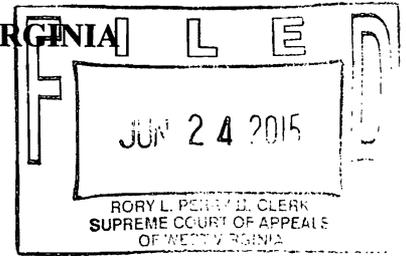


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 15-0037



NICHOLAS VARLAS,

Defendant Below, Petitioner

vs.

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent.

PETITIONER'S REPLY BRIEF

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

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TABLE OF CONTENTS

<u>SECTION</u>	<u>PAGE</u>
TABLE OF AUTHORITIES.....	3
ARGUMENT.....	4
I. The Trial Court Committed Reversible Error By Excluding the Text Messages Under West Virginia’s Rape Shield Law, And Thereby Violated Petitioner’s Constitutional Right To Confrontation And A Fair Trial.....	4
II. The Trial Court Committed Reversible Error By Permitting Officer Robertson To Testify As An Expert Witness	10
CONCLUSION.....	15
CERTIFICATE OF SERVICE.....	17

TABLE OF AUTHORITIES

Case Law:

State v. Guthrie
205 W. Va. 326, 518 S.E.2d 83 (1999).....10

Davis v. Alaska
415 U.S. 308, 94 S. Ct. 1111, 39 L. Ed. 2d 347 (1974).....5, 9

Olden v. Kentucky
488 U.S. 227, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988).....5

Quinn v. Haynes
234 F.3d 837 (4th Cir. 2000).....10

Mayhorn v. Logan Med. Found.
193 W. Va. 42, 454 S.E.2d 87 (1994).....12

State v. Jackson
181 W. Va. 447, 383 S.E.2d 79 (1989).....12

State v. Miller
194 W.Va. 3, 459 S.E.2d 114 (1995).....14

State v. Seen
No. 14-0173, 2015 WL 1721012 (W. Va. Apr. 10, 2015).....14, 16

Chapman v. California
386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)..... 14

United States v. Barnette
211 F.3d 803 (4th Cir. 2000).....15-16

Statutes and Code:

West Virginia Code 61-8B-11.....7

W. Va. R. Evid. 404(a)(3).....7

W. Va. R. Evid. 103(b).....17-18

Other Authorities

4 Jack B. Weinstein et al., *Weinstein's Federal Evidence* § 607.04 (2d ed. 2000).....10

ARGUMENT

I. The Trial Court Committed Reversible Error By Excluding the Text Messages Under West Virginia's Rape Shield Law, And Thereby Violated Petitioner's Constitutional Right To Confrontation And A Fair Trial.

Respondent acknowledges that West Virginia's rape shield law does not bar evidence of an alleged victim's motive to fabricate allegations of sexual assault. (Resp't Br. at 13, 19-20). Respondent admits that the text messages at issue in this appeal contain relevant evidence of N.S.'s motive to fabricate the allegations against Petitioner in order to save her relationship with her boyfriend who vehemently pressured her to claim she was raped and file charges against Petitioner. (Resp't Br. at 15-16). Despite this, Respondent wrongly argues that the Trial Court correctly excluded the text messages simply because Trial Court allowed Petitioner to cross-examine N.S.

Petitioner was denied his constitutional right to confrontation and a fair trial because he was not permitted to utilize the text messages, which are not even covered by West Virginia's rape shield law, during cross examination of N.S. It is undisputed that evidence of motive to fabricate is not barred by West Virginia's rape shield law and that such evidence is a critical part of the defendant's right to present evidence on his own behalf. (Resp't Br. at 13, 19-20; *see also 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). Here, N.S. had a clear motive to fabricate the allegations against Petitioner – her boyfriend was threatening to permanently end their long-term relationship unless she “proved to [him] that it was rape.”

The text messages at issue contain the full extent of the pressure that was placed on her the morning after the alleged assault. It was impossible for Petitioner to elicit

testimony from N.S. on cross-examination to fully convey to the jury the immense pressure she received from Mr. Shepard to press charges against Petitioner without the use of the text messages. Therefore, Petitioner was denied the opportunity to demonstrate to the jury the full impact the text messages had on N.S.

During the cross-examination of N.S., Petitioner's counsel asked N.S. the following questions:

Q. Okay. And were there any text messages that you respond to that night from [Travis Shepard] after you leave his house?

A. Probably.

Q. Okay. He is putting pressure on you to report this to the police?

A. Yes.

Q. And you don't want to do that?

A. No.

Q. And he's using very vulgar terms towards you in order to get you to report that correct?

A. Correct.

(A.R. at 186-87). Following that exchange, Petitioner sought to introduce to the text messages into evidence and use the text messages in his cross-examination of N.S. (A.R. 187-89). The Trial Court ruled that there was already enough testimony as to the amount of pressure Mr. Shepard placed on N.S. to file charges and that the text messages were therefore inadmissible. *Id.*

Respondent argues that by permitting Petitioner to ask those four (4) questions regarding the text message the Trial Court appropriately denied Petitioner permission to introduce the actual text messages into evidence. However, without the use of the actual text messages, Petitioner could not possibly demonstrate the amount of pressure she was under from Mr. Shepard. No questioning could convey the fact that Mr. Sheppard sent a

total of 29 text messages in less than a two-hour period pressuring her to press charges with statements such as:

“If you don’t file charges, that just shows me you wanted to have sex with him.”

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

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

“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.”

“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.”

(A.R. 446-448).

Moreover, Respondent fails to explain how the text messages even fall within the scope of West Virginia’s rape shield law. Not a single text message relates to N.S.’s past sexual history or provides private intimate details regarding N.S.’s prior sexual experiences. Each of the text messages only refers to the sexual experience with the Petitioner for which the allegations arose. Therefore, West Virginia’s rape shield law is inapplicable to bar the text messages from being introduced on cross-examination of N.S. *See* W. Va. Code § 61–8B–11 and W. Va. R. Evid. 404(a)(3).

Respondent argues that every text message must be barred because some contain purportedly irrelevant material such as Mr. Shepard’s opinion that N.S. was lying and statements calling N.S. a whore. (Resp’t Br. at 16). First of all, Respondent repeatedly misrepresents the actual content of the text messages throughout its brief by stating at least seven (7) times that Mr. Shepard called N.S. a whore, which it argues “impl[ies] that she has a reputation or history of sleeping around.” (Resp’t Br. at 12, 15, 16, 17, 18, 21). Mr. Shepard does not call N.S. as a whore in a single text message. (A.R. 446-448). The

actual text message Respondent repeatedly misrepresents states “Good job at whoring around.” While the difference may seem minor, it makes all the difference in determining whether that particular text message is barred by West Virginia’s rape shield law.

A statement that N.S. is a whore could arguably be barred as evidence of a victim’s sexual history or reputation. However, the actual text message does not refer to her prior sexual conduct or reputation at all. Rather, the text message only refers to the sexual experience with the Petitioner on the particular instance at issue. The text message does not imply that she has a history of sleeping around as Respondent argues. The only inference that may be obtained from that text message is that N.S. had sexual relations with Petitioner, and was therefore unfaithful to her boyfriend. Since this comment relates solely to the single instance for which Petitioner is accused, it does not fall within the purview of West Virginia’s rape shield law.

Further, the text message that refers to N.S.’s actions in having sexual intercourse with Petitioner as “whoring around” was the last text message that Mr. Shepard sent to N.S. before Mr. Shepard showed up at her house to take her to the police station. The text demonstrates the full extent of the pressure that N.S. was under to please her boyfriend. She had to claim that the sexual intercourse was nonconsensual or else her boyfriend would think she was unfaithful to their relationship and leave her for good.

Respondent argues that Petitioner seeks to use the fact that N.S. has a child with Mr. Shepard to show that she has a sexual past. (Resp’t Br. at 13). However, the fact that N.S. has a child in no way implies that she consented to sexual intercourse with Petitioner and Petitioner never attempted to make such connection. Rather, Petitioner highlighted the fact that Mr. Shepard is the father of N.S.’s child as it is further evidence of N.S.’s

motive to fabricate the allegations and claim that she did not consent to sexual intercourse with Petitioner.

Mr. Shepard was N.S.'s long-term boyfriend and the fact that they have a child together demonstrates that she had an enormous reason to lie about what occurred the night in question. She wants to keep Mr. Shepard in her and her daughter's life. She wants save her relationship with her long time boyfriend and she does not want a sexual experience with another man that she now regrets to ruin that relationship. She wants to live happily-ever-after with Mr. Shepard and their daughter, and he promises to do "everything [he] can to make [her] happy," but only if she proves to him that it was rape and files charges against the Petitioner, otherwise he was gone. (A.R. 446 - 48).

N.S.'s motive to press charges against the Petitioner was a critical part of Petitioner's defense. Petitioner had a constitutional right to present all of the evidence of her motive to the jury so that the jury could judge N.S.'s credibility. By denying Petitioner his right to introduce the text messages into evidence and have the jury hear the full force of the pressure that N.S. was under to press charges against him, the Trial Court erred in its application of West Virginia's rape shield law and violated his constitutional rights to confront his accuser and to a fair trial.

Next, Respondent argues that allowing the text messages to be introduced would usurp the jury's role in determining credibility because the text messages show Mr. Shepard did not believe she was raped. On the contrary, barring the text messages denied the jury all of the information necessary for it to fairly assess N.S.'s credibility. The jury 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.” *Quinn v. Haynes*, 234 F.3d 837, 845 (4th Cir. 2000)(quoting 4 Jack B. Weinstein et al., *Weinstein's Federal Evidence* § 607.04[1] (2d ed. 2000)). Accordingly, evidence of an alleged victim’s motive to fabricate charges must be admitted into evidence so that the jury can make an informed decision as to the weight to place on a accuser’s testimony, especially when the truthfulness of the testimony is a key element in the State’s case against the accused. *Davis v. Alaska*, 415 U.S. at 317-18. Therefore, by not permitting the text messages to be admitted, the Trial Court denied the jury all of the information necessary to adequately determine the creditability of N.S. and unfairly prejudiced the Petitioner.

Moreover, it is an unreasonable assumption that the jury would thoughtlessly adopt Mr. Shepard’s opinion that N.S. was not sexually assaulted. The Trial Court could have easily abated any potential prejudice of Mr. Shepard’s opinion contained in the text messages by properly instructing the jury that they are the sole judges of credibility of the witness, and they must form their own opinion of the truthfulness of N.S.’s testimony. Therefore, the prejudicial effect, if any, of permitting the jury to hear the text messages is minor, and clearly does not outweigh its probative value and the Petitioner’s constitutional right to present evidence supportive of his defense. *See State v. Guthrie*, 205 W. Va. 326, 330, 518 S.E.2d 83, 87 (1999). As such, the trial court committed reversible error in preventing Petitioner from cross-examining N.S. as to the text messages.

II. The Trial Court Committed Reversible Error By Permitting Officer Robertson To Testify As An Expert Witness.

Petitioner maintains that N.S. consented to the sexual intercourse with him and only decided to claim it was nonconsensual and press charges after her boyfriend, Travis Shepard, pressured her into doing so. As such, the reason why N.S. did not immediately go to the police and press charges against Petitioner and initially refused to do so is a critical factor in Petitioner's defense.

In order to rebut Petitioner's defense, Respondent called Officer Robertson to testify that N.S.'s reluctance in reporting the alleged sexual assault to the police conformed to the conduct of most victims of sexual assault because they are too ashamed or too embarrassed to come forward. (A.R. 256 – 259). Clearly such opinion required the testimony of an expert witness.

The Trial Court erred in permitting Officer Robertson to testify as an expert on this issue because he indisputably was not an expert. (*See* Pet'r Br. at 33; Resp't Br. at 22-29). N.S.'s credibility and the State's prosecution were improperly bolstered by the Trial Court allowing Officer Robertson to testify as an expert witness on the behavior of a victim of sexual assault following the assault, also known as rape trauma syndrome. Consequently, Petitioner was unfairly prejudiced and the verdict should be vacated.

Respondent argues that the Trial Court did not abuse its discretion in permitting Officer Robertson to testify as an expert witness because the State did not disclose Officer Robertson as an expert or move to admit him as an expert. Respondent's argument is flawed because Respondent questioned Officer Robertson as his qualifications to testify as expert and the Trial Court overruled Petitioner's objection, and further stated in front of the jury that Officer Robertson can testify as an expert.

A court cannot recklessly use the term “expert” when referring to a witness’s testimony. Expert or not, in the jury’s eyes, Officer Robertson became an expert the moment the Trial Court referred to him as such. As this Court has recognized, juries place significant weight on the testimony of an expert and permitting an unqualified witness to testify as an expert will unfairly prejudice a defendant. *See State v. Jackson*, 181 W. Va. 447, 451, 383 S.E.2d 79, 83 (1989). The Trial Court’s identification of Officer Robertson as an expert can hardly be considered a harmless error, when considering the importance of the matter to Petitioner’s defense and the considerable weight juries place on an expert’s opinion. Therefore, the Trial Court committed a reversible error in permitting Officer Robertson to testify as an expert at trial.

Respondent’s arguments that the verdict should not be vacated because Petitioner failed to object to the Trial Court’s use of the word expert and never objected on the basis of hearsay is not supported by the record or West Virginia law.

When Respondent began it’s questioning on the behavior of N.S. following the alleged assault, Petitioner objected on the grounds that there was no basis for Officer Robertson’s testimony. (A.R. at 257-59). Respondent then proceeded to question Officer Robertson as to his training in dealing with sexual assault cases. *Id.* Petitioner again objected to Officer Robertson’s testimony because he was not a qualified to provide an expert opinion on the behavior of victims of sexual assault following an assault. *Id.* The Trial Court overruled his objection stating that Officer Robertson can testify as an expert. (A.R. at 259). Officer Robertson then testified that in his training he was advised that “most sexual assault victims never come forward, they’re too ashamed or embarrassed”

and that N.S. was very quiet and not forthcoming with a lot of information during her initial report of the incident. *Id.*

Respondent argues that following the Trial Court's ruling that Officer Robertson may testify as an expert, Petitioner had to again object to the word "expert" in order to preserve the issue on appeal. Respondent is wrong. Under Rule 103(b) of the West Virginia Rules of Evidence, a party is not required to renew an objection to preserve a claim of error for appeal once the court rules definitely on the record. W. Va. R. Evid. 103(b). The record is clear; Petitioner objected to Officer Robertson's testimony as an expert, and the Trial Court overruled him and permitted Officer Robertson to testify as an expert. (A.R. at 259). Therefore, the error was preserved and is appropriately before this Court on appeal.

Likewise, Petitioner was not required to object to Officer Robertson's testimony on the grounds of hearsay because the Trial Court overruled his objection and permitted Officer Robertson to testify as an expert. Under West Virginia Rule of Evidence 703, experts may rely on hearsay for the basis of their opinion. *Mayhorn v. Logan Med. Found.*, 193 W. Va. 42, 46, 454 S.E.2d 87, 91 (1994). Since the Trial Court definitely ruled Officer Robertson may testify as an expert, Petitioner had no basis to then object on the grounds of hearsay. However, since Officer Robertson was not a qualified expert and the Trial Court erred in overruling Petitioner's objection, the statements were in fact hearsay and this Court should vacate the verdict on that ground.

However, if the Court finds that the error was not properly preserved for appellate review, the Court should still vacate the verdict under the plain error doctrine due to the magnitude of the error and the violation of Petitioner's constitutional right to due process.

The plain error doctrine “grants appellate courts, in the interest of justice, the authority to notice error to which no objection has been made.” *State v. Miller*, 194 W.Va. 3, 17, 459 S.E.2d 114, 128 (1995)). “To trigger application of the ‘plain error’ doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.” *Id.* at syl. pt. 7. This Court has held that an error involving a fundamental right of an accused which is protected by the Constitution will trigger the plain error doctrine. *State v. Seen*, No. 14-0173, 2015 WL 1721012, at *7 (W. Va. Apr. 10, 2015).

A violation of a constitutional right of an accused is a reversible error unless the prosecution can prove beyond a reasonable doubt that there is no reasonable possibility that the error contributed the verdict obtained. *Id.* at *7; *see also Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)(the burden is on “the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.”).

Applying the four-part test from *Shrewsbury*, it is clear that the Trial Court committed plain error. First, permitting Officer Robertson to testify as an expert when he undisputedly was not qualified as such was clearly an error, and Respondent does not contest that fact. (*See* Pet’r Br. at 33; Resp’t Br. at 22-29). The error was also plain since Officer Robertson completely lacked the training, education and practical experience to qualify as an expert on the subject of the behavior of sexual assault victims. His only training was a brief highlight during a single training seminar when he was in the police academy. (A.R. 258).

Next, the error substantially violated Petitioner's constitutional right to due process and a fair trial. As explained above, the reason N.S. did not immediately report the incident to the police is a critical factor in Petitioner's defense. The Trial Court violated Petitioner's constitutional right to due process by denying him the opportunity to prepare for the State's expert's opinion and to have his own expert provide rebuttal testimony. *United States v. Barnette*, 211 F.3d 803, 825 (4th Cir. 2000).

In *Barnette*, during the government's rebuttal at the sentencing hearing, the government's expert testified that the defendant was a psychopath with twice as great a likelihood to engage in future criminal behavior as a noncriminal psychopath. *Id.* at 823. The defendant then moved to recall its expert to testify in surrebuttal to the government's expert's psychopathy testimony. *Id.* The trial court denied the defendant's motion, finding that since the defendant's attorney cross-examined the government's expert, the defense's expert had nothing additional to contribute. *Id.*

On appeal, the United States Court of Appeals for the Fourth Circuit vacated the sentencing order because the lower court committed reversible error in violating the defendant's constitutional right to present rebuttal expert testimony. *Id.* at 825. The *Barnette* Court reasoned that permitting the government's expert's testimony to go unanswered can have a devastating effect on the defendant, and that cross-examination of the expert by the defendant's attorney was an inadequate substitute for testimony from a live expert witness to counter the government's expert's opinions. *Id.* Accordingly, the *Barnette* Court held that the defendant's constitutional rights were violated when he was denied the opportunity to introduce the opposing views of his expert. *Id.*

As in *Barnette*, the Trial Court below violated Petitioner's constitutional right to have an expert rebut Officer Robertson's expert testimony. The Trial Court let Officer Robertson's expert testimony go unanswered, which permitted the jury to conclude that the reason N.S. refused to report the alleged assault to the police was because she was actually sexually assault, not because she consented to the sexual intercourse.

Lastly, this error seriously affected the fairness of the trial because Petitioner was unable to have an expert rebut Officer Robertson's testimony and because Officer Robertson's testimony improperly bolstered N.S.'s credibility. *See Barnette*, at 825. Moreover, the fact that the Trial Court classified a witness as an expert when he clearly is not, seriously affects the integrity and reputation of the court system. Thus, the Trial Court committed plain error in permitting Officer Robertson to testify as an expert at trial.

Because Respondent has failed to prove beyond a reasonable doubt that there is no reasonable possibility that the error contributed the conviction of Petitioner, the verdict should be vacated, and this matter remanded for further proceedings. *Seen*, No. 14-0173, 2015 WL 1721012, at *7.

CONCLUSION

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

Respectfully submitted,

NICOLAS VARLAS, Petitioner

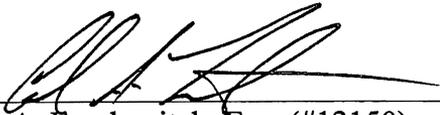
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CERTIFICATE OF SERVICE

I hereby certify that on this 23th day of June, 2015, true and accurate copies of the foregoing **Petitioner's Reply 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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