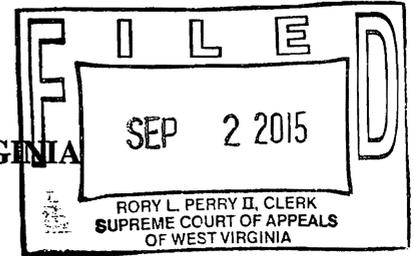


No. 15-0537
SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,
Plaintiff below and
Respondent herein,

v.

Circuit Court of Mingo County
Case No. S14-F-74

GARY ADKINS,
Defendant below and
Petitioner herein.

PETITIONER'S BRIEF

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III.
Assignments of Errors

A. The Circuit Court committed prejudicial error by failing to give the mandatory jury instruction required by W.Va. Code, Chapter 62, Article 6B, Sec. 4(c) when the giving of such instruction was *not waived* by the accused Gary Adkins.

B. The Circuit Court abused its discretion in permitting the introduction of “other crimes” evidence.

C. The evidence failed to establish the essential elements of the crimes for which Mr. Adkins now stands convicted.

D. The Circuit Court committed plain error by commenting about the child’s truthfulness in the presence of the jury.

IV.
Statement of the Case

Gary Adkins worked for many years in the coal industry, most recently as a mine foreman, JA-447. He is now 54 years old and the married father of two children, JA-13, 417-418. Both children are college educated. His wife Diedra is employed as an educator in the Mingo County public schools, JA-417, 17. Mr. Adkins had never been in legal trouble before the instant charges were brought against him.

A Mingo County grand jury returned a four count indictment against Mr. Adkins, JA-6. This indictment charged two counts of sexual abuse in the first degree in violation of W.Va. Code §61-8B-7 and two counts of sexual abuse by a person in a position of trust in violation of W.Va. Code §61-8D-5. A trial took place on these charges on March 9 and 10, 2015. Mr. Adkins was found guilty on all counts. On April 2 he was sentenced to the maximum confinement on all four counts each to run consecutively. More particularly, his sentence is to an indeterminate term of not less than 5 nor more than 25 years with a fine of \$5000 as to count one,

an indeterminate term of 5 to 25 years and \$5000 fine as to count two, not less than 10 nor more than 20 years and \$5000 as to count three, and 10 to 20 years and \$5000 as to count four. He also has a fifty year supervision period if he should ever be released, JA-600-601. Because the sentences are to run consecutively to each other the sentence of incarceration is effectively 30 to 90 years for the now 54 year Mr. Adkins.

The allegations which led to these convictions were first brought to the attention of law enforcement on July 10, 2013, JA-12. The mother of the alleged child victim told the State Policeman who took the information from her that her daughter, when she was age 6 or 7, had visited her uncle Gary Adkins at his residence sometime between July 4th and Labor Day, 2012. The mother reported that according to the child Mr. Adkins:

“made her take her finger and pet his belly button but the child told her mother ‘mommy, I don’t believe it was Uncle Gary’s belly button’,” JA-13.

According to the mother’s earliest report provided to law enforcement the child later repeated the story which prompted the mother to then report the accusation to authorities.

On July 18 the child was first interviewed by CPS. She provided no information which would indicate that any crime had occurred. CPS had her return on July 19 when it was reported that the child stated that Mr. Adkins had taken her hand and stuck it down his pants and that he had rubbed her vaginal area through her clothing, JA-14-15.

Several significant developments occurred after the indictment was returned. At a hearing on October 14, 2014 the State informed the Circuit Court of the need to appoint a friend of the Court psychiatrist or psychologist in that the State had recently filed a motion to take the child accuser’s testimony by closed circuit television, JA-22 and, see W.Va. Code 62-6B-3. Further, on that same date the Court heard the testimony of a 29 year old woman from Indiana

who testified in a 404(b) hearing that on occasions between the ages 7 and 10 years old her father's cousin's husband Gary Adkins would "tickle us" in the "pelvic area" and that once she woke up and his hand was on her pelvic area, JA-37. This witness said she "wanted to help [the child] in her case," JA-39 after the child's mother had telephoned her. The child's mother explained that she called this cousin after God led her to call after praying very hard about it, JA-51.

The parties next appeared in court on January 12, 2015 when the State's motion to take the child's testimony by closed circuit television was granted. It was unopposed by the defense, JA-64. Another witness was identified as a 404(b) witness, therefore another hearing was set, JA-65. That hearing took place on January 22, 2015.

At the January 22 hearing the witness identified herself as a school principal whose mother's brother is Gary Adkins, JA-73. She is now age 47 and testified that the sexual abuse by her uncle took place over a period of time beginning at age 5 and ending when she was 10 or 11 years old, JA-76. Those times were said to be 1971, 1977 or 1978, JA-77. Mr. Adkins was 6 years older than she. This witness described the abuse as including oral sex and penis to vagina contact occurring even in front of her brother and cousins, JA-78. Mr. Adkins testified, denying the oral sex, but acknowledging other acts, JA-90-91. Both agreed that he had apologized, JA-79 and JA-90. This abuse had occurred when Mr. Adkins was age 16. Both 404(b) witnesses were permitted to testify at trial.

The State's trial witnesses consisted of the two 404(b) witnesses, the child and the child's mother and brother who was one week shy of his 15th birthday when he testified, JA-220. He testified that he was at the Adkins' home playing Wii bowling about two years ago when his sister was sitting on her uncle's lap under a blanket, JA-224. He claims that he then saw:

“movement under the blanket towards her lower area and I was concerned,” JA-224.

He attributed this movement to Mr. Adkins, JA-225. The movement was toward “her private area.” When asked whether he actually saw his uncle’s hand touch his sister’s private area, he answered:

“not clearly” because of the blanket, JA-226. The sister and uncle “didn’t act like anything was going on at the moment,” JA-226.

They soon left and according the brother he never spoke with his family about this, JA-226. In an earlier statement made to the State Police the brother claimed to have seen his uncle rub his sister’s leg and made no mention of a blanket. He acknowledged the differing versions on cross examination, JA-234.

In giving her testimony the child came to the courtroom, but Mr. Adkins chose to view the testimony by closed circuit television, JA-183. Regarding this procedure the following took place:

“The Court: Mr. Lyall, have you decided what you want me to say to the jury?”

Mr. Lyall: What we talked about before is fine. Just tell them pursuant to the Code he’s elected-

The Court: That the Defendant has elected to be out of the presence of the witness?

Mr. Lyall: Yes.

The Court: All right. Bring the jurors in (Jurors are seated in courtroom directly in front of the video conference camera.)

Everybody find a comfortable seat. Everyone will notice they’re sitting in a different spot this time. It took us a while. We had a little technical difficulty getting our closed circuit set up, and, if you will notice, Mr. Adkins is not in the courtroom at this time. He has elected to appear by closed circuit during the testimony of this particular witness. He will be returning to the courtroom when her testimony has finished. Is that

sufficient, Mr. Lyall?

Mr. Lyall: Yes, Your Honor.” JA-185.

The child accuser then testified that she was in the fourth grade and that if she failed to tell the truth it was “a bad thing,” JA-186-187. At the time of trial she was age 9. She testified that she stopped going to her uncle’s house because “he touched me in my private,” JA-190. This allegedly occurred when she and her brothers were playing Wii in her uncle’s living room. She answered that it happened more than once but did not know how many times. She also responded affirmatively to the prosecutor’s leading question that he had her touch him. She testified that:

“it was his belly button, but I didn’t fully believe him,” JA-191.

She explained her answer by later responding:

“I don’t guess it exactly felt like a belly button,” JA-191.

And: “He took my hand and put it there,” JA-192.

The child added that she did not know whether her brothers were there when this occurred and that:

“my brother actually told, because I guess he saw me slap him,” JA-192.

On redirect examination the child testified that the touching was “against my skin,” JA-213. But “I don’t guess I know exactly for sure,” JA-213-214. She then added the same for touching Mr. Adkins saying “I’m pretty sure it was under his clothing,” JA-214. She stated that she had a journal and that she had discussed this with other family members, JA-215. A portion of the journal was produced, Exhibit 33, JA-579. The journal was said to be upon the instruction of her mother, JA-217.

The final two State’s witnesses on March 9 were the 404(b) witnesses. They repeated

their accounts as previously provided at the 404(b) hearings. The last State's witness was the child's mother who described the two trips with her daughter to the CPS interviews. She also testified about alleged changes in her daughter's behavior especially the desire to excessively scrub her hands, JA-285-286. She acknowledged having promised to take her child to swim at Waterways and eat at Chucky Cheese after going to CPS, JA-298-299.

The defense called 12 witnesses on March 10. Mr. Adkins was the last to testify, JA-442 to JA-459. The first to testify was Dr. Clifton R. Hudson of Charleston who testified as an expert in clinical and forensic psychology, JA-322.

Dr. Hudson opined as to several matters. First, that the child's initial statement to her mother constituted the first interview, JA-331. On that occasion the child stated only that she touched her uncle's belly button but she wasn't sure that was what it was. Second, by the time the child got to CPS after a year had passed the interviewers were at a deficit, JA-331. As Dr. Hudson put it:

“They were way too late coming to the game.”

Third, Dr. Hudson testified that the mother's reward of taking the child to Waterways and then Chucky Cheese after the CPS interviews is something that should not be done, JA-332. Fourth, that throughout the CPS interviews the child frequently used qualifying words such as “maybe” or “probably” which is not typical he stated.

As such it indicates a lack of certainty he opined. Dr. Hudson referred to this as “contamination of memory.” He testified that the contamination of memory had occurred over a 15 month period of time due to conversations with others and that it created problems, JA-335 to JA-337.

The defense called the two CPS interviewers who confirmed that the child disclosed no touching at the first interview and that they usually do not re-interview a child, JA-352-356. In

the second interview there were a lot of “maybes,” JA-356-363. Also the child mentioned viewing a questionable movie which she had seen with her older sister and her boyfriend.

Three female friends of Mr. Adkins’ daughter testified for the defense about their experiences staying at the Adkins’ home, JA-364 to 372. They described having “grown up in the house” with no hint of such problems as alleged.

Family members including daughter Laura, wife Diedre, sister Sheria and a young man who now works in St. Albans but who once lived with the Adkins testified about the discrepancies both in time and place of the accounts being provided by the child, the child’s mother and the 404(b) witnesses JA-372 to JA-395, and JA-406-416. Mr. Adkins’ mother in law who lives next door, testified about the discrepancies, JA-395-406. As noted, Mrs. Adkins is a school teacher, daughter Laura is in the PsyD program at Marshall University and Mr. Adkins’ sister is a law enforcement officer, JA-412. The sister of course is the child’s aunt. Mrs. Adkins offered photographs of times when the 404(b) witness from Indiana claimed to be at the Adkins’ home in Mingo County showing that huge discrepancies exist in the accuser’s account both as to time and place, JA-432. Mrs. Adkins added that there had been problems between her and the child’s mother over a relationship Mrs. Adkins had with her father, JA-430-431.

Mr. Adkins denied the child’s accusations, JA-441-458. He did acknowledge a portion of one of the 404(b) accuser’s account in front of the jury just as he had at the 404(b) hearing, JA-458-459. This transgression had occurred when he was age 16, JA-459.

V. Summary of Argument

The Circuit Court twice committed plain error in its handling of the child accuser and the testimony by closed circuit television. Further, prejudicial error occurred in connection with the introduction of collateral crimes under Rule 404(b) and the trial court’s appraisal of the

sufficiency of the evidence.

VI.
Statement Regarding Oral Argument and Decision

Oral argument is requested under Rule 20. The issue concerning the mandatory jury instruction under W.Va. Code §62-6B-4(c) has not been previously addressed. Further, Mr. Adkins has been sentenced to what is essentially a life sentence without parole. His conviction is grounded in evidence provided by children which ambiguously and deficiently described requisite elements of the crimes charged.

VII.
Argument
A.

W.Va. Code, Chapter 62, Article 6B, Section 4(c) Requires Either That A Jury Instruction In Conformity With The Language Contained In The Statute Be Given Or That A Waiver Of That Instruction Shall Be Received From The Defendant.

W.Va. Code, Chapter 62, Article 6B, Section 4(c) states:

“In every case where the provisions of the article are used, the jury, at a minimum, shall be instructed, unless such instruction is waived by the Defendant, that the use of live, closed-circuit television is being used solely for the child’s convenience, that the use of the medium cannot as a matter of law and fact be considered as anything other than being for the convenience of the child witness and that to infer anything else would constitute a violation of the oath taken by the jurors.”

There is nothing ambiguous about the language contained in §62-6B-4(c). When closed circuit television is employed in connection with the testimony of a child witness the jury shall be instructed at a minimum that the jury under their oaths must consider the use of this procedure as nothing more than being for the convenience of the child and that considering it as anything other than that would violate their oaths as jurors. As it is unambiguous this statute must be applied, not interpreted, Consumer Advocate Division of PSC v. PSC, 182 W.Va. 152, 386 S.E. 2d 650

(1989). It is unnecessary for a reviewing court to attempt construction of this statute, State ex rel. Johnson v. Robinson, 162 W.Va. 579, 251 S.E. 2d 505 (1979).

At a hearing before the Circuit Court on October 14, 2014 the prosecution indicated that they were seeking to employ the aforementioned procedure, JA-21. The Court next addressed the use of closed circuit television for the child’s testimony on January 12, 2015. The parties then agreed that the report¹ of the forensic psychological evaluation of the alleged child victim supported the use of closed circuit television, JA-64. The Court there concluded:

“The Court will adopt the findings of the evaluation of the child pursuant to 62-6B-3 and find the child will be able to testify by closed circuit t.v., and accordingly, the Court will find by a clear and convincing evidence that the child is and was a competent witness; that absent the use of live closed circuit television the child witness would be unable to testify due solely to being required to be in a physical presence of the Defendant while testifying; that the child witness can only testify if live, two-way closed-circuit television is used in the trial and the State’s ability to proceed against the Defendant without the child’s live testimony would be substantially impaired or precluded, so the child will be able to testify by closed-circuit television.”

With this finding in place the next and last time the matter was addressed was at the trial shortly before the child testified, JA-182-185. As reflected by the colloquy between counsel and the trial court, supra p. 4, the only mention of a possible jury instruction was the following:

“The Court: Mr. Lyall, have you decided what you want me to say to the jury.

Mr. Lyall: What we talked about before is fine. Just tell them pursuant to the Code he’s elected –

The Court: That the Defendant has elected to be out of the presence of the witness?

Mr. Lyall: Yes.

¹The report identified as docket entry 35 remains under seal by the Circuit Court. Therefore, it is not filed in the Appendix.

With defense counsel's approval the Court then told the jury:

“ . . . if you will notice, Mr. Adkins is not in the courtroom at this time. He has elected to appear by closed circuit during the testimony of this particular witness. He will be returning to the courtroom when her testimony has finished,” JA-185.

As is clear, the jury instruction which is mandated by the statute was not given. The question then is whether what transpired constitutes a waiver. Waiver is generally defined as the voluntary relinquishment or abandonment of a right or advantage, Black's Law Dict. (9th ed. 2004). A waiver may be express or implied. However, to be an implied waiver the party must have evidenced his waiver by decisive, unequivocal conduct. In this case the Defendant is nowhere seen to have waived the right to the instruction which is accorded him under 62-6B-4(c). The purpose of the instruction is plain – to avoid the prejudice of this singularly uncommon procedure wherein the accuser cannot be in the presence of the accused.

An apt analogy is supplied in cases in which the accused waives his right to a jury trial. There the accused must demonstrate on the record that he understands the right, that he has consulted with his counsel about his decision, the decision is spread on the record, and a written waiver is also signed, State v. Redden, 199 W.Va. 660, 487 S.E. 2d 318 (1997). While the right to a jury trial is found in our constitutions so is the Defendant's right to effectively confront and cross-examine one's accuser. Although trial counsel alluded to “what we talked about before” the record is otherwise silent as to what may have been discussed and when or whether Mr. Adkins was present. Since there is no record which indicates that Mr. Adkins had been provided with an explanation of the jury instruction no waiver of this important right can be implied. As this error was not brought to the Circuit Court's attention, it is presented herein as plain error, Rule 52(b) West Virginia Rules of Criminal Procedure. The error of having failed to give the mandated jury instruction and/or have the accused waive the same is plain, it affected the

substantial rights which attend a fair trial, and this failure impaired the fairness of the trial proceedings, State v. Thompson, 220 W.Va. 398, 647 S.E. 2d 834 (2007). Accordingly, on this ground alone Mr. Adkins' conviction should be reversed.

B.

The Circuit Court Abused Its Discretion When The Court Allowed The Introduction Of Evidence At Trial Of Other Crimes Or Wrongs.

As noted supra p. 3 the trial court allowed the State to introduce evidence from two witnesses who testified that they too had been the victim of sexual abuse by Mr. Adkins, JA-237 to 271. The first 404(b) accuser was age 29 and stated that she had been inappropriately touched in the pelvic area when she was between the ages of 7 and 10. The second was age 47 and stated that she had been sexually abused in various ways when she was between the ages of 5 and 10 or 11 which would mean that Mr. Adkins was ages 11 up to 16 or 17 at the time.

Mr. Adkins' trial counsel had strenuously objected to the introduction of this evidence, JA-55-57 and JA-96-101. However, the Court found that the evidence of each of these witnesses could be received by the jury, JA-548. The Court cited State v. McGinness, 193 W.Va. 147, 455 S.E. 2d 516 (1995) and State v. Edward Charles L., 183 W.Va. 641, 398 S.E. 2d 123 (1990) in reaching its decision.

Aside from the argument made by trial defense counsel that these accusations were too remote in time to be admitted counsel noted that with respect to the 47 year old accuser Mr. Adkins:

“ . . . was a juvenile at the time these was (sic) committed. . . ” JA-101.

West Virginia Public Policy Protects the Confidentiality of Juvenile Transgressions

It has long been the public policy of the State of West Virginia that in all court

proceedings the confidentiality of juvenile information shall be protected, State ex rel. Garden State Newspapers, Inc. v. Hoke, 205 W.Va. 611, 520 S.E. 2d 186 (1999); Jeffrey v. McHugh, 166 W.Va. 379, 273 S.E. 2d 837 (1981); and see W.Va. Code §49-5-17. This policy has been extended to the records of students and their family members who attend our public schools, W.Va. Code §18-2-5h. Additionally, juveniles' names are protected in records of court proceedings such as this one, Appellate Rule 40(e). In contrast, the trial court in this case allowed evidence of wrongful acts by Mr. Adkins when he was as young as 11 years of age and no older than 17. Mr. Adkins testified that he was no older than age 16, JA-459. Surely, Rule 404(b) of our Rules of Evidence should not be used as a mechanism to allow a violation of the long-standing public policy of our State as was the case here.

**The Evidence of Other Crimes or Wrongs
Herein Was Extremely Remote In Time**

In the decision of State v. Jackson, 181 W.Va. 447, 383 S.E. 2d 79, 82 (1989) the Court concluded that testimony from the Defendant's niece about incidents of sexual abuse which occurred more than 20 years before the trial were too remote and therefore constituted reversible error. Much like Mr. Adkins the Defendant in Jackson had been convicted of sexual abuse in the first degree for allegedly rubbing three girls ages 6, 7 and 8 between the legs. Further, as is eerily similar to the evidence in Mr. Adkins' trial the State called the Defendant's 29 year old niece to testify that between ages 4 and 8 or 9 Mr. Jackson had touched her private parts and caused her to touch his penis.

Later in the case of State v. McIntosh, 207 W.Va. 561 534 S.E. 2d 757 (2000) which the State below cited and the Circuit Court adopted in its order, JA-548, the Court upheld the introduction of an accusation of sexual assault which was for acts allegedly committed 21 years previously. In McIntosh the Court discussed the relationship between the decision in Edward

Charles L. and Rule 404(b). The Court noted, S.E. 2d at 765, that under syllabus point one of Edward Charles L. the use of evidence of other wrongful sexual acts supplies the purpose for admitting the evidence i.e. lustful disposition towards the victim.

These two decisions on their face do not appear compatible. On the other hand, this Court has consistently held that the action of a trial court in admitting or excluding evidence is discretionary and will not be disturbed on appeal unless the trial court abused its discretion, State v. Jonathan B., 230 W.Va. 229, 737 S.E. 2d 257 (2014); State v. Huffman, 141 W.Va. 55, 87 S.E. 2d 541 (1955). This standard applies to the decision on remoteness, McIntosh, S.E. 2d at 768. Notwithstanding the foregoing how long ago an alleged wrong is said to have occurred remains an important factor in determining its probative value for admissibility in a case State v. Rash, 226 W.Va. 35, 697 S.E. 2d 71 (2010). So does the similarity of the alleged act to the act on which the accused is standing trial.

**The Acts of the 47 Year Old
Accuser Are Not Similar**

The basic premise for allowing any collateral acts evidence is that the collateral acts and the act(s) of which the defendant is accused in the case at bar are similar in character. The 47 year old who testified as to the second set of bad acts testified that when she was in the 5th grade or younger and Mr. Adkins was no more than a young teenager:

“He would make me rub his penis before doing oral sex but mostly at night when he would come to bed it would just be him touching me with his fingers or him rubbing his penis on my vagina,” JA-267.

When compared to the accusations of the alleged child victim in this case, most particularly the sketchy, ambiguous initial account attributed by the mother to her child these allegations are not similar.

In summary, certainly as relates to this particular 404(b) evidence the introduction

represents an abuse of discretion. First, it was a forty year old occurrence. Second, it was a juvenile crime. Third, it was dissimilar conduct. The fact that Mr. Adkins acknowledged some of the acts alleged at trial makes the undue prejudice even worse. Mr. Adkins should not have been placed in that position in the first instance.

The Bad Acts Were Shotgunned

This Court has condemned the excessive, unnecessary use of other crimes evidence, State v. Thomas, 157 W.Va. 640, 203 S.E. 2d 445 (1974); State v. Spicer, 162 W.Va. 127, 245 S.E. 2d 922 (1978). This practice, called “shotgunning,” results from a prosecutor’s devotion of excessive trial time to the introduction of collateral crimes evidence, State v. Messer, 166 W.Va. 806, 277 S.E. 2d 635 (1981).

Applying the above-mentioned concept to the case at bar, the Court will find that when you consider that there are actually two adult accusers and one child accuser, two-thirds of the accusations of sex crimes against Mr. Adkins were uncharged collateral acts. When one considers the pages of the transcript of trial devoted to the collateral acts about one-third of the trial was spent on the collateral acts alleged (more than 33 out of 120 pages of the State’s case in chief) and more so when the defense witnesses are considered which makes it about one-half of the trial. This figure does not include the direct and cross examination of the child’s mother concerning her communication with the 404(b) witness from Indiana. In the closing arguments 5 out of 16 pages of the transcript references collateral accusations.

Taking into account the aforementioned facts this prosecution excessively addressed the accusations which were decades old and uncharged. For this reason also, Mr. Adkins’ convictions should be reversed.

C.

**The Elements Of The Crimes Charged Were
Not Established By The Evidence Presented.**

This Court reviews the sufficiency of the evidence in the light most favorable to the prosecution. The Court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done, State v. Starkey, 161 W.Va. 517, 244 S.E. 2d 219 (1978) syl. pt. 1.

Mr. Adkins' trial counsel challenged the sufficiency of the evidence both with his motion for acquittal made during the trial, JA-317, and written Motion for Judgment of Acquittal submitted following the trial, JA-558.

The statute of conviction on the first two counts is §61-8B-7. The elements of this crime include subjecting another person to sexual contact which is defined in §61-8B-1 as:

“Any intentional touching, either directly or through clothing, of the breasts, buttocks, anus or any part of the sex organs of another person, or intentional touching of any part of another person's body by the actor's sex organs, where the victim is not married to the actor and the touching is done for the purpose of gratifying the sexual desire of either party.”

The evidence presented by the State concerning the first two counts of the indictment in their case in chief came entirely from the testimony of the young child who was the alleged victim and her brother. The child who was age 9 when she testified but age 6 or 7 when the crime is alleged to have happened testified that Mr. Adkins “touched me in my private,” JA-190. She also testified after considerable leading that Mr. Adkins had her touch his belly button which she didn't believe was a belly button, JA-191.

“I don't guess it exactly felt like a belly button,” Id.

As to where the belly button “normally sits” she answered “I'm not for sure,” JA-191-192. At the close of direct examination the Judge makes the following comment in front of the jury:

“Mr. Lyall, do you have any questions, and before you question the Court will make a finding that Ms. Maynard is a competent witness and knows the difference between the truth and a lie.” JA-193.

This comment is the subject of argument D infra.

During cross-examination the child was asked about statements in her interviews with CPS, JA-199-212. Referring to her parents she said:

“I don’t think they told me what happened. I mean they might have reminded me, but no, they didn’t remind me, but I don’t think they ever told me what happened,” JA-205.

On redirect the child testified for the first time that the touch was below the belly button and “against my skin” and “every time” it may have been that way “but I don’t know exactly for sure,” JA-213-214. Thereafter, on recross excerpts from the child’s journal were introduced, JA-113, 579-585. Counsel submits that the notes in the journal reflect coaching which had occurred over the year and more before the case was tried. Dr. Hudson characterized this as “contamination of memory.”

The brother was a few days shy of age 15 when he testified, therefore he would have been 12 years old at the time his sister and mother were testifying to, JA-221. His testimony consisted of saying his sister was “on Gary’s lap under a blanket,” and “I seen movement under the blanket towards her lower area,” which he added was towards “her private area” but that he did not see this “clearly,” JA-224-226. He added that “they didn’t act like anything was going on at the moment,” JA-226.

The evidence as advanced above at trial does not satisfy the element of sexual contact as the same is defined by statute.

With regard to the 3rd and 4th counts which charge sexual abuse by a parent, guardian, custodian, or person in a position of trust the evidence in the State’s case in chief again came

primarily from the children. The children's mother also testified. The mother's testimony was that by history the children would go to the Adkins' mother in law's home for Sunday meals and on occasion the daughter would stay overnight with Mr. Adkins' wife who is the mother's sister in law, JA-279. As to Mr. Adkins "he was family" and she trusted him with her children, JA-279-280. The gist of the children's testimony was that they spent a "good bit of time there" [prosecutor's question answered affirmatively by the brother], JA-223.

What is absent from the trial evidence is what the arrangement was, if any, about the childcare on the day in question.² The mother's testimony was general and clearly non-specific as to the day she reports that this occurred. Likewise, the brother's testimony was not specific. For example, how did they travel to the Adkins home that day? Who took them? Who was present when they arrived? What was said to those present, if anything, about what, if any, expectations existed concerning child care?

In this instance it is:

The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction to examine the evidence admitted at trial to determine whether such evidence and if believed, is it sufficient to convince a reasonable person of the Defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt, State v. Guthrie, 194 W.Va. 657. 461 S.E. 2d 163 (1995).

Trial counsel argued vociferously that under this Court's decision in State v. Longerbeam, 226 W.Va. 535, 703 S.E. 2d 307 (2010), any evidence establishing the element of care, custody and control of the child in question is lacking, JA-317-318. The State answered the argument by

²In making this argument counsel is cognizant of the defense denial. For this purpose counsel relies entirely on the State's view of the evidence as presented through the family witnesses named above.

stating that according to the brother there was no other adult in the house at the time, JA-318.

The court below surmised that “maybe it started out with another person in charge. . . however, it always ended up . . . and what’s in the record, that Mr. Adkins was solely in charge of the victim. . .JA-319. Thus, the State’s theory is that Mr. Adkins gains care, custody, and control by default without any explanation or support in the record from adult witnesses whose children are those in question.

It is submitted that defense trial counsel was correct and Longerbeam provides the appropriate authority. No one has produced evidence that this child on that date was left under the care, custody and control of Mr. Adkins. As such the motion for acquittal which was made at the conclusion of the State’s case in chief was correct. Judgment should have then been entered in favor of Mr. Adkins on counts 3 and 4. As this Court noted in Longerbeam the record disproves any contention that the accused became a custodian of the child in question upon their walking into the Adkins’ home. As noted in Longerbeam the brother, then age 12, was at all relevant times present. Under the evidence the big brother was as much caring for his little sister as Mr. Adkins could be. After all, the brother testified that it was he not Mr. Adkins whom the mother called when she wanted them to come home:

“ . . .mom had called us like five minutes before that and told us to go ahead and get ready so I told her [the sister] to go ahead and get ready. . .JA-226.

On the basis of the foregoing judgment should be entered for Mr. Adkins.

D.

The Trial Court’s Comment About The Child’s Knowing The Difference Between The Truth And A Lie Made In Front Of The Jury Constitutes Plain Error Which Requires Reversal.

As with the Court’s failure to provide the mandatory jury instruction under §62-6B-4(c)

the following comment constitutes plain error, Rule 52(b) West Virginia Rules of Criminal Procedure which meets the requirements for reversing the judgment below, State v. Thompson, supra. Right after the young girl testified on direct as the first trial witness the trial court declared the child to be a competent witness who “*knows the difference between the truth and a lie*,” JA-193. This statement was made shortly after the accused had exited the courtroom and immediately after the State had questioned her on direct but after the child had already been questioned by the Court as voir dire before taking the oath, JA-187.

Undersigned counsel asserts that the trial court’s voir dire of the child which was conducted as it was in front of the jury was unnecessary and should not have been so conducted, JA-186-187. This adds to the prejudice from the comment which followed. The applicable statute reads:

“In any prosecution under this article, neither age nor mental capacity of the victim shall preclude the victim from testifying,” W.Va. Code §61-8B-11(c).

The foregoing confirms the presumption of her competency. No motion was made to challenge her competency in this case. She had been examined forensically with no objection raised. As a result the trial court in effect informed the jury that the Court had found her testimony to be truthful. It has long been considered axiomatic that:

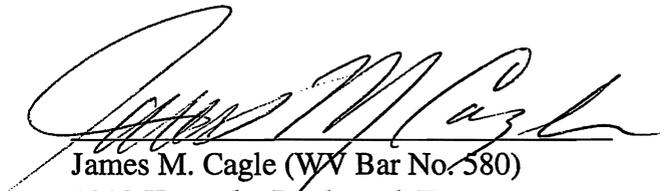
“in the trial of a criminal case the jurors, not the court, are the triers of facts, and the court must be extremely cautious not to intimidate by word, tone, or demeanor, his [her] opinion upon any fact in issue,” State v. Pietranton, 137 W.Va. 477, 72 S.E. 2d 617 (1952); State v. Austin, 93 W.Va. 704, 117 S.E. 607 (1923).

In the context of the proceedings below this conduct cannot be considered innocuous or non-prejudicial. It was in fact a case of he said she said. Corroboration was lacking, see State v. Haid 228 W.Va. 510, 721 S.E. 2d 529 (2011). Due to the important role of the court this

procedure and the comment constitutes prejudicial error. The failure of defense trial counsel to object should not preclude reversal. This error goes right to the heart of these proceedings and represents the quintessential case for the application of the plain error rule.

VIII
Conclusion

For the foregoing reasons Mr. Adkins' conviction should be reversed. In the event this Court finds that the evidence was sufficient to allow the case to go to the jury then a remand is also requested.



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No. 15-0537
SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff below and
Respondent herein,

v.

Circuit Court of Mingo County
Case No. S14-F-74

GARY ADKINS,
Defendant below and
Petitioner herein.

CERTIFICATE OF SERVICE

The undersigned, James M. Cagle, Counsel for the Petitioner, Gary Adkins, does hereby certify that a true and correct copy of the *Petitioner's Brief* was served hand delivered to David A. Stackpole, A.A.G on this the 2nd day of September, 2015.

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