82.) Paul Hunter obtained the crack cocaine from the transaction from Sergeant Castle and submitted it to the Huntington Police Department evidence locker. (*Id.* at 75.)

Carrie Kirkpatrick, a forensic chemist with the West Virginia State Police Drug Investigation Section, took possession of the substance from the transaction on August 28, 2008. (*Id.* at 118.) She conducted a physical examination and two chemical color tests. (*Id.* at 119.) As a result of these tests, she concluded that the substance was 0.16 grams of cocaine, a schedule-two narcotic. (*Id.*)

On November 25, 2008, the jury convicted Appellant of the felony offense of delivery of a controlled substance.

III.

RESPONSE TO ASSIGNMENTS OF ERROR

Appellants' assignments of error are quoted below, followed by the State's responses:

A. THE STATE DID NOT PRODUCE SUFFICIENT EVIDENCE AT TRIAL TO SUPPORT MR. SHARP'S CONVICTION OF DELIVERY OF A CONTROLLED SUBSTANCE BECAUSE THE STATE FAILED TO PROVE THAT THE PROPER PHYSICAL EVIDENCE WAS SUBMITTED TO THE LAB FOR ANALYSIS, AND THE STATE DID NOT PROPERLY REFUTE COUNSEL'S ARGUMENT OR ATTEMPT TO EXPLAIN THE DISCREPANCIES IN ITS OWN WITNESSES' TESTIMONY AND REPORTS. THEREFORE, THE STATE FAILED TO MEET AN ESSENTIAL ELEMENT OF ITS CASE AND MR. SHARP'S CONVICTION CANNOT STAND.

The State's Response:

There was indeed sufficient evidence to convict Appellant of this offense, and he fails to meet this burden to have the conviction overturned.

B. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED MR. SHARP'S MOTION FOR A MISTRIAL BASED ON HUNTER'S INAPPROPRIATE AND UNNECESSARY REFERENCE TO MR. SHARP'S PRIOR CRIMINAL RECORD AND PRIOR INCARCERATIONS, IN THE PRESENCE OF THE JURY.

The State's Response:

There was no abuse of discretion in the circuit court's decision to deny Appellant's motion for mistrial. The reference made was not directly responsive to the State's question, and Appellant's objection was sustained.

IV.

ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE TO CONVICT APPELLANT OF DELIVERY OF A CONTROLLED SUBSTANCE, AND HE FAILS TO MEET THE HEAVY BURDEN TO HAVE THE CONVICTION OVERTURNED ON THIS GROUND.

Appellant contends that there was insufficient evidence to convict him of delivery of a controlled substance because there was a difference in the characterization of the crack cocaine he sold to the undercover officers during the trial. The officers on duty referred to a rock of crack cocaine, whereas a lab chemist for the State Police referred to tan chunks. Appellant still does not overcome the heavy burden to establish that there was insufficient evidence warranting a reversal of his conviction. There was indeed still sufficient evidence for a jury to find guilt beyond a reasonable doubt.

1. The Standard of Review.

> 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).

> "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. Pts. 1 and 2, *State v. Foster*, 221 W. Va. 629, 656 S.E.2d 74 (2007).

2. <u>Appellant Fails to Meet the Heavy Burden to Establish That There Was Insufficient Evidence to Convict Him of the Offense. When the Evidence Is Examined, It Was Sufficient to Convince a Reasonable Person of His Guilt Beyond a Reasonable Doubt.</u>

Appellant's entire argument with respect to insufficiency of evidence is based on an inference on which he attempts to develop a theory that the substance he sold the undercover police officers was not the same as that tested by the crime lab chemist. This whole argument by Appellant comes down to the fact that Special Agent Bevins testified that Sergeant Castle purchased one rock of cocaine from him, David Castle testified regarding a rock of crack cocaine being placed in an evidence baggie and Carrie Kirkpatrick described the substance she analyzed as being tan chunks. (Tr., 41, 55, 120, Nov. 24, 2008.) The entire chain-of-custody procedure was thoroughly detailed through the testimony of all of the State's witnesses.

The fact of the matter is that it is highly plausible that one rock of crack cocaine became chunks during this process. There is nothing cited in the trial where the officers involved in this

undercover transaction described the crack as not being tan. It may be the case that crack cocaine breaks away over time and a solid rock can become a couple chunks. This is merely speculation on Appellant's part where he rests his argument for insufficiency of evidence.

Appellant cannot escape the fact that two undercover police officers engaged in this transaction and witnessed Appellant sell crack cocaine to them. Additionally, the entire transaction was filmed, and the officers all testified to this. Officer Paul Hunter testified that he watched the transaction via video surveillance. In examining all of the evidence presented by the State in the light most favorable to the prosecution, there is no doubt that a reasonable person could be convinced of Appellant's guilt beyond a reasonable doubt. There was sufficient evidence for the jury to convict Appellant of delivering a controlled substance beyond a reasonable doubt when all of the evidence presented is examined in the light most favorable to the prosecution. Appellant fails to overcome this heavy burden.

In light of this, Appellant's argument fails on this ground.

B. THERE WAS NO ABUSE OF DISCRETION IN THE CIRCUIT COURT'S DENIAL OF APPELLANT'S MOTION FOR MISTRIAL UPON A HUNTINGTON POLICE OFFICER'S TESTIMONY REGARDING PRIOR INCARCERATION. APPELLANT OBJECTED TO THIS UNSOLICITED STATEMENT WHICH WAS SUSTAINED.

Appellant incorrectly asserts that the circuit court abused its discretion in its denial of a motion for mistrial when Huntington Police Officer Paul Hunter made reference to Appellant's prior incarceration. However, no abuse occurred. The reference was unsolicited and not directly responsive to the prosecutor's question. The circuit judge sustained Appellant's objection to the statement, and even offered to give a jury instruction to disregard if Appellant so chose.

1. **The Standard of Review.**

> "In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review." Syl. Pt. 3, *State v. Vance*, 207 W.Va. 640, 535 S.E.2d 484 (2000).

Syl. Pt. 2. *State v. Keesecker*, 222 W. Va. 138, 663 S.E.2d 593 (2008).

> "Concerning our standard of review of the circuit court's exclusion of the evidence at issue, we note that '[r]ulings 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. Guthrie, 205 W. Va. 326, 332, 518 S.E.2d 83, 89 (1999), quoting *State v. Louk*, 171 W. Va. 639, 643, 301 S.E.2d 596, 599 (1983), citing Syl. Pt. 2, *State v. Peyatt*, 173 W. Va. 317, 315 S.E.2d 574 (1983).

2. **There Was No Abuse of Discretion in the Circuit Court's Decision to Deny Appellant's Motion for Mistrial. The Reference Made Was Not Directly Responsive to the State's Question, and Appellant's Objection Was Sustained.**

Appellant incorrectly contends that the circuit court abused its discretion in denying his motion for a mistrial based on an improper remark by Huntington Police Officer Paul Hunter which referred to his mug shot and prior incarceration. Appellant is correct that evidence of prior bad acts may not be admitted to establish that a defendant acted in conformity therewith in a case. Regarding this issue, this Court has held the following:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity,

> intent, preparation, plan, knowledge, identity, or absence of mistake or accident. W.Va.R.Evid. 404(b). Syl Pt. 1, *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990).
>
> "In the exercise of discretion to admit or exclude evidence of collateral crimes and charges, the overriding considerations for the trial court are to scrupulously protect the accused in his right to a fair trial while adequately preserving the right of the State to prove evidence which is relevant and legally connected with the charge for which the accused is being tried." Syl. Pt. 16, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Syl. Pts. 1 and 2, *State v. McDaniel*, 211 W.Va. 9, 560 S.E.2d 484 (2001). Additionally, Appellant correctly cites the following holding of this Court on this matter:

> The rationale for the rule announced in [*State v.*] *Thomas* [157 W.Va. 640, 203 S.E.2d 445 (1974)] is that when one is placed on trial for the commission of a particular offense, he is to be convicted, if at all, on evidence of the specific charge against him. The purpose of the rule excluding evidence in a criminal prosecution of collateral offenses is to prevent a conviction for one crime by the use of evidence tending to show that the accused engaged in other legally unconnected criminal acts, and to prevent the inference that because the accused engaged or may have engaged in other crimes previously, he was more liable to commit the crime for which he is being tried.

State v. Harris, 166 W. Va. 72, 76, 272 S.E.2d 471, 474 (1980).

During the trial, the following exchange took place between Officer Hunter and the State:

Prosecutor: And what were you doing on that day [undercover transaction and arrest of Appellant]?

Hunter: My responsibility that day was to act as security surveillance, just in case something went wrong, to be able to respond to the undercover officers attempting to purchase drugs in the Fairfield area.

Prosecutor: And what [*sic*] were the undercover officers?

Hunter: Special Agent Tom Bevins with the Drug Enforcement Administration and also Sergeant Dave Castle with the Huntington Police Department.

***

Prosecutor: And were you able to view a video involving this transaction?

Hunter: Yes.

Prosecutor: And did you— let me rephrase. Based on that information, did you identify the subject in it?

Hunter: Well, Corporal Shane Bills and myself, after the purchase is done, a lot of times we will review the Hawk [video camera utilized to film transaction] to determine who the suspect is. And we were able to look at our photo mug shot, our pictures at headquarters. And Corporal Bills is also— had worked at the jail years ago.

Defense: Objection.

Court: Sustained.

(Tr., 64, 76, Nov. 24, 2008.) In addition to the circuit judge's sustaining Appellant's objection, he also offered to give a cautionary instruction to the jury regarding what the officer said.[1] (*Id.* at 80-81.) In denying Appellant's motion, the circuit judge stated that he did not think the answer in response to the question was directly in relation to it. (*Id.*)

In this exchange, the prosecutor was merely asking Officer Hunter, based on his role in the video surveillance of the transaction, if he could identify Appellant. The same question was asked of all the other police officers involved in this undercover drug transaction. The circuit judge used this reasoning in the denial of the motion for mistrial.

In *State v. Compton*, 167 W. Va. 16, 277 S.E.2d 724 (1981), this Court upheld the denial of a mistrial and held there was no abuse of discretion where a police officer stated that the defendant was spending weekends in jail because the statement was found not to be directly responsive to the prosecutor's question, the State did not pursue a line of questioning regarding it and the answer was

[1]Appellant never raised the issue of the offer of a cautionary instruction to the jury again, and none was given.

in general terms rather than concerning what type of crime for which he was incarcerated. *Id.*, 167 W. Va. at 20, 277 S.E.2d at 727-28. This is exactly what took place in the case at bar.

Similarly, where an officer gave testimony that was not directly responsive to a prosecutor's question and referred to evidence of flight where no hearing was conducted on the matter, this Court upheld the denial of the motion for mistrial on the following grounds:

> The record reflects that the Appellant's presence in the State of Ohio was referenced fleetingly and without accompanying evidence attempting to indicate or insinuate intent to flee this jurisdiction. We decline to apply the plain error doctrine based upon the absence of any indication that this reference affected the Appellant's substantial rights or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. The Appellant's objection to the second reference to the State of Ohio was sustained, and no additional evidence was elicited regarding the Appellant's presence in another state. We find no error in the trial court's ruling in this regard, and we find no violation of the Appellant's due process rights.

State v. Jessie, 2009 WL 062193, *13 (2009).

Appellant cites the holding in *United States v. Reed*, 376 F.2d 226 (7th Cir. 1967), where the Seventh Circuit reversed a conviction due to testimony regarding the defendant's mug shot. However, in this case, the State submitted the mug shot as an exhibit, and various State witnesses testified regarding them. The court of appeals found this practice to be prejudicial and it vitiated his right pf presumption of innocence. *Id.* at 227-28. This is distinguishable from the instant case. Additionally, Appellant cites various other cases from different jurisdictions where convictions were reversed due to mug shots and related testimony. Yet in all of these, it appears that the State actually introduced the evidence as opposed to the fleetingly-referenced, non-responsive answer given by Officer Hunter.

The State does not concede that the circuit court erred. However, if anything, this was harmless error. Regarding harmless error, this Court has held the following:

> "Where improper evidence of a nonconstitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury." Syl. Pt. 2, *State v. Atkins*, 163 W. Va. 502, 261 S.E.2d 55 (1979).

Syl. Pt., *State v. Ferrell*, 184 W. Va. 123, 399 S.E.2d 834 (1990).

With all the testimony in the form of the undercover officers that observed the transaction and the scientific evidence, there was indeed sufficient evidence to convict Appellant when the one isolated statement by Officer Hunter is removed. The fact that this was an isolated statement, Appellant's objection was sustained and the State never drew attention to it again; there was no prejudicial effect on the jury. At worst, this remark should be considered harmless error.

In applying the standards established in *Keesecker*, *supra*, and *Guthrie, supra*, the circuit court did not abuse its discretion and no error occurred regarding its denial of Appellant's motion.

In light of all of this, Appellant's argument fails on this ground.

V.

CONCLUSION

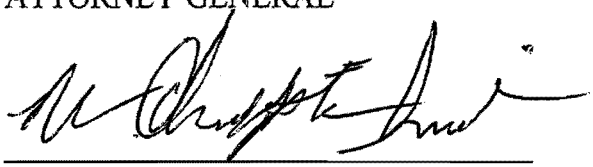
For the foregoing reasons, the judgment of the Circuit Court of Cabell County should be affirmed by this Honorable Court.

Respectfully submitted,

State of West Virginia,
Appellee,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of Appellee, State of West Virginia* was mailed to counsel for the Appellant by depositing it in the United States mail, first-class postage prepaid, on this day of 16th day of April, 2010, addressed as follows:

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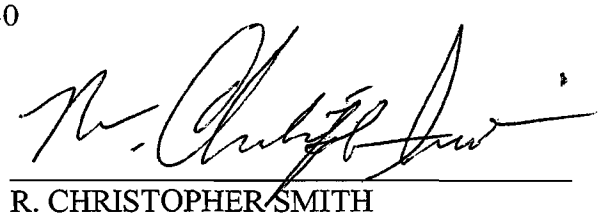

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