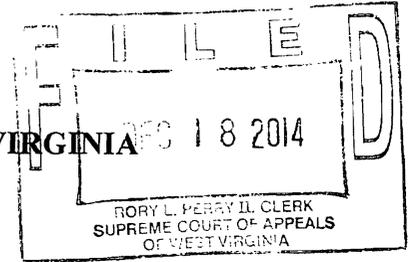


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-00968



RICHARD WAKEFIELD,

Defendant - Appellant

vs.

STATE OF WEST VIRGINIA,

Plaintiff - Appellees

APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

PETITIONER'S BRIEF

**JAMES T. KRATOVIL (W.Va. Bar #2103)
KRATOVIL LAW OFFICES PLLC
211 W. Washington Street
Charles Town, WV 25414
Telephone No. (304) 728-7718
Fax No. (304) 728-7720
Email: kratovil@charlestownlaw.com
Counsel for Appellant**

TABLE OF CONTENTS

TABLE OF AUTHORITIES	3
ASSIGNMENT OF ERROR	5
STATEMENT OF THE CASE	6
SUMMARY OF ARGUMENT	7
STATEMENT OF ORAL ARGUMENT	8
ARGUMENT	9
CONCLUSION	29
CERTIFICATE OF SERVICE	30

TABLE OF AUTHORITIES

CASES	Page
<i>State v. Lockhart</i> 208 W.Va. 622, 542 S.E. 2d 443 (2000)	9, 13
<i>Daubert v. Merrill Don Pharmaceutical, Inc.</i> 509 U.S. 579	13
<i>Wilt v. Buracker</i> , 191 W.Va. 35, 443, S.E. 2d 196 (1993)	14
<i>State v. Haid</i> 228 W.Va. 510 (2011)	16
<i>Barbe v. McBride</i> 521 F. 3d 443 (2008)	16, 17
<i>State v. Sayre</i> , 183 W.Va. 376, 395 S.E. 2d 799 (1990)	19, 20, 21
<i>Blockburger v. United States</i> , 284 U.S. 299, 52. S.Ct. 180 76 L. Ed 306 (1932)	19, 20, 22
<i>State v. Barnes</i> 2013, WL 2300946 (May 2013)	20
<i>Games-Neely v. Silver</i> , 226 W.Va. 11 697 S.E. 2d 47 (2010)	22
<i>State v. Boyd</i> , W.Va. 234, 233 S.E. 2d 710 (1977).	27
<i>State v. Tiller</i> , 168 W.Va. 522, 285 S.E. 2d 371 (1981)	27
<i>State v. Barker</i> , 176 W.Va. 533, 346 S.E. 2d 344 (1986)	27
<i>State v. Smith</i> , 156 W.Va. 385, 193 S.E. 2d 544, 550 (1972)	27
<i>State v. Hicks</i> , 198 W.Va. 656, 482 S.E. 2d 641 (1996)	27
<i>State v. Myers v. Painter</i> , 213 W.Va. 32, 576 S.E. 2d 277	27
<i>Klessner v. Stone</i> , 157 W.Va. 332, 332, 201 S.E. 2d 269, 270 (1973)	27
<i>State v. Allen</i> 193 W.Va. 172, 176, 455 S.E. 2d 545 (1994)	27

STATUTES

<i>W. Va. Code §61-8B-11</i>	17
<i>W. Va. Code §61-8B-5(a)(2)</i>	19, 20
<i>W. Va. Code §61-8B-4(a)(1)</i>	20
<i>W. Va. Code §61-8B-5(a)(1)</i>	20, 21
<i>W. Va. Code §61-8B-4(a)(2)</i>	20, 21
<i>W. Va. Code §61-8B-1(4)</i>	19, 20, 21
<i>W.Va. Code §61-8B-1(5)</i>	21, 22
<i>W.Va. Code §62-3-2</i>	27

OTHER

<i>W. Va. Rules of Evidence 814</i>	15
<i>Rule 2(e) W.Va. Rules of Appellate Procedure</i>	20
<i>Rule 43(a), W.Va. R.Crim. Proc</i>	27

ASSIGNMENT OF ERROR

- A. The Court erred in allowing Trinka Porrata to testify as an Expert Witness on the issue of GHB Intoxication. The Defendant filed a “Daubert” objection to Trinka Porrata's proposed testimony on the issue of GHB intoxication. The science behind her testimony does not meet the “Daubert” standard.**
- B. The Court erred in not allowing the Defendant to introduce evidence or even question the State's witnesses, Billy Carper on what activity, if any, took place immediately prior to the alleged victim going into the house where she was allegedly assaulted.**
- C. The Court erred in allowing the jury to consider second degree sexual and third degree sexual assault based on the evidence.**
- D. That the Court erred in allowing the bailiff to have a conversation with a juror on February 12, 2014 about a potential witness.**

STATEMENT OF THE CASE

This is an appeal from a jury verdict in the Circuit Court of Jefferson County. In this case Richard Wakefield was convicted of two counts of sexual abuse in the second degree, sentence of 10-25 years and two counts of sexual assault in the 3rd degree, sentence of 10-25 years. The sentences of 10-25 were to be served concurrently as were the 1-5 sentences, but the sentences were to be consecutively, in essence an 11-30 year sentence. The Defendant pleads that the trial court made numerous errors that are addressed specifically on the Assignment of Error and argued in the Brief. The Defendant was also sentenced to two years supervised release at the conclusion of his sentence.

SUMMARY OF ARGUMENT

Specifically the Defendant argues that the Court erred in the following specifics:

1. GHB evidence:

a. GHB evidence generally:

The State was allowed to introduce the evidence of GHB intoxication through the testimony of Trinka Porrata, a State witness. While the State admitted that there was no GHB evidence found in the blood of the alleged victim, the State was allowed to hear the evidence of a person who opined that the alleged victim's actions were consistent with GHB intoxication.

b. Trinka Porrata was allowed to testify as an expert on a subject that has not yet been deemed a science as that term is defined in Daubert.

2. Not allowing the Defendant to introduce evidence of the activities of the alleged victim immediately prior to the alleged sexual incident.

3. The Court erred in allowing a second degree sexual assault verdict going to the jury where the Defendant's acts, in a light most favorable to the State, showed that, there were only two sexual acts.

STATEMENT OF ORAL ARGUMENT

Oral argument is necessary in this case as the dispositive issues have not been decided. The briefs and records on appeal do not adequately present the facts and legal arguments. Oral argument would significantly aid the decisional process, and a memorandum decision would not be appropriate.

ASSIGNMENT OF ERROR A

- A. **The Court erred in allowing Trinka Porrata to testify as an Expert Witness on the issue of GHB intoxication. The Defendant filed a “Daubert” objection to Trinka Porrata’s proposed testimony on the issue of GHB intoxication. The science behind her testimony does not meet the “Daubert” standard.**

The standard of review on the admissibility of the expert’s qualifications is the sole discretion of the trial court and will not be reversed unless clearly wrong.

1. GHB Evidence.

a. GHB Evidence Generally:

The standard of review on scientific evidence de novo is State vs. Lockhart 208 W.Va. 622, 542 S.E. 2d 443 (2000).

The State was allowed to introduce evidence that the alleged victim was subject to GHB intoxication probably administered by the Defendant.

The evidence presented at what I will call the Daubert hearing (App 35-101) was occasioned by the notice by the State to use the testimony of Dr. Wendy Adams and Trinka Porrata.

Dr. Wendy Adams, a PHD Chemist, without objection, was allowed to testify as an expert witness (App 45-60) that she had supervised the analysis of the June 11, 2012 sample taken from the alleged victim (App 54). The results of that sample showed in the report issued July 20, 2013 that there was 9.5 micrograms per milliliter of GHB in the subject’s urine (App 55). She opined that the research showed that living people not exposed to GHB were known to have up to 10 micrograms per milliliter (App 55). She finally stated that after 8 hours a administered dose of GHB would be undetectable (App 56).

Q. So if she had an elevated level of GHB in her body twenty hours or at the time that the sample was taken it would be because she had normally high endogenous— is that the way you pronounce it level of GHB?

A. That's one explanation. There are other possibilities.

On cross-examination, Dr. Adams testified that after 20 hours GHB could be tested for but, it would not be detectable (App 57). She went on to say.

Q. Okay. But if we have the twenty hours before as your standard for your hypothetical question the twenty hour rule would be there would be no GHB from the administering twenty hours before, is the correct?

A. I wouldn't expect it to still be detectable, correct.

Q. Okay. And so that other one would merely be a guess and couldn't be applied to a reasonable degree of scientific certainty could there?

A. It would be a guess (App 59).

The State then called Trinka Porrata. Ms. Porrata stated that she had been a Los Angeles Police Officer (App 61). She then went on to tout her own experience with drug familiarity (App 61-69). The substance of this is that she is a self made expert.

Trinka Porrata reviewed the report of Dr. Wendy Adams and agreed that Dr. Adams was correct in her assumption that if a dose of GHB had been administered at 2:00 a.m. and the sample not collected until 10:00 p.m. that day no GHB could be present (App 70). She went on to say that the absence (emphasis added) of other drugs would indicate that this was a case of GHB administering (App 71).

On cross-examination Trinka Porrata admitted that she had no solid articles peer reviewed and that the only two articles she mentioned in her CV were ones where she was their

author and they both were in the European Journal of Emergency Medicine and that they related to 226 GHB associated fatality (App 75-76).

She reluctantly agreed that a well trained police force knows that it is important to take someone who is suspected of GHB intoxication and taken to an emergency room as soon as possible (App 77).

Ironically, Trinka Porrata disagreed with Dr. Wendy Adams and her opinion of the national standard for significance in GHB testing (App 83). Indeed she even disagreed with the relevance of testing done 20 hours after an administering of GHB (App 84).

After the Daubert hearing the Court ruled that the testimony of Dr. Wendy Adams and Trinka Porrata would be allowed at trial over the objection of defense counsel (App 26).

At trial the testimony of Dr. Wendy Adams was offered (App 504-519) as well as Trinka Porrata (App 603-624). Dr. Adams was stipulated as an expert (App 504) and she testified that the maximum time frame to detect on an administered dose of GHB was 10 hours (App 509).

She stated on direct:

Q. Can you draw any conclusion to a reasonable degree of scientific certainty whether GHB was used during the alleged sexual assault in this case?

A. I cannot (App 509).

The State then moved to admit Dr. Adams' report which was objected to be the defense and the defense moved to strike witness's testimony (App 512). The Court in its ruling recognized that this was merely a rehash of the Court's prior ruling that the testimony was admissible (App 514).

On cross-examination Dr. Adams stated that the 10 hour limit had been scientifically confirmed where a large dose of administered GHB could not be detected after 10 hours (App 516). She concluded.

A. The time of the collection will be critical to being able to make a conclusion based on the toxicology finding (App 516).

Trinka Porrata was allowed to testify as an expert witness (App 603-624) over objection of counsel (App 599-600). She in a rambling testimony recanted her experience and stated “[I] have published extensively in non-peer review things because they are on the website Project GHB.” (App 608). She also mentioned the peer review articles on 226 deaths where she was 3rd author (App 604). Interestingly her publication on Project GHB is a website of which she is president (App 569).

She went on to testify, over objection (App 610) that she believes that the alleged victim was the recipient of a drug facilitated sexual assault (App 612). She then goes on to say what the bases of is anecdotal symptoms described by the alleged victim. Incredibly she stated that Dr. Wendy Adams’ report of no findings is significant in that it rules out other drug that are “[m]ost of the more common ones and were likely ones.” (App 622).

On cross-examination Trinka Porrata showed how she had made her living deflecting questions from defense lawyers. She did agree that time was of the essence in getting an alleged victim to the hospital for a date rape kit (App 624). She went on to discuss that it like turning on a tape recording once the tape head does not contact with the tape (App 629).

Upon being challenged by the alleged victim having a recollection of the alleged assault, Trinka Porrata changed her testimony to say pristine memory loss refers to “onset” (App 628).

Apparently you can have “pristine” memory loss then remember something then have “pristine” memory loss again. The only recollection being one that favors the declarant’s position.

Rule 702 of the West Virginia Rules of Evidence govern the admission of the testimony of expert. Where scientific evidence is proffered, a circuit court in its “gatekeeping” role under Daubert v. Merrill Dow Pharmaceutical, Inc. 509 U.S. 579 must determine whether the expert ‘s testimony reflects scientific knowledge and whether the work products amounts to good science. State vs. Lockhart 208 W.Va. 622, 542 S.E. 2d 443 (2000).

In looking at the admissibility of the testimony of an alleged expert in a relatively new field, the court must under Rule 702 initially inquire if the assertion or inference is derived from the scientific method. The court must consider the witnesses' testimony is reliable considering its underlying scientific methodology and reasoning.

That includes an assessment (a) whether the scientific theory and its conclusions have been tested; (b) whether the scientific theory has been subject to peer review; whether the scientific theory’s actual or potential role; (c) whether the scientific theory's to actual or potential role or error has known; and (d) whether the scientific theory is generally accepted in the scientific community.

Essentially the inquiry is whether this is junk science based upon anecdotal evidence or good scientific evidence based upon thoughtful consideration by the scientific community.

In this case, a Los Angeles Police Officer observed a phenomena that was disturbing to her. She decided to look at this during the course of her employment recoding anecdotal data. Upon retirement she thought she had found her second job and constructed a theory using the anecdotal data she acquired at the taxpayers’ expense. She became an expert.

After a review of toxicology report that showed no date rape drugs, no GHB, nothing but normal findings and a review of the preliminary hearing testimony, Trinka Porrata found that the alleged victim was the subject of a non-consensual administering of GHB (App 612).

In fact one universal requirement for the admissibility of scientific evidence is that the evidence must be "reliable and relevant" State v. Lockhart *supra* p.451. The reliability requirement is met only by a finding by the trial court pursuant to Rule 704(a) of the West Virginia Rules of Evidence that the scientific or technical theory which is the basis for the test results is indeed "scientific, technical or specialized." "Scientific" implies a grounding in the methods and procedures of science, while "knowledge" connotes more than a subjective belief and unsupported speculation Lockhart *supra* p. 450.

The testimony of Trinka Porrata bears no relationship to science. There was no testimony or testing of her conclusion, no testimony of peer review except for a 3rd author or 226 deaths, no testimony of the potential role of error and no information on how this theory has been accepted in the scientific community. Wilt v. Buracker 191 W.Va. 35, 443 S.E. 2d 196 (1993) requirements as well as Daubert *supra*.

This highly inflammatory testimony coupled with the Defendant's inability to absolutely deny any contact was what convicted the Defendant.

ASSIGNMENT OF ERROR B

- B. The Court erred in not allowing the Defendant to introduce evidence or even question the State's witness, Billy Carper on what activity, if any, took place immediately prior to the alleged victim going into the house where she was allegedly assaulted.**

During the cross-examination of Billy Carper, fellow drinker, county police officer and owner of the home where the three went, it became obvious that the alleged victim expressed some interest in him. He testified that on their way home from Doc's (a local bar in Charles Town) Billy was in the front seat and the Defendant was driving. On the way home the alleged victim began pulling on Billy's arm to try to get him into the backseat (App 436). He then testified that he was pulled into the backseat with the alleged victim and asked what happened ibid.

At that point the State made its first rape shield objection. The Court correctly ruled that it was not covered by rape shield but rather was a statement of what happened at a time close to the alleged assault (App 440). After some additional discussion on this the Court seemed to rule in the Defendant's favor. The State continued to argue, citing its pretrial motion and the Court's previous ruling on rape shield. The Court in its final ruling (App 451-453) seems to rule in the defense's favor, but then snatched defeat to the Defendant from the jaws of victory. The Court said:

Now Mr. Kratovil and Madam Prosecutor, both of you upon making this ruling, Madam Prosecutor I note the State's objection, but, Mr. Kratovil, that is not a license for you to, depending upon what this witness' response may be to some of these question, to ask inflammatory follow up questions or questions which may attempt to sort or link some kind of comment upon a connection or sort of salacious connection or anything of that nature. I don't think I have to

caution you of that, but I am just saying it to let it be known (App 453).

STANDARD OF REVIEW

The ruling of the trial court in determining what evidence may be revealed at trial is governed by an abuse of discretion standard State v. Haid 228 W.Va. 510 (2011 but *de novo* as it applies to the 6th Amendment Barbe v. McBride 521 F. 3d 443 (2008).

As a result of the court's admonishment, a weak record was made about what happened in the backseat. Carper repeatedly said the alleged victim was rubbing his head, that she was a very happy girl.

She was laughing, giggling, she was pulling at me (App 455-456).

Carper went on to testify that Wakefield got out of the truck, locked the doors and left them in the truck. Carper was asked what happened when he and the alleged victim were locked in the truck. He really didn't answer the question (App 457).

Based upon the court's ruling the Defendant was unable to effectively cross-examine the witness. The obvious follow-up question would be with regard to sexual activity, salacious activity that was prohibited.

It was important to determine, if the bruising identified by the forensic nurse and the slight vaginal tearing (App 529-531) were caused by any activity that took place in the truck. It doesn't take a rocket scientist to conclude that a co-worker that is always playfully slapping you on the head, who pulled you into the backseat of a truck while laughing and giggling could have agreed to additional activity.

The so called Rape Shield Statute is codified in West Virginia Code §61-8B-11. Also the Rape Shield law has been recently clarified by the West Virginia Rules of Evidence 814.

West Virginia Code §61-8B-11 is confusing. It has been the subject of numerous cases that involve the confrontation clause embodied in the 6th Amended to the United States Constitution. Our court has agreed this mechanistic approach to 61-8B-11 is improper in light of 6th amendment consideration. Barbe v. McBride 521 F. 3d 443 (2008).

In this case the alleged victim stated she had no recollection of the acts that took place from the time she left the last bar (she had been to the Vista Lounge, Glory Days, Turf and finally Doc's that evening) until the time she was awakened in the middle of the incident and she threw up (App 579). It therefore became imperative to determine what happened during that period.

By hamstringing Defendant's counsel, the Court denied the confrontation clause rights of the Defendant. The whole theory of a fair trial rests upon the vigorous cross-examination rights of the Defendant. To deny counsel the right to ask Billy Carper if her and the alleged victim had sexual contact in the back of the truck on the way home from Doc's or while locked in the vehicle is tantamount to denying him the rights to a fair trial.

This Court, in recognizing the difficulty some circuit court judges were having in understanding rape shield should include the rape shield rule by enacting Rule 412. The new rule states:

(b) Exceptions

(5) evidence of specific instances of a victim's sexual behavior if offered to prove that someone other than the Defendant was the source of semen, injury of other physical evidence.

In the comment to the rule the Court stated that it was incorporating the element of the federal rule. Specifically the Court added the language from the justification for the federal rule was "to diminish some of the confusion and expand victim protection."

In this case the forensic nurse observed bruising and a small abrasion consistent with recent sexual activity (App 529-531).

2013)(memorandum decision)², this Court also held that a criminal defendant could be convicted and sentenced for two separate and distinct crimes arising from the commission of a single sexual act. In *Barnes, Id.*, the jury found that each of the two sexual acts also involved “forcible compulsion” [2nd degree sexual assault, W.Va. Code § 61-8B-4(a)(1), and that the victim was “mentally defective” [3rd degree sexual assault, W.Va. Code § 61-8B-5(a)(1)]. In each of these case, *Sayre, supra* and *Barnes, Id.*, the respective juries found two separate sets of facts which permitted them to find the defendants guilty of both second degree and third degree sexual assault. In both cases, this Court, applying the *Blockburger* test, held that no double jeopardy had occurred:

[w]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

Syllabus Point 4, *State v. Sayre*, 183 W.Va. 376, 395 S.E. 2d 799 (1990), quoting *Blockburger v. U.S.*, 284 U. S 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

The instant case may be distinguished from both *Sayre* and *Barnes*. In this matter, there was no finding by the jury that forcible compulsion was used. Instead, in contrast to both *Sayre* and *Barnes*, and based upon the testimony of the victim, the jury found on counts one and two, that the victim was “physically helpless” [2nd degree sexual assault, W.Va. Code § 61-8B-4(a)(2)], because she had testified that she could not move or talk (App 552). In additional, based upon the testimony of the State's expert, Trinka Porrata, the jury found on counts three and four that the victim had been given the date rape drug GHB and was, therefore, “mentally

²

Citation of memorandum decisions. Memorandum decisions may be cited in any court or administrative tribunal in this State; provided, however, that the citation must clearly denote that a memorandum decision is being cited. Rule 2(e) W.Va. Rules of Appellate Procedure.

ASSIGNMENT OF ERROR C

C. The Court erred in allowing the jury to consider second degree sexual assault and third degree sexual assault based on the evidence.

The Defendant was indicted in the April, 2013, term of the Jefferson County Grand Jury, on two (2) counts of Sexual Assault in the Second Degree, and two (2) counts of Sexual Assault in the Second Degree, and two (2) counts of Sexual Assault in the Third Degree (trial transcript 2-12-14 pp. 16-18; (App 8, 138-140).

During the course of the trial the victim testified that the Defendant had sexual intercourse with her and also performed oral sex on her (App 549-551). It is from the commission of these two distinct acts that the four-count indictment arose. The victim further testified that she was aware of what was happening at the time, but was unable to move or talk (App 552). The State offered the testimony of an expert witness to support its theory that the victim had been given the date rape drug GHB by the Defendant, prior to the commission of the sexual assaults (App 611-612). Initially, the State indicated to the Circuit Court that its position with respect to the Jury Verdict Form was one of "either-or". In other words, each of the two distinct acts was either second degree sexual assault or third degree sexual assault, but that the Defendant would not be convicted and sentenced for both crimes for each of the two acts (App 680-684). However the State later changed its position, using *State v. Sayre*, 183 W.Va. 376, 395 S.E. 2d 799 (1990), and the *Blockburger*¹ the victim was under sixteen years of age and more than four years younger than the defendant [3rd degree sexual assault, W.Va. Code § 61-8B-5(a)(2)]. In a similar, more recent case, *State v. Barnes*, 2013, WL 2300946 (May

¹ *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L. Ed 306 (1932).

incapacitated” [3rd degree sexual assault, W. Va. Code § 61-8B-5(a)(1)]. The Defendant contends that upon closer inspection, the fact that the victim could not move or talk was caused by and coincident with her “mental incapacitation”, and was not consistent with a finding of, nor did it conform to the definition of, “physically helpless”, as found in the statute. Therefore, the jury should not have been asked to find a separate fact on that issue.

“Mentally incapacitated” as defined as:

“Mentally incapacitated” means that a person is rendered **temporarily** incapable of appraising or controlling his or her conduct as a result of the influence of a **controlled or intoxicating substance administered to that person** without his or her consent or as a result of **any other act committed upon that person** without his or her consent. **[emphasis added]**

W.Va. Code § 61-8B-1(4).

On the other hand, “physically helpless” is defined as:

“Physically helpless” means that a person is **unconscious³** or for any reason is **physically unable to communicate unwillingness to an act.** **[emphasis added]**

W. Va. Code § 61-8B-1(5).

Both of these definitions contain a “catch-all” clause. In the “mentally incapacitated” definition, the “catch-all” clause might be read as follows: “. . . a person is rendered **temporarily incapable. . . Of controlling his or her conduct. . . as a result of any . . .act committed upon that person without his or her consent.**” **[emphasis added]** Certainly, the inability to move or talk, as described by the victim in this matter, comports with the language “incapable of controlling his or her conduct.” Likewise, in the “physically helpless” definition, we find the

3

Because the victim in this matter could recall details about being sexually assaulted, she obviously was not unconscious at the time.

“catch-all” clause, “. . . or for any reason is **physically unable to communicate unwillingness to an act.**” [emphasis added] Certainly, upon casual inspection, that clause would appear to include the victim’s inability to move or talk, as well.

Consider for a moment a situation in which the victim is rendered unconscious by being given a controlled substance by the perpetrator of a sex crime, and then is assaulted sexually. Which of the two definitions above would be applicable to such a scenario, or could both be applied? In both instances, one could easily find that the victim was, “rendered temporarily incapable of. . . controlling his or her conduct. . . as a result of [an]. . . act committed upon that person without his or her consent”, **or** that the victim was, “unconscious or for an reason physically unable to communicate unwillingness to an act.” So then, which definition would be the appropriate one to encompass the particular set of given facts for such a case?

To answer these questions, we must seek guidance from another case recently decided by this Court. In Syllabus Point 2, *State ex rel. Games-Neely v. Silver*. 226 W.Va. 11 697 S.E. 2d 47 (2010), this Court held that:

In ascertaining legislative intent, a court should look initially at the language of the involved statutes and if necessary, the legislative history to determine if the legislature has made a clear expression of its intention to aggregate sentences for related crimes. **If no such clear legislative intent can be discerned, the test set forth in *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L.Ed. 306 (1932), to determine whether each offense requires an element of proof the other does not.** (cite omitted) [emphasis added]

From the above ruling, it appears that the State and Circuit Court both erred by first applying the *Blockburger* analysis to the instant case, before examining the particular facts involved in the light of legislative intent for the definitions of “mentally incapacitated” [W.Va. Code § 61-8B-

1(5)]. The plain language of these definitions provides some essential clues as to the Legislature's intent for how they should be applied.

First, the phrase "rendered **temporarily** incapable" indicates that the limitations imposed upon the victim are temporary, transient or reversible. Secondly, other language found in the definition of "mentally incapacitated" "as a result of the influence of a controlled or intoxicating substance **administered to that person . . . or . . . any other act committed upon that person. . .**", clearly indicates that the victim's incapacitation was imposed upon them by the willful actions of the perpetrator of the sexual assault or by another party who assisted in facilitating the crime. These clarifications regarding the definition for "mentally incapacitated", make it abundantly clear that this definition more closely resembles the facts in the present case. The victim was rendered temporarily incapacitated and was unable to control her conduct, as a result of an act committed by the Defendant - - the administration of GHB.

On the other hand, a close inspection of the language used in the definition of or "is physically unable to communicate unwillingness to an act." No mention is made about the victim's condition either being temporary/reversible or having been imposed upon them by the perpetrator of the sexual act or anyone else, for that matter. Rather, the implication is that of a pre-existing condition. This should lead one to believe that the Legislature intended this definition to apply to situations in which the victim is either in a coma, has had a brain injury, head trauma or a stroke, was born with a brain stem birth defect or has some form of irreversible paralysis—all more permanent rather than temporary conditions. It stands to reason that the Legislature would have intended for a crime committed against such helpless persons to be the more egregious of the two crimes. For that reason, the Legislature crafted this definition, "physically helpless", for sexual assault in the second degree, which carries a penalty of from ten

to twenty-five years, while the “mentally incapacitated” definition more closely and appropriately aligns with sexual assault in the third degree, which carries a penalty of from one to five years.

If we accept the State’s position that the victim in this matter was “physically helpless”, because she **could not move or talk**, then we would be left without anything to support a conviction of the Defendant on third degree sexual assault. The element of “mental incapacitation” could not be sustained, since no other evidence was offered or testimony adduced by the State at trial, which would indicate that the victim was otherwise “rendered temporarily incapable of appraising or controlling her conduct as a result of the influence of a controlled or intoxicating substance administered” by the Defendant, except that the victim was **unable to move or talk**. The State appears to be treating third degree sexual assault in this case as an **enhancement** of second degree sexual assault, similar to the way the statutes for first degree arson and arson resulting in serious bodily injury were found to be related in the *SER Games-Neely* case, (i.e., “Sexual assault in the third degree—physical helplessness induced by administration of controlled/intoxicating substance”). If the Legislature had intended for third degree sexual assault, based upon mental incapacitation, to be an enhancement of second degree sexual assault involving physical helplessness, then the Legislature would have defined “mentally incapacitated” as: a person who is rendered ‘physically helpless’, as a result of the influence of a controlled or intoxicating substance administered to that person without his or her consent or as a result of any other act committed upon that person without his or her consent.” This, however, they did not do. Furthermore, it makes no sense that a criminal defendant could be charged **only** with second degree sexual assault, among sex-related crimes, if he had struck the victim in the head, rendering them unconscious (potentially long-term), whereas that same

criminal defendant could be charged with **both** second degree sexual assault **and** third degree sexual assault if he had rendered the victim temporarily unconscious, by the use of a controlled or intoxicating substance. Certainly, that is not what the Legislature intended.

The Defendant is not saying that charges of both second degree and third degree sexual assault could never arise from a single sexual act. Certainly, *Sayre* and *Barnes* should convince us that is untrue. However, the Defendant does assert that, given the particular facts of his case, and in light of legislative intent, the charges of second degree sexual assault which were brought against him were unfounded. Therefore, it was a violation of double jeopardy principles for the State and the Circuit Court to allow him to be tried, convicted and sentenced on the two counts of second degree sexual assault, while, at the same time, also trying, convicting and sentencing him on two counts of third degree sexual assault.

For the foregoing reasons, the Defendant's convictions should be reversed, and he should be granted a new trial. In the alternative, the Defendant's convictions for second degree sexual assault should be reversed, and his case should be remanded to the Circuit Court for re-sentencing on the third degree sexual assault convictions alone.

ASSIGNMENT OF ERROR D

D. The Court erred in allowing the bailiff to have a conversation with a juror on February 12, 2014 about a potential witness.

On February 12, 2014 the Court was informed by the bailiff that a juror had spoken to him about a potential witness.

THE COURT: The bailiff informed me that one of the jurors informed him that when the last witness was speaking of people, police officers involved in the chain of investigation, Officer Sell's name came up. This juror on our break immediately after that witness, informed the bailiff that she was aware of an Officer Sell because she works at the Sheetz store and an officer by that name apparently comes in the store from time to time.

She apparently indicated to the bailiff she had no independent sort of acquaintance or relationship with hi, but she was aware of an officer by that name who came to the store where she was employed.

I made that known to counsel for both sides. The Prosecutor told me that it wasn't the State's intention to have that officer as a witness.

Does anybody want to further make up the record? Feel free both side. (App 596-597).

While defense counsel did not object at the time it appears that the Court did not follow - proper procedure and thus denied the Defendant his constitutional right under the Confrontation Clause of the United States and West Virginia Constitution.

A criminal “. . . defendant has a right under Article III, Section 14 of the West Virginia Constitution to be present at all critical stages of the criminal proceeding; and when he is not, the State is required to prove, beyond a reasonable doubt that what transpired in this absence was harmless.” Syllabus Point 6, State v. Boyd, W.Va. 234, 233 S.E. 2d 710 (1977). [See: W.Va.

Code §62-3-2 and Rule 43(a), W.Va. R.Crim. Proc.] “A critical stage of a criminal proceeding is where the defendant’s right will be affected.” Syllabus Pint 2, State v. Tiller, 168 W.Va. 522, 285 S.E. 2d 371 (1981). A circuit judge’s communication with a sitting juror is such a “critical stage”, where a criminal defendant is entitled to be present. State v. Barker, 176 W.Va. 533, 346 S.E. 2d 344 (1986) (*per curiam*). [See also: State v. Smith, 156 W.Va. 385, 193 S.E. 2d 544, 550 (1972)]. Communications between other officers of the Court and a sitting juror, outside the presence of a criminal defendant, have likewise been held to be improper, for example: court clerks [See: State v. Hicks, 198 W.Va. 656, 482 S.E. 2d 641 (1996) [*per curiam*] and court bailiffs [See Barker, *supra* at 347; State v. Myers v. Painter, 213 W.Va. 32, 576 S.E. 2d 277 (2002) (*per curiam*).

This Court has been very clear on jury communication.

“As a general rule, all communications between the trial judge and the jury, after the submission of the case, must take place in open court and in the presence of, or after notice to, the parties or their counsel.” Syl. Pt. 1, Klessner v. Stone, 157 W. Va. 332 , 332, 201 S.E. 2d 269, 270 (1973). [T]he proper method of responding to a written jury inquiry during the deliberations period in a criminal case. . . is for the judge to reconvene the jury and to give further instructions, if necessary, in the presence of the defendant and counsel in the courtroom.” State v. Allen, 193 W.Va. 172, 176, 455 S.E. 2d 541, 545 (1994).

The Judge’s effort at curing his error by providing instruction to the jury for future such occurrences was insufficient to correct or cure any error which had already transpired. Although defense counsel did not object to the Defendant’s lack of presence during these off-the-record communications, that should not act as a barrier to the Defendant now raising the issue, since it involves the violation of such a fundamental Constitutional right. Because no official record

exists, from either the Court's Bailiff or the involved juror(s), setting both the exact nature and content of the communications which took place between them, the State cannot now prove that the error which occurred was harmless. For the foregoing reason, the Defendant herein, Richard Wakefield is entitled to have his conviction reversed and to receive a new trial.

Since the jury question was not in the form of a note, the proper procedure would have been to question the juror, bailiff or both to make sure what the problem was and to allow the Defendant to confront all of the evidence against him.

CONCLUSION

Based upon the foregoing the Court should grant Mr. Wakefield a new trial.

Respectfully submitted,

RICHARD WAKEFIELD
Appellant

By Counsel.



James T. Kratovil WV State Bar #2103
KRATOVIL LAW OFFICES PLLC
211 W. Washington Street
Charles Town, WV 25414

CERTIFICATE OF SERVICE

I, James T. Kratovil, Esquire, counsel for defendant, hereby certify that I served the foregoing *Petitioner's Brief* upon the Prosecuting Attorney, by hand delivering a true copy thereof to the below listed address on this the 18th day of December, 2014:

Brandon C. H. Sims
Assistant Prosecuting Attorney
Jefferson County
110 N. George
Charles Town, WV 25414



James T. Kratovil