

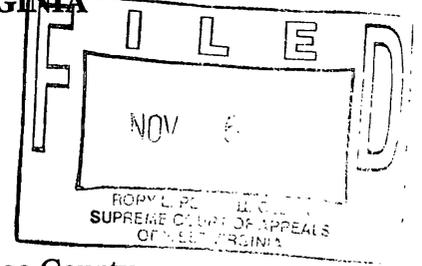
No. 15-0537

**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.

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**PETITIONER'S REPLY BRIEF**

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### **III.**

#### **A.**

#### **Argument**

#### **The Court's Failure To Give The Mandated Instruction Under W.Va. Code §62-6B-4 ( c ) Was Not Waived By The Defendant And The Failure Constitutes Plain Error.**

In its brief pp. 13-17 the State concedes, as it must, that the Circuit Court failed to instruct the jury as is required by W.Va. Code §62-6B-4( c ). The State instead argues that the Petitioner waived the instruction. There are three major flaws in the State's argument. First, it was counsel and not Mr. Adkins who had this exchange with the Court:

“THE COURT: Mr. Lyall, have you decided what you want me to say to the jury?

MR LYALL: What we talked about 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. J.A. 185.”

Mr. Adkins had been escorted to Magistrate Court before the above exchanges took place, JA184. He was reported to be on a phone with his attorney. In fact, Mr. Adkins could not have communicated directly with the Court at the time if he had wanted to:

“THE COURT: Ask him if he will say his name very loudly.

MR. LYALL: Say your name very loudly.

THE COURT: Okay, let the record reflect that I did not hear anything. . .Is everyone satisfied with how we are? JA 185.”

Nothing exists in the record to indicate that Mr. Adkins understood what the Court and Mr. Lyall were even talking about and certainly nothing to indicate that he understood the meaning of the

comment “what we talked about before is fine.” Therefore, Mr. Adkins by his silence cannot be said to have waived anything. Second, the record clearly reflects that both the Court and the defense attorney appear to have neglected to consider, much less to specifically address, the mandatory nature of the language contained in W.Va. Code §62-6B-4( c ). Its as if that language did not exist. Third, the statute states and the State in its brief fails to address this language:

“ . . . the jury, at a minimum, shall be instructed, **unless the instruction is waived by the Defendant.** . . .

“Defendant” of course is Mr. Adkins. There is no verbal or written waiver from Mr. Adkins. Therefore, the State’s argument in this regard must be rejected.

The State further argues that if not waived then the failure to give the mandatory jury instruction was nevertheless not plain error. The plain error rule specific to a failure to give instruction under Rule 30 of the Rules of Criminal Procedure is identical to Rule 52 (b), State v. Collins, 186 W.Va. 1,409 S.E. 2d 181 (1990). In Collins a murder conviction was reversed for plain error because the trial court did not *sua sponte* give a cautionary jury instruction. To constitute plain error there must be error, the error must be plain, and the error must affect substantial rights which seriously affects the fairness, integrity or public reputation of judicial proceedings, State v. Thompson, 220 W.Va. 398, 647 S.E. 2d 834 (2007). In Thompson the conviction for a meth lab was reversed for plain error because the judge extensively participated in questioning witnesses.

This particular error skewed the fundamental fairness of the trial proceeding. The stated purpose of allowing a child witness to testify outside of the presence of the accused is found in the authorizing legislation. That legislation states that the procedure required is designed to protect the accused’s right to confront his accuser while at the same time providing the alleged victim who has been found to be unable to testify in the presence of the accused a way to tell her

story, W.Va. Code §62-6B-1. The legislation commands very specific findings as a condition precedent to allowing such testimony, W.Va. Code §62-6B-3. The legislation also requires that the Court take into account very specific considerations, §62-6B-3( c ) and to proceed in a very specific way, §62-6B-3(d). All of these requirements must be taken together.

§62-6B-4( c ) supplies the jury instruction which is an integral part of the process which allows testimony by closed circuit. The instruction which is mandated represents a minimum of what must be told to the jury. The instruction is as important to the process as are the requisite findings of fact and the opinion of the expert. To conclude therefore that this error is not plain error because it does not adversely affect fundamental fairness is equivalent to concluding that the ability to confront one's accuser is not important.

As has been noted instructions play a major part in any criminal trial. They are required by Rule 30 of our Rules of Criminal Procedure. It has been said that:

“Complete, correct instructions are a fundamental and vital right, absolutely necessary to the fair dispensation of justice in jury trials,”  
Cleckley Handbook on West Virginia Criminal Procedure, 2<sup>nd</sup> ed. Vol. 2 p. 209.

It is well settled that there are situations which require that the court must give an instruction whether it is requested or not, e.g. Collins supra, Cleckley Id. p. 210. It follows that when a statute such as §62-6B-4( c ) requires a specific instruction that also presents a situation equal in importance to instructing on the elements of the charge and instructing on the meaning of reasonable doubt. As such, its omission does indeed constitute plain error.

### **B.**

#### **The 404(b) Evidence Was Too Remote And Excessive.**

The State argues that the other crimes evidence which were said to have occurred as long as 42 years previously and no more recently than 19-22 years previously was not too remote to be

introduced at trial, State's brief pp. 22-24. Focusing first on the 42 year old accusation, the State has cited to no case in which allegations so remote in time as this were allowed. On its face, such old evidence should have been disallowed. Its introduction represents an abuse of discretion. Turning to the other 404(b) accuser, her accusation was that she was "inappropriately touched" when she was between ages 7 and 10. Her age at trial was 29. The State cites one case, State v. McIntosh, 207 W.Va. 561, 534 S.E. 2d 757 (2000), which finds that 21 years was not too remote, State Brief p. 23. Taken together these two 404(b) accusations actually place the total passage of as much as 64 years. Surely, some vitality remains to the following passages which appear in the very cases which the State relies upon in its brief and which the Circuit Court cited in reaching its decision. Evidence of other wrongs may be admitted:

" . . .provided such evidence relates to incidents reasonably *close in time to the incident(s) giving rise to the indictment.*" State v. Edward Charles L., 183 W.Va. 641, 398 S.E. 2d 123 (1990), State's Brief pp. 18-19. And,

"Generally, relevance, in part, depends on whether the other crime, wrong, or act is similar enough *and close enough in time to the matter in issue.*" State v. McGinnis, 193 W.Va. 147, 455 S.E. 2d 516, 525 (1994). (Emphasis Added), State's Brief p. 18.

In fact the consideration that the proposed evidence shall not be too remote in time in relation to the charged conduct has been a part of West Virginia jurisprudence since the early days of this State, see State v. Yates, 21 W.Va. 761, 765 (1883); State v. Spencer, 125 S.E. 89 (1924) which requires that evidence be:

" . . .at or within a reasonable time before or after the offense, is ordinarily admissible. . ." 125 S.E. at 90.

The question then is when is the evidence within a reasonable time before the offense or is it an abuse of discretion when evidence this old is admitted. It is submitted that evidence occurring 42 years and also 22 years before the charges meet the test as being an abuse of discretion.

The State also argues that the 404(b) allegations were not excessive, State's Brief pp. 24-25. The State refers to the length of the two 404(b) accusers examinations as being short as compared to the State's case in chief. However the State's argument fails to account for the time which the defense took to defend or address these claims. When other crimes are presented the defense must address these accusations or run the extreme risk which comes from allowing evidence to go unchallenged or unexplained. In fact the following witnesses offered some evidence at trial about the collateral crimes or the accusers: the mother of the child J.A. 295, 297, the Defendant's daughter J.A. 383, the Defendant's mother in law, J.A. 395, 405, the Defendant's wife, J.A. 432-437, and Mr. Adkins himself, J.A. 456-457. Almost one-third of the closing argument was about these uncharged acts. When uncharged acts are relied upon by the prosecution they can take over the presentation. In the case sub judice the trial transcript indicates that 30 pages were spent on testimony from the two 404(b) accusers and 34 on the child accuser whose accusation was the subject of the indictment. When the testimony from the uncharged "victims" virtually equals that of the victim named in the charges which are being tried it is excessive.

The State further argues that the evidence of juvenile acts is admissible when lustful disposition is the issue and when there has been no juvenile proceeding. There is no authority which supports a different rule regarding 404(b) evidence just because it involves lustful disposition. Counsel submits further that the absence of a juvenile adjudication makes it no less logical to disallow such claims. Our law has long protected juvenile records, State v. Van Isler, 168, W.Va. 185, 283 S.E. 2d 836 (1981). This protection should extend to uncharged juvenile acts. Moreover, as addressed previously herein our law protects persons on trial for crimes against stale accusations for uncharged conduct. Together these considerations should require

that accusations and wrongdoings which took place 47 years before their presentation as evidence and when the accused is now nearly 60 years old are inadmissible.

Finally, this Court has held that evidence from juvenile adjudications may be admitted as impeachment in rebuttal to the Defendant's case but such juvenile acts should not be made a part of the State's case in chief, State v. Rygh, 524 S.E. 2d 447, 206 W.Va. 295 (1999). As the evidence herein was submitted in the State's case in chief it should have been refused and the Defendant's objection sustained.

### C.

#### **There Was No Evidence Presented At Trial Of Sexual Contact, Sexual Intercourse, Sexual Intrusion, Or Sexual Exploitation Or Of An Attempt Of The Same.**

The State is correct that at this stage the evidence must be viewed in the light most favorable to the State. The Petitioner has done so in the initial brief to this Court. The evidence is wholly lacking to establish the necessary elements of the charges made. Those charges were made under W.Va. Code §§61-8B-7 and 61-8D-5. In the former the State must prove "sexual contact." In the latter the State must prove either sexual contact, sexual exploitation, sexual intrusion, or sexual intercourse. The State's theory at trial was that sexual contact occurred or for purposes of 61-8D-5 an attempt at such contact, intrusion or intercourse.

Try as the State has done to argue that there exists proof by inference from which the jury could find these elements beyond reasonable doubt because the brother noticed movement under the blanket, the young girl said he touched her middle or private or that she touched his belly button these bald statements do not prove sexual contact. Nor does this evidence prove the attempt to commit sexual contact or intrusion and certainly not exploitation or intercourse. Testimony of these alleged acts was accompanied by "I'm not for sure," J.A. 191-192, my parents "might have reminded me [what occurred], J.A. 205 and from the brother "they didn't act

like anything was going on,” J.A. 226. Proof of sexual contact under the evidence in this case requires the intentional touching of the sex organs as was the State’s theory. The foregoing evidence simply does not establish such proof. Nor does the evidence prove that Mr. Adkins was then acting as a guardian or custodian.

What the evidence presented established, and all that was established, is suspicion. The jury was permitted to speculate about “movement” unseen by anyone and what it means. They were allowed to guess what the young girl meant by “belly button,” “middle” or whether she or her parents helped her come up with “privates.” No witness was sufficiently specific to establish the elements so as to allow this case to go to the jury. For this reason also Mr. Adkins’ conviction should be reversed.

**D.**  
**The Court’s Comment Concerning Knowing A Truth From  
A Lie As Related To The Child Accuser Made In Front Of The  
Jury Constitutes Plain Error Which Requires Reversal.**

The State’s argument that the Trial Court was merely determining competency of the alleged child victim as was the Court’s obligation misses the point, see State’s Brief pp. 31-33. The Court’s remarks made in front of the jury crossed the line to be a comment on the child’s veracity.

What follows is the setting for the remarks made:

Mr. Adkins has been escorted from the courtroom so that the closed circuit communication could be set up, J.A. 184.

The jury returned whereupon the court informs the jury “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.” J.A. 185.

The Circuit Court judge herself engaged in a brief voir dire examination of the child in front of the jury, J.A. 186-187.

During her voir dire the judge told the witness that it is important to tell the truth today and that it is a bad thing if you do not. At the end of the child's direct examination the Court states again in front of the jury:

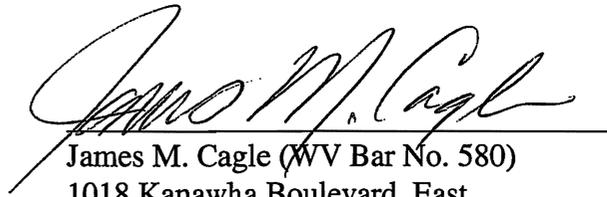
"Mr. Lyall, do you have any questions, and before you question the Court will make a finding that [the child] is a competent witness and knows the difference between the truth and a lie." J.A. 193.

For starters, the entire procedure for determining whether the child was competent was dubious. The law presumes her competency, W.Va. Code 61-8B-11(c). Next, no one had challenged her competency and she had been examined by a court-appointed mental health professional who rendered a report. Further, the voir dire, unnecessary as it was, should have been performed in camera, see e.g. State v. McPherson, 179, W.Va. 632, 371 S.E. 2d 333 (1988); State v. Watson, 173 W.Va. 553, 318 S.E. 2d 603 (1984); discussion in State v. Ayers, 179 W.Va. 365, 369 S.E. 2d 22, 25 pre-trial in camera hearing conducted about child's competency; and see State v. Daggett, 167 W.Va. 411, 280 S.E. 2d 545 (1981) wherein the Court discusses the trial judge's extensive in camera examination with both direct and cross by the parties of the child witness.

In the instant case, the statement that the child knows the difference between the truth and a lie made by the judge before cross examination and after direct examination in front of the jury and in the noted absence of Mr. Adkins is error, is plain error, and is grounds for reversal. The comment is nothing more than a statement to the jury that the judge believed the child was telling the truth.

**Conclusion**

For the foregoing reasons as well as those stated in the Petitioner's Brief the convictions in this case must be reversed and remanded for re-trial.



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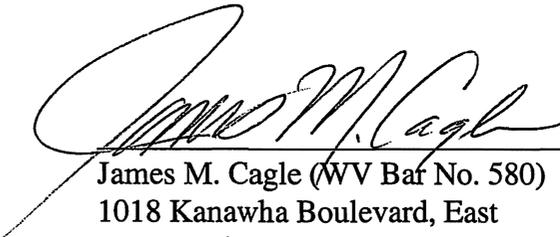
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**CERTIFICATE OF SERVICE**

The undersigned, James M. Cagle, Counsel for the Petitioner, Gary Adkins, does hereby certify that a true and correct copy of the *Petitioner's Reply Brief* was served hand delivered to David A. Stackpole, A.A.G on this the 6<sup>th</sup> day of November, 2015.

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