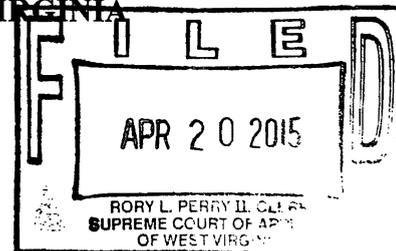


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 15-0037



NICHOLAS VARLAS,

Defendant Below, Petitioner

vs.

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent.

PETITIONER'S BRIEF

(Appeal from Circuit Court of Brooke County Criminal Action No. 13-F-63)

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ASSIGNMENTS OF ERROR

- I. THE TRIAL COURT ERRED BY EXCLUDING TEXT MESSAGES FROM THE ALLEGED VICTIM'S BOYFRIEND EVIDENCING A MOTIVE OF THE ALLEGED VICTIM TO FABRICATE THE SEXUAL ASSAULT ALLEGATIONS AGAINST PETITIONER BASED ON THE RAPE SHIELD LAW.

- II. THE TRIAL COURT ERRED IN ADMITTING THE INVESTIGATING OFFICER'S HEARSAY TESTIMONY IN REGARD TO THE BEHAVIORS OF VICTIMS OF SEXUAL ASSAULT BECAUSE THE INVESTIGATING OFFICER IS NOT A QUALIFIED EXPERT IN REGARD TO RAPE TRAUMA SYNDROME.

STATEMENT OF THE CASE

On August 12, 2012, Nicholas Varlas, the Petitioner herein, held a small social gathering at his home in Follansbee, Brooke County, West Virginia. (A.R. 135-136). Those in attendance at this get-together included the Petitioner and three other individuals- N.S.,¹ Jena Lindsey, and Jeremy Smith. *Id.* N.S. drove her own vehicle to the Petitioner's home for the purpose of meeting the petitioner, after having seen a picture of him wherein she believed he was attractive. (A.R. 173-175).

During the course of the evening and into the following morning, N.S. had engaged in a series of text messages with her then on-again, off-again boyfriend, and father of her child, Travis Shepard. (A.R. 185-187, 446-448). Among the topics of conversation, was Mr. Shepard becoming upset after learning that N.S. was spending time around other men. *Id.* In addition, Mr. Shepard threatened that if N.S. engaged in sexual acts with anyone else, that he would end their relationship. *Id.*

¹ Alleged victim referred to by initials pursuant to W.V Rules of Appellate Procedure 40(e).

At one point during the evening, Ms. Lindsey and Mr. Smith left the Petitioner's residence, leaving the Petitioner and N.S. alone. (A.R. 157). At that time, N.S. went into the living room, where Petitioner was already located, and they watched a pornographic movie together. (A.R. 175, 319). While watching the pornographic movie, they began to kiss each other. (A.R. 160, 340). N.S. and Petitioner then had sexual intercourse. (A.R. 164-165, 340-341). At trial, the State alleged, and N.S. testified, that she did not consent to the sexual intercourse. (A.R. 160-165). Conversely, the Petitioner alleges that while he did engage in sexual intercourse with N.S. on the night in question, that said intercourse was completely consensual. (A.R. 340-341).

Following the sexual intercourse between N.S. and Petitioner, Ms. Lindsey and Mr. Smith returned to the residence, where all four individuals continued to socialize. (A.R. 166). After approximately 20 minutes, N.S., Ms. Lindsey, and Mr. Smith all decided to go home for the evening, at which point N.S. kissed the Petitioner before getting into her car and driving home. (A.R. 166-168, 322-323, 343).

After leaving the Petitioner's residence, N.S. testified that she contacted Mr. Shepard, and reported the alleged sexual assault to him. (A.R. 169-170). Initially, N.S. elected not to contact the police to report the incident. (A.R. 170). However, after Mr. Shepard sent a series of text messages to N.S. pressuring her to file charges and threatening to end their relationship if she did not, N.S. went with Mr. Shepard to report the alleged sexual assault against Petitioner. (A.R. 186-187).

SUMMARY OF THE ARGUMENT

At multiple times and during multiple stages of the trial proceedings, the Petitioner sought to introduce certain text messages sent by N.S.'s on-again, off-again boyfriend and father

of her child, Travis Shepard, to N.S., which were being offered to support the defense's position that the alleged victim fabricated the sexual assault allegations against Petitioner because Mr. Shepard suspected N.S. had been unfaithful and pressured her to file charges so that he would believe her claims of sexual assault and excuse her infidelity in their relationship.

The trial court erred in excluding the text messages from Mr. Shepard pursuant to West Virginia's rape shield law. The text messages evidenced a strong motive for N.S. to fabricate her allegations of sexual assault against the Petitioner. In the text messages, Mr. Shepard, repeatedly threatened N.S. that if she did not prove to him that the sexual activity between Petitioner and N.S. was rape by filing charges against the Petitioner he would "[be] gone for good" and be "done" with her. (A.R. 446, 448). Mr. Shepard also threatened to shame N.S. by informing her parents of her sexual experience with Petitioner if she did not press charges against the Petitioner. (A.R. 447).

The text messages are not within the scope of West Virginia's rape shield law. The trial court's exclusion of this evidence was an erroneous application of West Virginia's rape shield law. Further, even to the extent that such evidence could arguably fall within the scope of the rape shield law, the Court's ruling was an unconstitutional application of the law, in that it violated Petitioner's constitutional right to confrontation and a fair trial.

The trial court also erred in permitting the investigating officer to offer hearsay testimony as to what he learned in training about rape trauma syndrome and thereby impermissibly allowed the jury to infer that N.S.'s conduct was normal under the circumstances. The trial court erroneously recognized the investigating officer as an expert on "rape trauma syndrome," although he was clearly unqualified to testify as an expert in that field and admitted that his training and experience with rape victims was minimal. (A.R. 257-59). The trial court clearly

erred in permitting the investigating officer's testimony regarding the behavior of sexual assault victims, which misled the jury.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner submits that oral argument is necessary in view of the criteria set forth in Rule 18(a) of the West Virginia Rules of Appellate Procedure. Petitioner submits pursuant to Rule 18, that the issues presented in the instant appeal have not been authoritatively decided. In addition, while facts and arguments are significantly and adequately presented in Petitioner's brief, Petitioner believes the decision process would be significantly aided by oral argument.

Petitioner believes that the instant matter would be appropriate for oral argument pursuant to Rule 19 of the Rules of Appellate Procedure in that the matter involves assignments of error in the application of settled law which are also narrow issues of law.

Petitioner further believes the case at bar would also be appropriate for oral argument under Rule 20 of the Rules of Appellate Procedure, in that the appeal presents constitutional questions regarding the rulings of the trial court.

ARGUMENT

I. THE TRIAL COURT ERRED BY EXCLUDING TEXT MESSAGES FROM THE ALLEGED VICTIM'S BOYFRIEND EVIDENCING A MOTIVE OF THE ALLEGED VICTIM TO FABRICATE THE SEXUAL ASSAULT ALLEGATIONS AGAINST PETITIONER BASED ON THE RAPE SHIELD LAW.

Standard of Review

The Court's standard of review when considering a rape shield challenge is twofold. First, an interpretation of the West Virginia Rules of Evidence presents a question of law subject to *de novo* review. Second, a trial court's ruling on the admissibility of testimony is reviewed for

an abuse of discretion, but to the extent the circuit court's ruling turns on an interpretation of a Rule of Evidence, the Court's review is plenary. *State v. Quinn*, 200 W. Va. 432, 435, 490 S.E.2d 34, 37 (1997)(citing *State v. Sutphin*, 195 W.Va. 551, 560, 466 S.E.2d 402, 411 (1995)).

Argument

A. The text messages sent by N.S.'s on-again, off-again boyfriend and father of her child to N.S. after the alleged sexual assault do not fall within the scope of West Virginia's rape shield law.

Prior to the trial in this matter, an *in camera* conference was held where Petitioner's counsel sought to admit evidence of N.S.'s motive to fabricate the sexual assault allegations via text messages sent from N.S.'s on-again, off-again boyfriend and father of her child, Travis Shepard, to N.S. following the alleged sexual assault. (A.R. 62-67). The State objected to the introduction of the text messages based upon West Virginia's rape shield law. (A.R. 63-64). The trial court ruled that the evidence was not admissible, but that the defense could approach the bench to ask for another ruling if he believed the door was opened by the State during trial. (A.R. 66).

During defense counsel's opening argument, the State objected to the following statement by defense counsel and the trial court held a sidebar to again hear argument as to the admissibility of the text messages:

MR. HERSHBERGER: ... You'll also hear about a series of text messages from an on-again-off-again boyfriend of the victim immediately after this, later that night into the morning. You will hear that this gentleman is the father of her child. They're in an on-again-off-again relationship. You will hear that he does not believe her and indicates that he will not –
(Defense Counsel):

MR. BARKI: Objection, Your Honor. Can we approach?
(Prosecutor)

(Response in the affirmative.)

MR. BARKI: First off, I don't know if this man has been subpoenaed to testify, number one. And number two, we touched on the fact that his opinion, whether she was telling the truth or not, is inadmissible in trial. He just opened that door. Whether or not he believes the victim is not an appropriate question (inaudible) –

MR. HERSHBERGER: -- (inaudible) why he did not believe her. He would not believe her until she reported it. That is why he tells her to report it.

THE COURT: As I indicated before, I think it's admissible, but whatever else might come out of your mouth may not be. But that is.

MR. BARKI: It's admissible to ask a witness whether they do or do not believe allegations made by a victim?

THE COURT: No. Did he pressure her to testify or report this incident to the police is admissible.

MR. BARKI: I agree with what you just said. He just said here how this man didn't believe her. That's completely different than where he pressures her. I disagree that that's admissible.

MR. HERSHBERGER: If I can get the exact text message he sent, that message said that I would believe you if your report this. He calls her a vulgar name and says until you report this –

THE COURT: Okay. I don't think that you're permitted to get into all that. You are able to get into the fact of the pressure he applied to her, that I'm going to find admissible evidence.

(A.R. 125-127).

Again, during N.S.'s cross-examination, defense counsel attempted to introduce the text messages from Mr. Shepard in order to question N.S. regarding the messages and her motive to fabricate the sexual assault allegations in an attempt to continue her relationship with Mr. Shepard, who is also the father of N.S.'s child. (A.R. 187). Petitioner's counsel asked to approach the bench to request clarification of the court's earlier rulings and sought to introduce the text messages and cross-examine N.S. as to the amount of pressure Mr. Shepard placed on her. *Id.* The following colloquy took place:

MR. HERSHBERGER: Your Honor, may we approach?

THE COURT: You may.

(WHEREUPON, counsel approached the bench and the following discussion ensued.)

THE COURT: That's white noise.

MR. HERSHBERGER: Your Honor, I wanted to get a clarification that I believe that the text messages from Mr. Shepard are not hearsay, because I'm not going to be offering them for the truth. They'll be offered for why she may have reported it. I believe I should be able to get into the exact substance of those text messages and I wanted to get a ruling on that before we did that.

MR. BARKI: It's not a hearsay exception.

MR. HERSHBERGER: If it's not being – if it's not offered for the truth, it's not hearsay. It's for the impact on listeners –

MR. BARKI: What's not being offered for the truth? The fact that he didn't say that to her?

MR. HERSHBERGER: No. The fact that she is what he's calling her in those text messages.

MR. BARKI: I guess I don't understand your argument.

MR. HERSHBERGER: She answered the question whether she was being pressured –

THE COURT: He wants to go further.

MR. BARKI: Yes. He wants put in specifically that he's calling her a slut and that he's saying things like that in the text message, which is blatantly being done to try to embarrass and to – which is the whole point of this evidence not coming in.

She already answered that he was putting pressure on her. If he wants to follow up and ask a question that she doesn't want to answer – the only reason he did this was because he pressured you, that's one thing. The text messages don't add any light to that.

MR. HERSHBERGER: It goes to the amount of pressure that he was putting on her.

THE COURT: I think that there's already been testimony to the effect that he used foul language when he was putting the pressure on her. I think that's enough.

MR. HERSHBERGER: Okay. Note my objection, please.

THE COURT: Thank you.

(A.R. 187-189).

Following the trial in this matter on September 3-4, 2014, the jury returned a verdict on both counts of the Indictment. The Petitioner was convicted of one count of Sexual Assault in the Second Degree and one count of Attempted Sexual Abuse in the First Degree. (A.R. 384). On September 15, 2014, Petitioner filed a Motion for New Trial pursuant to Rule 33 of the West Virginia Rules of Criminal Procedure on the basis that the trial court erred in not allowing the defense to question the alleged victim about the specifics of the text messages. (A.R. 445-450). The specific text messages from Mr. Shepard² the Petitioner sought to introduce and cross-examine N.S. about are as follows³:

Fr: Chavis Shepard 9/12/2012 7:56:43 AM Read

Good job at whoring around. This just shows me how you really are. If it was rape, you would of already called the cops ..

Fr: Chavis Shepard 8/12/2012 7:54:19 AM Read

First of all, you never should of went there, secondly, you should of hit or bit him if you didn't wanna fuck him, and thirdly, you should have called the cops by now. That's why I don't believe you. That's why I think you fucked him on your own will..

Fr: Chavis Shepard 8/12/2012 7:52:27 AM Read

I'm done until you prove to me that it was rape and not just you fucking him and regretting it, if you go file charges by the time I wake up, then I'll believe you and do everything I can to make you happy, but until then, I'm going with you fucked him .. goodnight.

Fr: Chavis Shepard 8/12/2012 7:51:22 AM Read

I'm done until you prove to me that it was rape and not just you fucking him and regretting, it, if you go file charges by the time I wake up, but until them, I'm going with you fucked him.. goodnight.

Fr: Chavis Shepard 8/12/2012 7:48:04 AM Read

It was such a simple fucking request, no boys, no other fucking boys, and you end up having sex .. I don't even know what to think now, I mean, you might have something now, and I don't want anything ... I mean, all you had to do was not get in the car..

² Mr. Shepard is identified within the phone report as "Chavis Shepard."

³ The following text messages are arranged from the most recent sent to oldest sent, and the time has been adjusted to local time.

Fr: Chavis Shepard 8/12/2012 7:44:50 AM Read

I told you before you fucking went, no other boys, or I'm gone, you say you got raped but wont file charges, seems like you're hiding something and trying to keep me from not getting mad, but until you press charges, I'm done. Bye.

Fr: Chavis Shepard 8/12/2012 7:41:00 AM Read

Apparently, you were next to him on the fucking couch and shit, and left his hand on your leg for a long time. I don't know what to fucking believe, if you honestly got raped, or you just fuck him. Im going to bed.

Fr: Chavis Shepard 8/12/2012 7:36:12 AM Read

Nor should you of walked away with him by yourself to watch a movie ..

Fr: Chavis Shepard 8/12/2012 7:35:50 AM Read

You shouldn't of ever went there. Goodnight.

Fr: Chavis Shepard 8/12/2012 7:34:48 AM Read

I told you, have sex with anyone else. I'm gone ..

Fr: Chavis Shepard 8/12/2012 7:23:01 AM Read

All I wanted to do was help, and you wanna let him get away with it ..

Fr: Chavis Shepard 8/12/2012 7:14:22 AM Read

Then whatever, I'm done trying, obviously there's something more than your telling me, I told you, if you had sex with him, and it wasn't rape just tell me now, because if it was rape, would wouldn't be keeping it to yourself, and not getting yourself fucking tested. Goodnight.

Fr: Chavis Shepard 8/12/2012 7:10:54 AM Read

Because, they need to see if they can collect a semen sample, check you for STDs, and internal injuries, and get you help ..

Fr: Chavis Shepard 8/12/2012 7:07:17 AM Read

Time is a big factor in rape cases Nicole .. you need to talk to the cops soon ..

Fr: Chavis Shepard 8/12/2012 7:04:22 AM Read

You need to file charges on him, he fucking raped you, you can't let him get away with it..

Fr: Chavis Shepard 8/12/2012 7:02:11 AM Read

It just bothers me that you wont file charges, did you have sex with home then regret It afterwords? Tell me what really happened ..

Fr: Chavis Shepard 8/12/2012 6:59:43 AM Read

You need to press charges Nicole .. it pissed me off more than anything that someone fucked you tonight, all I asked was no other guys, then I find out you went alone with him to watch a movie? Wtf.

Fr: Chavis Shepard 8/12/2012 6:57:22 AM Read

No, I didn't tell your parents, but if you don't press charges, I will..

Fr: Chavis Shepard 8/12/2012 6:55:55 AM Read

No, I swear I didn't.

Fr: Chavis Shepard 8/12/2012 6:55:24 AM Read

Are you going to file charges?

Fr: Chavis Shepard 8/12/2012 6:54:01 AM Read

You need to ,this guy needs to go to jail for what he did to you, he, fucking raped you, who knows if he has any stds, If he came in you, if he's a sex offender you need to file charges

Fr: Chavis Shepard 8/12/2012 6:52:33 AM Read

You don't have to, they'll keep it down low, I promise. Just please, go to the cops with me ..

Fr: Chavis Shepard 8/12/2012 6:51:11 AM Read

The cops will keep it private, no one will know, just the cops and court. The news won't get your name or anything, I promise ..

Fr: Chavis Shepard 8/12/2012 6:49:29 AM Read

You still need to file charges. Please Nicole, do this for me):

Fr: Chavis Shepard 8/12/2012 6:46:53 AM Read

So you just let it happen? That's real fucking nice .. he's getting his ass beat tomorrow.

Fr: Chavis Shepard 8/12/2012 6:45:30 AM Read

Then why can't you go to the hospital and file charges? You need to have justice served on him ..

Fr: Chavis Shepard 8/12/2012 6:42:28 AM Read

Nicole, you need to go to the hospital and you need to file charges. If you don't file charges, that just shows me you wanted to have sex with him ..

Fr: Chavis Shepard 8/12/2012 6:26:05 AM Read

Where are you?

Fr: Chavis Shepard 8/12/2012 6:03:31 AM Read

You need to call the cops!

To: Chavis Shepard 8/12/2012 2:19:15 AM Sent
I knoww.

Fr: Chavis Shepard 8/12/2012 2:18:50: AM Read
Well, I'm gonna trust you, just remember, if you do something with someone else, I'm gone for good ..

To: Chavis Shepard 8/12/2012 2:18:01 AM Sent
Idk).:

Fr: Chavis Shepard 8/12/2012 2:17:27 AM Read
Why did you guys go there?

To: Chavis Shepard 8/12/2012 2:16:15AM Sent
He's 33

Fr: Chavis Shepard 8/12/2012 2:16:01 AM Read
You promised no other guys, and now you two are with a different guy, not cool at all ...

(A.R. 446-448).

At the sentencing hearing on December 18, 2014, Petitioner's counsel made the following argument in favor of his Motion for New Trial based upon the exclusion of the text messages at issue:

MR. FRANKOVITCH:
(Petitioner's Counsel)

We've received the transcripts in stages as the court reporter has been able to get to them, and we've gotten the last ones I think yesterday. And so we've read them, but we've read them quickly. And there's things in there that – just from memory, because we didn't have a chance to like study them. But it's our understanding that the court did rule on several different occasions denying the introduction of the text messages that the defendant had requested to be submitted into evidence, and some of the reasoning behind that was the Rape Shield law. And that there was some evidence that was allowed to be presented that the boyfriend, Travis – I'm sorry. Travis Shepard. That he did apply pressure to the victim to file the rape charges. But we don't think that that by itself gives the full import as to what those text messages did. They were more than just pressure, they were threats. You know, if you don't do this we're done. Until you press charges I'm done. Basically he was leaving. And that was never communicated to the jury to the extent that she was pressured and forced to file these charges. Additionally, the state was permitted on cross-examine – I'm sorry, on closing argument, to stand up and argue about text

messages and saying the text messages said this, the text messages said that, without the defense being – given the same opportunity to be able to show, Well, yeah, there's text messages both ways and there's more than just was the stated indicated. There's text messages that shows a great degree of pressure that was applied for her to present these charges. And as well her general attitude about those text messages. And I'm getting a lesson in what some of these initials mean. But I am LMFAO, laughing my f-ing ass off. Well, supposedly –

THE COURT: You know, I've got kids. I know this stuff.

MR. FRANKOVITCH: So anyway, messages like that, where she supposedly is, you know, had just gone through a rape or in the process of going through a rape. And those types of information, you know, we believe had to be presented to the jury for them to have a full view of exactly what was going on and what happened. So that's the substance of that motion, as far as the text messages are concerned.

(A.R. 418-20).

At the hearing, the trial court explained its decision to exclude the text messages as follows:

THE COURT: Okay. First, in my minds eye there was two different sets of – and there were more involved in the case, but two different sets that I made crucial rulings on. First was on the Rape Shield and I believe that the – there was some possibility that some of the text messages would have disclosed her sexual past. And I believe Rape Shield was the proper way to approach those and I kept them out of evidence.

Then there was a series of text message, basically two of them, two groups. One which was before they meet. I think I kept those out of testimony, because I didn't think that they had much to do with the case. And secondly, was once again part of the Rape Shield, where there were allegations that these other messages had been made and I wouldn't let them in.

You know, it's my understanding that the idea behind the Rape Shield is that the only true question before the jury is whether this was consensual sex or not. Her sexual history could be highly inflammatory and I thought that that's exactly the type of information that I kept out of the trial. So I'm going to deny the defense motion on that part.

(A.R. 422-23).

West Virginia's rape shield law is expressed in West Virginia Code § 61-8B-11 and in West Virginia Rule of Evidence 404(a)(3);⁴ *Quinn*, 200 W. Va. at 436, 490 S.E.2d at 38. The statute and the rule are considered *in pari materia*, and are referred to herein jointly as West Virginia's "rape shield law." *Id.* These provisions are set forth as follows:

W. Va. Code § 61-8b-11(b) - In any prosecution under this article evidence of specific instances of the victim's sexual conduct with persons other than the defendant, opinion evidence of the victim's sexual conduct and reputation evidence of the victim's sexual conduct shall not be admissible: *Provided*, That such evidence shall be admissible solely for the purpose of impeaching credibility, if the victim first makes his or her previous sexual conduct an issue in the trial by introducing evidence with respect thereto.

Rule (a) - Character evidence generally - Evidence of a person's character or trait of character is not admissible for the purpose of proving that he or she acted in conformity therewith on a particular occasion, except:

Rule(a)(3) - Character of victim of a sexual offense. In a case charging criminal sexual misconduct, evidence of the victim's past sexual conduct with the defendant as provided for in W.Va. Code § 61-8B-11; and as to the victim's prior sexual conduct with persons other than the defendant, where the court determines at a hearing out of the presence of the jury that such evidence is specifically related to the act or acts for which the defendant is charged and is necessary to prevent manifest injustice.

West Virginia's rape shield law was enacted to protect the privacy interests of sexual assault victims. The statute and the rule attempt to accomplish this goal by limiting degrading and embarrassing disclosure of intimate details about the alleged victim's private life. The West Virginia Supreme Court of Appeals has stated that West Virginia Code § 61-8B-11 was enacted to "protect the victims of sexual assault from humiliating and embarrassing public fishing expeditions into their sexual conduct; to overcome victims' reluctance to report incidents of

⁴ By order issued June 2, 2014 (effective September 2, 2014) the Supreme Court of Appeals of West Virginia approved revisions to the West Virginia Rules of Evidence in which provisions formerly in Rule 404(a) were moved to a new Rule 412. The new Rule 412 did not alter the substantive application of West Virginia's Rape Shield Law as W. Va. Code § 61-8b-11 already covered nearly all of what the new Rule 412 covers. *See* W. Va. R. Evid. 412 cmt.

sexual assault; and to protect victims from psychological or emotional abuse in court as the price of their cooperation in prosecuting sex offenders.” *State v. Guthrie*, 205 W. Va. 326, 339, 518 S.E.2d 83, 96 (1999). Likewise, the rule was intended to “safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact finding process.” W. Va. R. Evid. 412 cmt.

The trial court erred in its interpretation of West Virginia’s rape shield law and excluding the proffered text messages from Mr. Shepard. The evidence was simply not within the scope of the rape shield law. The trial court further abused its discretion in sustaining the State’s objection to the introduction of the text messages from Mr. Shepard to N.S. urging her to press charges against Petitioner and threatening to leave her if she did not. Likewise, that evidence is not within the scope of the rape shield law. When certain evidence is outside the scope or purview of West Virginia’s rape shield law, the Court need not apply the provisions of the rape shield law in considering the admissibility of the evidence. *Quinn*, 200 W. Va. at 437, 490 S.E.2d at 39.

First and foremost, the text messages do not relate to “sexual conduct.” Neither West Virginia Code § 61–8B–11 nor Rule 404(a)(3) define the term “sexual conduct.” While the text messages do relate to the sexual intercourse with Petitioner, neither relate to N.S.’s past sexual history nor do they provide intimate details regarding the incident or past sexual experiences. Nor can the text messages be construed as harassing N.S. since each of the messages relate solely to the incident in question and are relevant to N.S.’s credibility and motive to lie.

Furthermore, the text messages do not fall into any of the three categories excluded by West Virginia Code § 61–8B–11. The text messages do not refer to specific instances of the N.S.’s sexual conduct with persons other than the defendant. The text messages are not opinion

evidence of the N.S.'s sexual conduct. Finally, the text messages do not and cannot be considered reputation evidence of N.S.'s sexual conduct. N.S.'s statements in the text messages do not relate in any way to any sexual conduct intended to be excluded under the rape shield law. The statements also do not fall within any of the three types of evidence listed within the statute and rule. As such, the rape shield law does not apply to this evidence and the trial abused its discretion.

Attempting to fit the evidence into the 404(a)(3) exception to the rape shield law further demonstrates that this evidence was not intended to be barred by the rule. The text messages do not relate in any way to the alleged victim's *past sexual conduct with the defendant*, as they relate solely to the incident for which the allegation arose. Nor do the text messages relate to *prior sexual conduct with persons other than the defendant*, as they do not mention any of N.S.'s prior sexual relations. Clearly, evidence that is highly relevant to the credibility of the complainant, and which does not relate to the complainant's sexual history was not intended to be barred by the rape shield law. The evidence sought to be admitted is well outside the scope of the rape shield law.

In further support that this statement is not within the scope of the rape shield law the Petitioner asks the Court to distinguish this evidence from those types of statements at the heart of the rule. Traditionally, this Court has dealt with those statements or questions of a victim that contemplate that the victim has slept with multiple other persons or made false accusations of sexual offenses against others. *See State v. Jessica Jane M.*, 226 W.Va. 242 (2010), *State v. Quinn*, 200 W.Va. 432 (1997), and *State v. Wears*, 222 W.Va. 439 (2008). It is clear that the text messages in the instant case bear no similarity to the types of questions or statements this Court has previously held are excluded under the rape shield law.

B. Petitioner’s right to a fair trial was violated when the trial court excluded the text messages sent from Mr. Shepard to N.S. on the basis of the rape shield law.

In the event this Court finds that the text messages at issue fall within the scope of the rape shield law, the verdict must still be reversed. The trial court abused its discretion by excluding the proffered evidence and thereby violated the Petitioner’s due process rights under the Fifth and Fourteenth Amendments to the United States Constitution. The trial court’s ruling denied the Petitioner a fair opportunity to defend against the government’s charges. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); *State v. Jonathan B.*, 230 W. Va. 229, 240, 737 S.E.2d 257, 268 (2012)(citing *Guthrie*, 205 W.Va. at 337, 518 S.E.2d at 94 (“The rape shield statute is expressly designed to yield to constitutional protections that assure fair trials with just outcomes.” (quoting *People v. Hill*, 289 Ill.App.3d 859, 862, 225 Ill.Dec. 244, 247, 683 N.E.2d 188, 191 (1997)))).

“The test used to determine whether a trial court’s exclusion of proffered evidence under [West Virginia’s] rape shield law violated a defendant’s due process right to a fair trial is: 1) whether that testimony was relevant; 2) whether the probative value of the evidence outweighed its prejudicial effect; and 3) whether the State’s compelling interests in excluding the evidence outweighed the defendant’s right to present relevant evidence supportive of his or her defense.” *Guthrie*, at syl. pt. 6.

Applying this test to the instant appeal, it is clear that the trial court abused its discretion in excluding the text message evidence. The text messages from Mr. Shepard were undeniably relevant for the purposes of evaluating the credibility of N.S.’s testimony and her motive for alleging that the Petitioner sexually assaulted her. *Jonathan B.*, 230 W. Va. at 240-41, 737 S.E.2d at 268-69. “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or

less probable than it would be without the evidence.” W. Va. R. Evid. 401. Evidence suggesting a motive of the alleged victim to fabricate her allegations of sexual assault is clearly relevant to the credibility of Petitioner’s accuser. *State v. Jones*, 230 W. Va. 692, 706, 742 S.E.2d 108, 122 (2013)(“Evidence suggesting a motive to lie has long been regarded as powerful evidence undermining credibility.”).

Next, the probative value of the text messages substantially outweighed its prejudicial effect, if any, because the State’s entire case relied completely on the testimony of N.S. *Jonathan B.*, 230 W. Va. at 240-41, 737 S.E.2d at 268-69. In *State v. Jonathan B.*, the defendant, Jonathan B., attempted to introduce evidence as to the credibility of the alleged victim in the form a notebook in which she wrote after the date of the alleged sexual assault that she had only had sexual intercourse with one person, “Chris.” *Id.* The trial court excluded the notebook based upon West Virginia’s rape shield law. *Id.* On appeal, this Court found that the exclusion of evidence relating to the alleged victim’s credibility was highly prejudicial to the defense, particularly because the State’s case rested solely on the claims of the alleged victim. *Id.* Because a conviction for any sexual offense may be obtained on the uncorroborated testimony of the alleged victim and such credibility is a question for the jury, the defendant must be able to present evidence as to the alleged victim’s credibility in order to receive a fair trial. *Id.* Under circumstances similar to this case, this Court has held that the trial court’s exclusion of evidence based upon the rape shield law was reversible error. *Id.*

As in the case of *State v. Jonathan B.*, the State’s case here relied solely on the testimony of N.S. and her allegation that the sexual intercourse between her and Petitioner was nonconsensual. There were no other witnesses to the alleged sexual assault and the only evidence that the sexual intercourse was nonconsensual was the testimony of N.S. The trial court even

noted in denying Petitioner's renewed motion for a judgment of acquittal at the end of the trial, that this case is pretty much a matter of "he-said-she-said." (A.R. 382). Therefore, the evidence of N.S.'s credibility and motive to fabricate was highly probative of the Petitioner's defense, and the exclusion of that evidence was highly prejudicial and unconstitutional.

Conversely, the prejudicial effect of the proffered text messages to the complainant was extremely low because Petitioner did not seek to introduce the evidence to "imply promiscuity" or to harass or embarrass N.S., as the rape shield is intended to prevent. Rather the sole purpose for introducing the text messages was to attack N.S.'s credibility and offer evidence that she had a motive to fabricate the allegations against Petitioner – to maintain her relationship with Mr. Shepard who is the father of her child. *Jonathan B.*, 230 W. Va. at 240-41, 737 S.E.2d at 268-69. In *State v. Jonathan B.*, this Court held that the since the introduction of the notebook was intended to attack the credibility of the alleged victim and not to "imply promiscuity," the evidence was not the type the rape shield statute was intended to exclude, and therefore, the prejudicial value of the evidence was low. *Id.* As the proffered text messages were highly probative of Petitioner's defense and only marginally prejudicial, if prejudicial at all, the trial court erred in preventing Petitioner from introducing the text messages and cross-examining N.S. as to the evidence. *Id.*

Lastly, Petitioner's right to present the evidence supportive of his defense outweighs the State's interests in excluding the evidence. The United States Supreme Court has recognized that the right to examine a witness's motive to fabricate is a critical part of the defendant's right to present evidence on his own behalf. *Davis v. Alaska*, 415 U.S. 308, 319, 94 S. Ct. 1105, 1111, 39 L. Ed. 2d 347 (1974); *Olden v. Kentucky*, 488 U.S. 227, 233, 109 S. Ct. 480, 484, 102 L. Ed. 2d 513 (1988). The exposure of a witness' motivation in testifying is a proper and important

function of the constitutionally protected right of cross-examination. *Davis*, at 316-17. While this right is not unyielding, restricting Petitioner's right to present the text messages from Mr. Shepard which evidence N.S.'s motive to fabricate the allegations against Petitioner denied the Petitioner's right to a fair trial.

As discussed above, the West Virginia rape shield law serves the legitimate interest of protecting sexual assault victims from such things as public humiliation and unfair invasions of privacy. To that end, trial courts may impose limits on a defendant's right to cross-examine based on concerns of "harassment prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Wears*, 222 W. Va. at 449-50, 665 S.E.2d at 283-84 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)).

Excluding the text messages proffered by the Petitioner did not advance any legitimate interest of the State that is contemplated by the rape shield law. The text messages from Mr. Shepard pressured and threatened N.S. to claim the sexual intercourse between N.S. and Petitioner was rape and to file charges against him. Introduction of the text messages during cross-examination would not have harassed or embarrassed N.S. because the content of the text messages related solely to the incident at issue. None of the text messages referred to the sexual history of N.S. and none of the text messages provided any private or intimate details of her sexual past.

Additionally, the evidence would not have presented any confusion of the issues or concerns over the witness's safety. Most importantly, the evidence was highly relevant as it went to the credibility of the Petitioner's accuser. *Davis*, 415 U.S. at 316-17 ("The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and

affecting the weight of his testimony.”); *Jonathan B.*, 230 W. Va. at 240-41, 737 S.E.2d at 268-69.

In *Guthrie*, the victim made a false statement to hospital officials that she had not engaged in sexual intercourse in two months. *Guthrie*, 205 W. Va. at 339, 518 S.E.2d at 96. The defendant sought to the present results of a physical examination of the victim which revealed spermatozoa on her that included a mixture of DNA from two or more individuals, neither of which was the defendant, for the purposes showing that the statement was false and impeaching her credibility. *Id.* The *Guthrie* Court found that this evidence was only marginally relevant as impeachment evidence because there was no testimony at trial regarding the alleged false statement the victim made to hospital officials concerning prior sexual intercourse. *Id.*

Unlike the evidence in *Guthrie*, the text messages at issue in the instant appeal are highly relevant to the credibility of the alleged victim because they display the incredible pressure placed on N.S. to file false charges against the Petitioner. It is important to note the distinction between impeachment evidence proving bias or motive and impeachment of general credibility in comparing the present matter to *Guthrie*. Generally, applicable evidentiary rules limit inquiry into specific instances of conduct through the use of extrinsic evidence and through cross-examination with respect to general credibility attacks, but no such limit applies to credibility attacks based upon motive or bias. *Quinn v. Haynes*, 234 F.3d 837, 845 (4th Cir. 2000)(*comparing* W.Va.R.Evid. 608 *and See* W.Va.R.Evid. 404(b)). This is because the bias or motive of a witness is “always significant in assessing credibility” and “the trier of fact must be sufficiently informed of the underlying relationships, circumstances, and influences operating on the witness to determine whether a modification of testimony reasonably could be expected as a probable human reaction.” *Id.*

Therefore, in applying the three-part test set forth in *Guthrie*, it is clear that the text messages sought to be introduced at trial for the purposes of cross-examination of the alleged victim were relevant, highly probative to the defense, and not even minimally prejudicial. Petitioner's constitutional right to present the evidence outweighed the State's interests because the proffered evidence was completely outside the scope of the State's interests. As such, the trial court abused its discretion in excluding the evidence and the conviction in this case should be vacated.

C. Petitioner's Sixth Amendment right to confrontation was violated when the court sustained the State's objection to the content of the text messages on cross-examination of N.S.

The Sixth Amendment of the Constitution guarantees a defendant the right "to be confronted with the witnesses against him." U.S. Const. Amend. VI. Confrontation means, in essence, that witnesses whose testimony is adverse to the defendant must be present at the trial and subject to cross-examination. Confrontation is valuable because cross-examination provides the defendant the opportunity to obtain all the relevant facts from the witness, not just those in the prosecution's favor, and to elicit answers that impeach the witness' credibility. The right to confront adverse witnesses is especially important in sexual assault prosecutions since the trial outcome often turns on the credibility of the alleged victim.

As discussed throughout Petitioner's Brief, the rape shield law is designed to prevent defense counsel from eliciting evidence of the complainant's promiscuity as part of a general credibility attack. But the rape shield statute is not designed to shield the alleged victim's motive to fabricate a false rape charge. A defendant has an absolute and fundamental Constitutional right to examine his accuser about fabrication. That right is at the heart of our Constitutional system.

The Constitutional right of confrontation encompasses the right to attack the accuser's credibility in court "by means of cross-examination directed toward *revealing possible* biases, prejudices, or *ulterior motives* of the witnesses as they may relate directly to the issues in the case at hand." *Davis v. Alaska*, 415 U.S. at 315–316 (emphasis supplied.) Therefore, "the *exposure of a witness' motivation* in testifying is a proper and important function of cross-examination." *Id.* at 316-317. (Emphasis supplied.) Indeed, cross-examination is the most important impeachment technique because "even an untruthful [person] *will not usually lie without a motive.*" *Gates v. Kelly*, 110 N.W. 770, 773 (N. D. 1907). (Emphasis supplied.)

In *Olden v. Kentucky*, the Supreme Court held that the exposure of a complainant's motivation for making a rape charge is a proper and important function of the constitutionally protected right of cross-examination. *Olden*, 488 U.S. at 228-231 (citing *Davis*, at 31-17). In *Olden*, the defendant contended that the complainant fabricated the charges against him to protect her relationship with her boyfriend. *Id.* at 230.

As in the case at bar, the motive evidence in *Olden* was not expressly barred by the rape shield statute. The trial court, however, barred the cross-examination designed to explore the accuser's motive for fabricating a false accusation. *Id.* The Kentucky Court of Appeals affirmed the conviction. *Id.* at 231. However, the United States Supreme Court reversed the conviction holding inadequate consideration had been to the defendant's Sixth Amendment right of confrontation, which includes the right to cross-examine adverse witnesses. *Id.* at 233. The Supreme Court reaffirmed that a defendant's right to confront his accuser as to her motive to fabricate the allegations against him is protected by the Sixth Amendment of the Constitution:

A criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the

jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness.’

Olden, at 231 (quoting *Davis*, at 318).

The Supreme Court’s reasoning in *Olden* is equally applicable to the case at bar. Petitioner’s defense is for all practical purposes identical to the defense raised in *Olden*. In this case, substantial evidence existed that the complainant fabricated the charge to maintain a relationship with her boyfriend and father of her child. Accordingly, Petitioner, like the defendant in *Olden*, was wrongly denied his Constitutional right to develop his defense pertaining to N.S.’s motive through cross-examination.

The right to cross-examine a complainant about the motivation for making a false rape charge has been recognized in other contexts. The rape shield statute does not abridge that right.

Reasonable cross-examination to shape a bias has long been a matter of right. We do not read the rape-shield statute as abridging this right. *The right to cross-examine a complainant in a rape case to show a false accusation may be the last refuge of an innocent defendant.* ‘A defendant has the right to bring to the jury’s attention any “circumstances which may materially affect” the testimony of an adverse witness *which might lead the jury to find that the witness is under an “influence to prevaricate.”* ‘ We have in the past recognized that *this right may assume constitutional dimensions.*

Commonwealth v. Joyce, 415 N.E.2d 181, 186 (S. Ct. Massachusetts 1981). (Citations omitted.)

The trial court violated Petitioner’s fundamental Constitutional rights by barring Petitioner from introducing the text messages on cross-examination of N.S. for the purposes of questioning her motive to fabricate a false rape charge. The denial of that critical cross-examination prevented Petitioner from receiving a fair trial. The trial court, by restricting Petitioner’s cross-examination of N.S., prevented the jury from learning the full scale of the incredible pressure that Mr. Shepard placed on her to file charges against Petitioner. That pressure resulted in false rape charges against Petitioner, and a wrongful conviction. Indeed, the trial court, by restricting Petitioner’s cross-examination of N.S., precluded Petitioner from

developing his defense in any meaningful way. As a result of the trial court's unconstitutional restraint of cross-examination, the jury was denied the opportunity to weigh the credibility of N.S., and the Petitioner was wrongly convicted.

II. THE TRIAL COURT ERRED IN ADMITTING THE INVESTIGATING OFFICER'S HEARSAY TESTIMONY IN REGARD TO THE BEHAVIORS OF VICTIMS OF SEXUAL ASSAULT BECAUSE THE INVESTIGATING OFFICER IS NOT A QUALIFIED EXPERT IN REGARD TO RAPE TRAUMA SYNDROME.

During the State's case-in-chief, the investigating officer, Timothy Robertson, Jr., was permitted to testify as an expert, over defense counsel's objection, as to what he had been told in a brief training class regarding the behaviors of sexual assault victims and their reluctance to come forward. This evidence was proffered by the State to bolster the credibility of the alleged victim, who admitted on cross examination by defense counsel that she initially did not want to press charges in this case. The evidence offered by Officer Robinson was clearly hearsay as it was out of court statements offered for their truth. Since the investigating officer was not a qualified expert in the field of the behavior of sexual assault victims, the trial court erred in overruling the defense's objection to the testimony.

During the State's case-in-chief, the following discussion occurred in regard to Officer Robertson's expert qualifications:

MR. BARKI: Okay. In your experience and training in handling these types of matters, is it unusual for sexual assault victims to be reluctant in reporting of sexual assault?

MR. HERSHBERGER: Objection, Your Honor. I don't believe we've established to the point necessary what his training and experience in sexual assault cases are.

THE COURT: Do you have anything additional to offer on his experience?

MR. BARKI: Sure.

In addition to this, have you had training at any academies or any continuing law enforcement education on how to deal with sexual assault victims and interviewing sexual assault victims?

OFFICER ROBERTSON: Yes. Through the West Virginia State Police, they hold multiple courses and classes teaching officers different aspects of investigation.

MR. BARKI: Sure. And in addition to that, during your practical day-to-day work. Have you had the opportunity to assist and investigate reports of sexual assaults on other occasions, other than the case before the Court here today?

OFFICER ROBERTSON: I have only investigated one other case.

MR. BARKI: And, again, in your – in your training at the state police academy, did they go through the handling or interviewing of sexual assault victims?

OFFICER ROBERTSON: Yes, they did.

MR. BARKI: Okay. And in that training did it touch on the issues of handling sexual assault victims, the emotional stress of these events and how to conduct these interviews?

OFFICER ROBERTSON: Yes. They gave us a brief highlight of how victims of sexual assault would react to you and others, and also advised us that most victims usually don't come forward due to the fact –

MR. HERSHBERGER: Objection, Your Honor. I believe we're still getting to the point of eliciting – I don't believe any of that means he's a psychological expert, Your Honor, and obviously have the police offer testify to that. Especially given that he's only had one other sexual assault case.

THE COURT: I think he can testify as an expert as to what he has learned in class, and I'm going to permit that. Keeping in mind this is not his personal experience. It's what he's been told by someone during training.

Go ahead.

OFFICER ROBERTSON: In the training we were administered, they advised us that most sexual assault victims never come forward, they're too ashamed or embarrassed.

MR. BARKI: So in this particular case, was that [N.S.] initially reports to you, she is – as you have indicated, she’s very quiet and not forthcoming with a lot of information; is that correct?

OFFICER ROBERTSON: That’s correct.

(A.R. 257-59).

The testimony of Officer Robertson was clearly hearsay as he testified as to what he was told in a single training seminar, for the purpose of proving that victims of sexual assault are hesitant to come forward. The State improperly utilized Officer Robertson’s testimony to bolster N.S.’s credibility. Hearsay is an out-of-court statement by someone other than the declarant offered as evidence to prove that the statement is true. W. Va. R. Evid. 801. West Virginia Rule of Evidence 703 allows experts to rely on the reports and observations of others even though this might mean the expert is basing his opinion on hearsay. *Mayhorn v. Logan Med. Found.*, 193 W. Va. 42, 46, 454 S.E.2d 87, 91 (1994). However, to the extent Officer Robertson was not qualified to testify as an expert on rape trauma syndrome, his testimony was inadmissible and the trial court committed reversible error in permitting the jury to hear such prejudicial testimony.

West Virginia Rule of Evidence 702 allows a witness to testify in the form of an opinion if that witness is “qualified as an expert by knowledge, skill, experience, training, or education.” W. Va. R. Evid. 702. In evaluating whether an expert is qualified to give an expert opinion this Court has set forth is a two-step process:

[I]n determining who is an expert, a trial court should conduct a two-step inquiry. First, a circuit judge must determine whether the proposed expert (a) meets the minimal educational or experiential qualifications (b) in a field that is relevant to the subject under investigation (c) which will assist the trier of fact. Second, the circuit court must determine that the expert’s area of expertise covers the particular opinion as to which the expert seeks to testify.

Gentry v. Mangum, 195 W. Va. 512, 525, 466 S.E.2d 171, 184 (1995).

The trial court erred in failing to conduct the necessary two-step inquiry into the investigating officer's qualifications. Additionally, the State failed to disclose Officer Robertson as an expert witness in accordance with West Virginia Rule of Criminal Procedure 16(E), which denied the defense an opportunity to prepare and present rebuttal expert testimony. Even excusing the State's disregard for procedural requirements, the trial court abused its discretion in allowing Officer Robertson to testify as an expert to the behavior of an alleged victim of sexual assault, also known as "rape trauma syndrome."

Rape trauma syndrome is a complex psychological diagnosis and requires significant education, training, and experience to diagnose. Testimony regarding rape trauma syndrome may only be admitted from a qualified expert. *State v. Jackson*, 181 W. Va. 447, 451, 383 S.E.2d 79, 83 (1989). The qualification of an expert testifying to rape trauma syndrome is of the utmost importance because juries tend to place too much emphasis on the expert's testimony and may thereby unfairly prejudice the defendant. *Id.* "Before [rape trauma syndrome] evidence is introduced, the expert must be properly qualified. The jury should be admonished and instructed that the evidence is for the purpose of explaining the other evidence in the case and cannot serve as the ultimate basis of the jury's verdict." *Id.*

In the only West Virginia Supreme Court of Appeals case to determine whether a witness was properly qualified to testify as an expert on "rape trauma syndrome," the expert was a highly qualified rape counselor with a bachelor's and master's degree in the field and experience in over one hundred cases of sexual abuse or sexual assault. *State v. McCoy*, 179 W. Va. 223, 225 S.E.2d 731 (1988). The expert was the assistant director of a domestic violence shelter, co-founder and coordinator of a rape crisis group which counseled sexual assault victims, held a bachelor's degree in sociology and a master's degree in community agency counseling, received training in

rape crisis counseling and had work experience working with a rape victim companion program in Virginia and a women's center at Marshall University, dealing with sexual assault victims. *Id.* Additionally, she attended conferences regarding sexual assault, actively read literature on sexual assault, and had experience working on over one hundred cases of sexual assault or sexual abuse. *Id.* The Court in *McCoy* found that given the witness's extensive knowledge, skill, experience, training, and education in the field of rape counseling, she was properly admitted as an expert to testify on rape trauma syndrome. *Id.*

The fact that a witness has slightly more knowledge than jurors in a field is not the proper test for determining that the witness is qualified to testify as an expert in that field. *State v. M. M.*, 163 W. Va. 235, 240, 256 S.E.2d 549, 553 (1979). In *M.M.*, the trial court admitted two police officers as expert witnesses on the subject of juvenile rehabilitation. The trial court based its ruling on the officer's visitations of a juvenile rehabilitation center over a nine year period, and discussions with the staff and the youths in the institution during those visits. This Court held that the trial court abused its discretion by improperly allowing the officers to testify as experts based on their limited experience with juvenile rehabilitation. The Court found that the subject of juvenile rehabilitation is a "complex matter[] of human behavior; [a] matter[] whose understanding involves true expertise, not mere specific competency. In such matters a stricter standard is called for to determine whether a witness is qualified to state an opinion as an expert." *Id.*

In finding the officer lacked the elements necessary to be qualified as an expert witness, the *M.M.* Court found that the officer did not demonstrate the "training, education or practical experience" nor "possess significant skill and knowledge regarding the rehabilitation of juveniles" to qualify as an expert on the subject of juvenile rehabilitation. The officers "had a

limited and superficial contact with the institutions about which they offered opinions. Neither possessed education, training or experience in the field of juvenile rehabilitation.” *Id.*, 163 W. Va. At 242, 256 S.E.2d at 554.

The instant case is analogous to *M.M.* and diametrically opposed to *McCoy*. Officer Robertson’s only training was a single training seminar on how to interview a sexual assault victim during his time at the state police academy, which by his own testimony gave only a “brief highlight” on the behavior of sexual assault victims. (A.R. 258). Officer Robertson testified that the only other knowledge, skill, experience, training, or education he maintained was one prior sexual assault investigation. (A.R. 258). Officer Robertson lacked any college or graduate level education on psychology, counseling, or sexual abuse or assault, any experience in sexual assault or abuse counseling, any knowledge from literature or seminars, or experience in the field outside of the unknown amount of participation in the one other case. (See A.R. 257-259).

Moreover, the testimony failed to elicit the extent of Officer Robertson’s knowledge in the field of rape trauma syndrome. Officer Robertson at no time testified to receiving training on sexual assault counseling or the identification of rape trauma syndrome. The only testimony elicited from Officer Robertson concerning his knowledge in the behavior of a sexual assault victim was that “most sexual assault victims never come forward, they’re too ashamed or embarrassed.” (A.R. 259). The fact that sexual assault victims are hesitant to come forward because they are ashamed or embarrassed is common knowledge and demonstrates no advanced understanding on the subject. Officer Robertson’s lack of testimony concerning his knowledge in the field, including his failure to even identify the behavior as rape trauma syndrome, clearly illustrates his lack of knowledge, skill, experience, training, and education in the field.

The court below clearly abused its discretion in allowing Officer Robertson to testify as an expert on the behavior of a sexual assault victim, and as a result, N.S.'s credibility was improperly bolstered. The diagnosis and counseling of a sexual assault victim is an advanced science requiring years of study and experience in the field. Officer Robertson lacked any significant training or experience for the court to designate him as an expert in the field and allowing him to do so unfairly prejudiced the defendant by placing a disproportionate emphasis on his testimony, thereby giving credibility to the alleged victim's testimony.

Therefore, because Officer Robertson lacked the knowledge, skill, experience, training, or education necessary to be qualified as an expert on rape trauma syndrome, the trial court abused its discretion in permitting him to testify as expert on the subject. The testimony of Officer Robertson was clearly hearsay as it was out of court statements - what he learned in a single training seminar - offered for their truth - that victims of sexual assault are hesitant to come forward. The court committed reversible error in permitting this hearsay testimony be presented to the jury, and when that error is aggregated with the errors identified above in regard to the trial court's exclusion of other evidence regarding N.S.'s credibility, it is clear that the Petitioner was denied a fair trial in this case, and that the verdict must be vacated.

CONCLUSION

The verdict in this matter should be vacated, and this matter should be remanded for further proceedings.

Signed: _____


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Counsel of Record for Petitioner

CERTIFICATE OF SERVICE

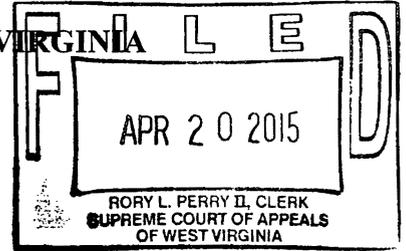
I hereby certify that on this 17th day of April, 2015, true and accurate copies of the foregoing **Petitioner's Brief** were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 15-0037



NICHOLAS VARLAS,

Petitioner

vs.

STATE OF WEST VIRGINIA,

Respondent.

NOTICE OF SUBSTITUTION OF COUNSEL

PLEASE TAKE NOTICE that Carl A. Frankovitch of Frankovitch, Anetakis, Colantonio & Simon is being substituted for Jordan C. Hettrich formerly of the same law firm, as counsel of record for the Petitioner, Nicholas Varlas, in the above-styled civil action, and request that all papers in this action be served on counsel for Nicholas Varlas as follows:

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