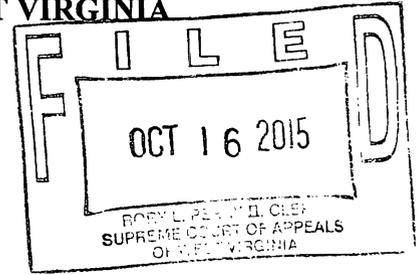


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 15-0537



STATE OF WEST VIRGINIA

*Plaintiff Below, Respondent,*

vs.

GARY ADKINS,

*Defendant Below, Petitioner.*

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RESPONDENT'S BRIEF

---

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---

**RESPONDENT'S BRIEF**

---

COMES NOW, Respondent, State of West Virginia, by counsel, David A. Stackpole, Assistant Attorney General and responds to Petitioner's Brief.

**I.**

**STATEMENT OF THE CASE**

Petitioner was indicted on one (1) count of First Degree Sexual Abuse for "intentionally touching the sex organ of L.M." and one (1) count of First Degree Sexual Abuse for "having L.M. touch his sex organ." (App. at 6-7.) Petitioner was also indicted on two (2) counts of Sexual Abuse by a Person in a Position of Trust. (App. at 8-9.)

The State provided Notice of Rule 404(b) Evidence and identified Amanda Roemer (hereinafter "Ms. Roemer") as a witness to testify regarding sexual contact by Petitioner that occurred when she was between the ages of seven (7) and ten (10) years old. (App. at 537-39.) The State identified the purpose of the 404(b) evidence as lustful disposition toward children

evidence. *Id.* The State also filed a Proposed Rule 404(b) Limiting Instruction. (App. at 586-88.)

On October 14, 2014, the Trial Court held a Pre-Trial Motions Hearing. (App. at 19-61.) Both Petitioner and the State had “filed a motion to take the testimony of the child witness by closed circuit television.” (App. at 21, 525-30.) The Trial Court instructed the State to provide the Court a draft Order with a blank in it for the name of the psychologist or psychiatrist who would do the forensic interview of the child witness whom the Trial Court would appoint. (App. at 28-9.) Later, the Trial Court informed the parties that Robin Browning was being appointed to do the forensic evaluation. (App. at 59, 552-53.)

That same day, the Trial Court held a 404(b) Hearing involving witnesses Ms. Roemer and K.M., the mother of L.M. (App. at 30-52.) Ms. Roemer testified at the 404(b) Hearing that Petitioner is her “dad’s cousin’s husband.” (App. at 31.) When she was “between seven and ten” years old,<sup>1</sup> she was at Petitioner’s house in West Virginia at a family gathering. (App. at 36.) Petitioner would “tickle” her in the pelvic area and on a sleepover, she woke up and found Petitioner’s hand on her pelvic area on the outside of her pants. (App. at 37-8.)

The Trial Court found that the acts did occur by a preponderance of the evidence and that they “show lustful disposition towards children in general.” (App. at 58-9.) The Trial Court reasoned that “[t]he age of the child at the time of the evidence offered is approximately the same as the victim that we’re currently here on.” (App. at 59.) The Trial Court also reasoned that “[t]he location was the same.” *Id.* The Trial Court then expressly found that the evidence was relevant and that “the probative value does outweigh any prejudicial effect that it would have.” *Id.*

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<sup>1</sup> Ms. Roemer was twenty-nine (29) years old at the time of the 404(b) Hearing. (App. at 31.)

On January 12, 2015, the Trial Court held a Hearing regarding the forensic evaluation for the purpose of using closed circuit television at trial. (App. at 62-8.) At the Hearing, Petitioner's position was that they did not oppose use of closed circuit television so that the child witness would avoid Petitioner's presence while testifying. (App. at 64.) The Trial Court expressly held that "by [] clear and convincing evidence [] the child is and was a competent witness" and that the child could testify *via* closed circuit television. (App. at 64-5, 531-33.) Also at that Hearing, the State requested another 404(b) Hearing regarding another witness who had just come forward. (App. at 65-6.)

The State filed another Notice of Rule 404(b) Evidence regarding a witness, Sabrina Runyon (hereinafter "Ms. Runyon"). (App. at 540-43.) The Notice indicated that Ms. Runyon would testify that she was sexually abused when she was between the ages of five (5) and eleven (11) years old. *Id.* The State identified the purpose of the 404(b) evidence as lustful disposition toward children evidence. *Id.* In the Notice, the State acknowledged that "on its face such time frame may appear remote." *Id.* However, the State argued that there were significant similarities as the acts each involved "younger female relatives" who were around the same ages at the time of the abuse. *Id.*

On January 22, 2015, the Trial Court held the second 404(b) Hearing. (App. at 70-102.) Ms. Runyon testified that Petitioner is her uncle. (App. at 73.) Ms. Runyon testified that "some of [her] first memories as a child was (sic) being molested by [Petitioner]." (App. at 76.) Ms. Runyon testified that the incidents took place from when she was "about four or five" until she "was probably 11, 10 or 11 years old."<sup>2</sup> *Id.* She had not come forth earlier with the information because she "didn't want to embarrass [her husband] or [her] children." (App. at 75.) Petitioner

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<sup>2</sup> Ms. Runyon was forty-seven (47) years old at the time of the 404(b) Hearing. (App. at 76.)

would have been between ten (10) and seventeen (17) years old at the time because “he is six years older than [Ms. Runyon].” (App. at 77.) Petitioner would require Ms. Runyon to “perform oral sex on him and then he would also at night in bed he would rub his penis on [her] vagina.” (App. at 78.)

Petitioner also testified at the 404(b) Hearing. (App. at 86-92.) When asked by his own counsel whether he sexually assaulted Ms. Runyon, Petitioner responded by saying, “I did touch [Ms. Runyon] while I was there. Yes I did.” (App. at 87.) Petitioner claimed that he “only remember[ed] two, maybe three times.” *Id.* On cross-examination, Petitioner admitted touching his penis against Ms. Runyon’s vagina. (App. at 91.)

The Trial Court found that Ms. Runyon was a credible witnesses and that the evidence she offered “was so similar in nature to the other 404b evidence.” (App. at 101, 548-51.) The Trial Court expressly stated that the purpose of admitting the 404(b) evidence was “to show lustful disposition.” (App. at 102, 548-51.) The Trial Court reasoned that “[t]hese children were approximately the same age” and that Petitioner “also admitted to sexual contact.” *Id.*

Petitioner filed a Notice of Defendant’s Election to Absent Himself from Courtroom During the Testimony of Child Witness. (App. at 534-36.) On March 9, 2015, before the start of the Trial, the Trial Court explained on the record that the agreed to process was that when the child is called to testify, Petitioner would leave the courtroom to view the closed circuit television testimony of the child witness and would have a cell phone to communicate with his counsel during the testimony. (App. at 105-10.)

At Trial, out of the jury’s presence, the Trial Court had a discussion with counsel regarding instructing the jury about Petitioner’s absence:

THE COURT: Mr. Lyall, do you want me to instruct the jury as to what’s going on, where your client is, etcetera? I will give them a special instruction if

you will write that out. I will tell them what you want me to tell them or what you fashion on your own, either way.

MR. LYALL: If you've got something;

THE COURT: I don't have a written instruction, and, to my knowledge, this is the first time it's ever been done this way in this courtroom, but I'm going to tell the jury what you want me to tell them, if anything. If you don't want me to tell them anything I won't. It will be your choice as to what you want me to do and to what extent you want me to –

MR. LYALL: - I'll defer to the Court. I guess they would wonder what happened to Gary and just say pursuant to the Rule he's elected to absence himself from the courtroom during the testimony of the child.

THE COURT: I can tell the jury that – You're saying to just tell them that he's elected to be absent from the courtroom during the child's testimony?

MR. LYALL: That's fine.

(App. at 183.) Then the Trial Court also made sure, out of the presence of the jury that the closed circuit television and cell phone system for communication between Petitioner and his counsel was working properly. (App. at 183-85.) Following the setup of the system, the Trial Court once again asked Petitioner what instruction he wanted given to the jury:

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.

(App. at 185.) The jury was brought back in and the Trial Court instructed the jury regarding Petitioner's absence:

THE COURT: . . . 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.

*Id.*

Before L.M. testified, the Trial Court asked L.M. questions to determine competency. (App. at 186-87.) L.M. told the Trial Court that she was nine (9) years old, that she understood the difference between the truth and a lie, that telling a lie is a bad thing, and that she needed to tell the truth. *Id.* The Trial Court did not make an express finding of competency at the time. *See id.* Following direct examination, but prior to cross-examination, Trial Court inserted the omitted finding that the child witness was competent to testify:

THE COURT: Mr. Lyall, do you have any questions, and before you question the Court will make a finding that [L.M.] is a competent witness and knows the difference between the truth and a lie.

(App. at 193.)

L.M. testified that Petitioner is her uncle and that she used to go to Petitioner's house to visit, but that the visits stopped two (2) years prior "[b]ecause he touched me in my private." (App. at 189-90.) She did not know how many times it happened, but she knew it happened more than once. (App. at 190-91.) L.M. also testified that Petitioner "took [her] hand and put it" on Petitioner and told her that it was his belly button. (App. at 192.) L.M. testified that "[h]e said it was his belly button, but I didn't fully believe him." (App. at 191.) L.M. told her mother what happened. (App. at 192-93.)

L.M.'s journal clearly states, "Me, My brothers, and him, were Playing a game I kept sittig (sic) on his lap every time I sat on his laP (sic) he kept on touching my middle, or getting my finger, and touching his middle." (App. at 581.)

C.B. also testified at Trial. (App. at 220-35.) C.B. is L.M.'s older brother.<sup>3</sup> (App. at 221.) C.B. testified that there was an occasion where he was with L.M. and his little brother at Petitioner's house and they were playing on the Wii. (App. at 223-24.) They were taking turns playing, but when it was not L.M. or Petitioner's turn, then L.M. was sitting on Petitioner's lap with a blanket over them. (App. at 224.) C.B. saw "movement under the blanket towards her lower area and [became] concerned." *Id.* C.B. testified that he did not actually see Petitioner's hand touch L.M.'s private area because of the blanket. (App. at 225-26.)

Prior to the testimony of any of the 404(b) witnesses, the State offered a limiting instruction and Petitioner stated that the proposed instruction was "fine." (App. at 235-36.) The Trial Court read the limiting instruction to the jury. (App. at 236-37.)

Ms. Roemer testified as the first 404(b) witness. (App. at 237-56.) Ms. Roemer testified that Petitioner is her father's cousin's husband. (App. at 238.) Ms. Roemer testified that she attended family gatherings and that when she was "between seven and ten" she would have sleepovers at Petitioner's house. (App. at 239-41.) Ms. Roemer recounted "him tickling us in what I would now say as inappropriate places and falling asleep on the couch and waking up to his hand on my private area not inside the pants but on the outside." (App. at 241-42.) Ms. Roemer clarified the area to be her vagina. (App. at 242.) Ms. Roemer was thirty (30) years old at the time of trial, so the events happened between twenty (20) and twenty-three (23) years prior. (App. at 240, 245.)

Ms. Runyon testified as the second 404(b) witness. (App. at 263-71.) Ms. Runyon testified that Petitioner is her uncle and is six (6) years older than her. (App. at 264.) Ms. Runyon testified that she had never told anyone, but when she was between the ages of five (5)

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<sup>3</sup> C.B. was fourteen (14) years old at the time of trial.

and ten (10) years old, Petitioner molested her. (App. at 264-65.) The first incident that she remembers is “him pushing me to the ground and trying to touch me and rub all over me.” (App. at 266.) Later “he did have me touch his penis and perform oral sex on him.” *Id.* Ms. Runyon also recalled that “[h]e would come to my bed at night and rub his penis on my vagina.” *Id.* She described that “[h]e would make me rub his penis before doing oral sex, but mostly at night when he would come to the bed it would just be him touching me with his fingers or rubbing his penis on my vagina.” (App. at 267.) Ms. Runyon was forty-seven (47) years old at the time of trial, so the events happened between thirty-seven (37) and forty-three (43) years prior. (App. at 263, 269.) Petitioner was between the ages of ten (10) and sixteen (16) years old at the time of the events. (App. at 268.)

Katie M. is the mother of L.M. and C.B. (App. at 276-77.) Katie M. testified that on a Sunday after C.B. and L.M. had been to Petitioner’s home playing video games, “[C.B.] was hounding [L.M.] in the car, wanting to know why did [L.M.] get upset.” (App. at 280.) Katie M. testified that C.B. was upset and she told him to “hush, stop, leave it alone.” *Id.* When they arrived home, she questioned L.M. about what C.B. was talking about in the car. *Id.* L.M. “whispered and said, ‘Mommy, Uncle Gary made me pat his belly button.’” *Id.* Then L.M. started crying and “said ‘But Mommy I don’t think it was his belly button.’” *Id.* Katie M. told L.M. that “[y]ou don’t even have to go back over there.” (App. at 281.) When Katie M. discussed the matter with her husband they were concerned because it was “a huge accusation and you don’t throw it around lightly.” *Id.*

Sometime later, Katie M. and L.M. were with family visiting L.M. “said, ‘Mommy, can you ever get really mad at me and not love me anymore?’” (App. at 282.) After Katie M.

reassured L.M. that she would not, L.M. raised the issue of Petitioner making her “pet his belly button” that she said “wasn’t his belly button.” *Id.*

On another occasion, Petitioner’s wife, was at Katie M.’s house and L.M. “was asking [] if she was clean, ‘Am I clean all over? Am I clean on the inside? Am I clean on the outside?’” (App. at 283.) Petitioner’s wife told Katie M. that “those are signs of child abuse, of sexual abuse.” *Id.* Then Petitioner “stuck his head in is all he did and asked if [his wife] was there, and [L.M.] runs and she wraps her arms and legs around me and she said ‘Mommy, what if it happens again[?]’” *Id.* Katie M. reassured L.M. that “it will never happen again.” *Id.*

Katie M. testified that L.M. “just started progressively getting worse after that.” *Id.* This included washing her hands “to the point of being raw and burning;” asking constantly if she is clean; going “thru a roll of toilet paper and [] just cleans and cleans and cleans;” not wanting to use the bathroom; and “get[ting] dressed in a certain way” that involves getting “dressed or undressed the furthest away” from where “he lives.” (App. at 285.) L.M.’s teacher had to take away the hand sanitizer because of the hand washing. (App. at 286.) L.M. refuses to wear clothes that come from family “because what if [Petitioner] touched it. *Id.*

Katie M. spoke with her husband and they agreed that one (1) of the things they needed to do is set up an appointment with a counselor. (App. at 284.) When she spoke to the counselor, she was informed that it had “to go thru CPS.” *Id.* CPS did a report and then Trooper Douglas came and obtained a report from Katie M. (App. at 284-85.)

Petitioner testified, during direct examination at Trial, that he never sexually touched Amanda Roemer. (App. at 445.) Petitioner testified, during cross-examination at Trial, that he rubbed his penis against Ms. Runyon’s vagina when she was ten (10) years old. (App. at 456-57.)

As part of the charge to the jury, the Trial Court gave the 404(b) instruction again. (App. at 473-74, 593.) The instruction stated, in part, that “the evidence of Amanda Roemer and Sabrina Runyon’s testimony may be considered only for the purpose of determining whether the State has established lustful disposition towards children.” *Id.* The Trial Court also stated that “[y]ou may not use this evidence in consideration of whether the State has established the crime charged in the indictment” and that “it is improper for the State to prove a criminal case by evidence that a Defendant may have committed other criminal acts or may be a bad person.” *Id.*

Following deliberations, the jury returned guilty verdicts on all four (4) counts. (App. at 503-04.) On April 2, 2015, the Trial Court held a Sentencing Hearing. (App. at 506-23.) Petitioner was sentenced to a term of five (5) to twenty-five (25) years for each count of Sexual Abuse in the First Degree and to a term of ten (10) to twenty (20) years for each count of Sexual Abuse by a Person in a Position of Trust, all counts to run consecutively, and to “post-incarceration extended supervision for a period of 50 years.” (App. at 519-20, 599-605.) This appeal followed.

## II.

### SUMMARY OF THE ARGUMENT

The Trial Court inquired of Petitioner as to what instruction should be given to the jury regarding his decision to absent himself during L.M.’s testimony. Petitioner suggested that the Court instruct the jury that “he’s elected to absence himself from the courtroom during the testimony of the child.” The Trial Court gave the jury the instruction as requested by Petitioner and then even asked Petitioner if it was sufficient and Petitioner agreed that it was sufficient. At no time did Petitioner object to the instruction that he proposed.

It is not error for a Trial Court to give an instruction as requested by a Defendant and there is not law prohibiting the Trial Court from using Petitioner's requested instruction. As such, it is not error and even if it were error it is not plain error. Moreover, the giving of Petitioner's proposed instruction did not affect substantial rights and it did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings. As such, the Trial Court did not err in giving Petitioner's suggested instruction regarding Petitioner's absence during L.M.'s testimony.

The admission of the 404(b) evidence must be reviewed in favor of the State and the probative value must be maximized while the prejudicial effect must be minimized. The State gave proper notice, the Trial Court held two (2) Hearings, the Trial Court made proper findings, and Trial Court gave limiting instructions at the time that the evidence was admitted and at the time that the charge was given.

The 404(b) evidence was similar as it involved a female child related to Petitioner at or near the age of seven (7) years old, with similar types of sexual contact. Petitioner even admitted that the 404(b) evidence regarding Ms. Runyon was true.

The 404(b) evidence was not required to be excluded based on Petitioner's age at the time of the act as there is no such prohibition. The jury was the proper body to determine the weight to be given to the evidence based on remoteness in time. The evidence was not excessive as it only took up twenty-seven (27) of one hundred thirty (130) pages of the State's case in chief. As such, the Trial Court did not err in finding that the 404(b) evidence was probative, not overly prejudicial, and proper for the jury to consider regarding whether the Petitioner had a lustful disposition towards children.

All evidence and all inferences and credibility assessments that the jury might have drawn must be viewed in favor of the prosecution. Petitioner was more than fourteen (14) years old and L.M. was only seven (7) years old at the time of the sexual contact. Additionally, Petitioner was not married to L.M. The evidence showed that Petitioner touched L.M. in her “private” and that the touching occurred more than once. Petitioner also placed her hand on his belly button that she did not believe was his belly button. L.M. made a journal, which reflects that Petitioner touched her “middle” and made her touch “his middle.” As such, the jury could properly find that Petitioner committed First Degree Sexual Abuse.

At the time that the sexual contact occurred, only C.B., C.B.’s little brother, and L.M. were at Petitioner’s house. C.B. was only twelve (12) years old and he was the oldest child in the house at the time. Petitioner was the only adult in the house at the time. As such, the jury could properly find that Petitioner had care, custody, and control of L.M. at the time of the sexual contact and could find that Petitioner committed Sexual Abuse by a Person in a Position of Trust.

The Trial Court had an obligation, pursuant to this Court’s precedent, to determine whether L.M. was competent to testify. The Trial Court’s properly questioned L.M. regarding her age and understanding of the difference between truth and lies. The Trial Court acted within its discretion in making an express finding that L.M. understood the difference between truth and lies and was competent to testify. At no point did the Trial Court find that L.M. was credible. Petitioner did not object to the Trial Court’s inquiry or finding of competency. Additionally, the jury was properly instructed regarding credibility determinations. As such, the Trial Court did not err in inquiring and in making an express finding that L.M. was competent to testify.

### III.

#### STATEMENT REGARDING ORAL ARGUMENT AND DECISION

All the issues raised by Petitioner have been authoritatively decided. The facts and legal arguments are adequately presented in the Briefs and the Appendix. The decisional process would not be aided by Oral Argument. This matter is appropriate for a Memorandum Decision.

### IV.

#### ARGUMENT

Petitioner argues four (4) assignments of error: [1] error for Trial Court to not give the closed circuit instruction; [2] error for Trial Court to permit 404(b) evidence; [3] insufficiency of the evidence; and [4] error for Trial Court to make comment about child's veracity. Pet'r's Br. at

1. This Court should reject all of Petitioner's claims.

**A. The Trial Court Did Not Err By Giving The Jury The Instruction Requested By Petitioner As Petitioner's Request Amounted To A Waiver Of The Statutory Instruction And Even If This Court Were To Find That It Was Not Waiver, The Giving Of Petitioner's Requested Instruction Was Not Plain Error.**

Trial Courts have broad discretion in the specific wording of a jury instruction as long as the instruction is an accurate reflection of the law:

This Court previously has set forth the applicable standards of review as follows:

A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, as long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.

Syllabus Point 4, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995). Further, “[a]s a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. By contrast, the question of whether a jury was properly instructed is a question of law, and the review is *de novo*.” Syllabus Point 1, *State v. Hinkle*, 200 W.Va. 280, 489 S.E.2d 257 (1996).

*State v. Jett*, 220 W. Va. 289, 293, 647 S.E.2d 725, 729 (2007).

Petitioner waived the use of the instruction provided in the Code and even if this Court were to find that Petitioner had not waived the use of the instruction, it was not plain error to instruct the jury using Petitioner’s suggested instruction. West Virginia Code provides that the jury is to be instructed when closed circuit television is used:

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.

W. Va. Code § 62-6B-4(c) (2013).

It is undisputed that the State sought to use closed circuit television for L.M.’s testimony, that the Trial Court held a Hearing and appointed an independent forensic psychological evaluation, and that following that evaluation, the parties agreed that there was a need for the use of closed circuit television use for L.M.’s testimony. *See* Pet’r’s Br. at 9.

Petitioner argues that he did not waive the jury instruction found in West Virginia Code § 62-6B-4(c). Pet’r’s Br. at 10. However, Petitioner concedes that he did not object to the matter below and therefore argues that the failure to give the instruction was plain error. *Id.* Petitioner is wrong for two (2) reasons: [1] Petitioner waived the instruction and as such, plain error analysis does not apply and [2] even if this Court were to find that Petitioner did not waive the instruction, it was not plain error.

First, the record clearly shows that Petitioner waived the instruction when Petitioner was asked by the Trial Court what instruction was desired and that Petitioner expressly requested that the jury be instructed that Petitioner elected to absent himself from the courtroom during the testimony of L.M.:

THE COURT: Mr. Lyall, do you want me to instruct the jury as to what's going on, where your client is, etcetera? I will give them a special instruction if you will write that out. I will tell them what you want me to tell them or what you fashion on your own, either way.

MR. LYALL: If you've got something;

THE COURT: I don't have a written instruction, and, to my knowledge, this is the first time it's ever been done this way in this courtroom, but I'm going to tell the jury what you want me to tell them, if anything. If you don't want me to tell them anything I won't. It will be your choice as to what you want me to do and to what extent you want me to –

MR. LYALL: - I'll defer to the Court. I guess they would wonder what happened to Gary and just say pursuant to the Rule he's elected to absence himself from the courtroom during the testimony of the child.

THE COURT: I can tell the jury that – You're saying to just tell them that he's elected to be absent from the courtroom during the child's testimony?

MR. LYALL: That's fine.

(App. at 183.) Later, the Trial Court confirmed that that was the instruction that was desired and nothing more. (App. at 185.) Moreover, following the instruction given by the Trial Court, Petitioner was asked if the instruction was sufficient:

THE COURT: . . . 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.

*Id.*

This was not just a failure to raise the claim before the Trial Court. Here, Petitioner expressly waived any claim of error as Petitioner told the Trial Court what instruction should be given to the jury. (App. at 183-85.) Petitioner cannot tell the Trial Court what instruction to give and then complain because the Trial Court instructed the jury as Petitioner requested.

Second, Petitioner never raised the matter before the Trial Court to give the Trial Court the opportunity to rule on the matter. *See State v. Miller*, 197 W. Va. 588, 597, 476 S.E.2d 535, 544 (1996) (stating that “[o]rdinarily, a defendant who has not proffered a particular claim or defense in the trial court may not unveil it on appeal”). “ ‘ ‘ One of the most familiar procedural rubrics in the administration of justice is the rule that the failure of a litigant to assert a right in the trial court likely will result” in the imposition of a procedural bar to an appeal of that issue.’ ” *State v. LaRock*, 196 W. Va. 294, 316, 470 S.E.2d 613, 635 (1996) (citations omitted).

There are four (4) elements to plain error. Syl. Pt. 7, *State v. Miller*, 194 W. Va. 3, 7, 459 S.E.2d 114, 118 (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.* In order to prove that the error affects substantial rights, the Court must find that the trial court “skewed the fundamental fairness or basic integrity of the proceedings in some major respect.” Syl. Pt. 7, *LaRock*, 196 W. Va. at 299, 470 S.E.2d at 618. “In clear terms, the plain error rule should be exercised only to avoid a miscarriage of justice.” *Id.*

In this case, it was not error for the Trial Court to inquire from Petitioner what instruction that he wanted to provide to the jury. (App. at 183-85.) It was not error for the Trial Court to accept Petitioner’s instruction that “he’s elected to absence himself from the courtroom during the testimony of the child.” *Id.* It was not error for the Trial Court to give that instruction and

then ask Petitioner if the instruction was sufficient. *Id.* Additionally, even if it were error to give Petitioner's suggested instruction, such error is not plain because the Trial Court has the right to believe that Petitioner can provide the instruction that Petitioner wishes to use where no rule or law prohibits Petitioner from providing desired language. Moreover, even if it were plain error to use Petitioner's requested instruction, such plain error neither affected substantial rights nor seriously affected the fairness, integrity, or public reputation of the judicial proceedings. The jury was clearly instructed that Petitioner "elected to appear by closed circuit during the testimony of this particular witness" and would "be returning to the courtroom when her testimony has finished." (App. at 185.) That instruction informed the jury as to the reason for Petitioner's absence from the courtroom and that he would be appearing by closed circuit television. *Id.*

Therefore, because the Trial Court inquired of Petitioner as to what instruction should be given to the jury regarding his decision to absent himself during L.M.'s testimony; because Petitioner suggested that the Court instruct the jury that "he's elected to absence himself from the courtroom during the testimony of the child;" because the Trial Court gave the jury the instruction requested by Petitioner; because the Trial Court inquired of Petitioner regarding the sufficiency of the jury instruction following the giving of the instruction and Petitioner affirmed that it was sufficient; because Petitioner did not object to the instruction given; because it is not error for a Trial Court to give an instruction as requested by a Defendant; because even if it were error, such error is not plain as there is not law prohibiting the Trial Court from using Petitioner's requested instruction; and because the instruction that was given was accurate and neither affected substantial rights nor seriously affected the fairness, integrity, or public reputation of the judicial proceedings, this Court should affirm Petitioner's conviction and sentence.

**B. The Trial Court Properly Admitted The 404(b) Evidence Regarding Petitioner's Lustful Disposition Towards Children.**

The standard of review regarding claims that the Trial Court erred in admitting 404(b) evidence requires a three (3) step process:

First, we review for clear error the trial court's factual determination that there is sufficient evidence to show the other acts occurred. Second, we review *de novo* whether the trial court correctly found the evidence was admissible for a legitimate purpose. Third, we review for an abuse of discretion the trial court's conclusion that the "other acts" evidence is more probative than prejudicial under Rule 403.

*State v. Jonathan B.*, 230 W. Va. 229, 236, 737 S.E.2d 257, 263-64 (2012) (quoting *LaRock*, 196 W. Va. at 310-11, 470 S.E.2d at 629-30). "In reviewing the admission of Rule 404(b) evidence, we review it in the light most favorable to the party offering the evidence, . . . maximizing its probative value and minimizing its prejudicial effect." *Jonathan B.*, 230 W. Va. at 236, 737 S.E.2d at 263-64 (quoting *State v. McGinnis*, 193 W. Va. 147, 159, 455 S.E.2d 516, 528 (1994)).

In this case, the Trial Court properly admitted the 404(b) evidence to show lustful disposition. A Trial Court must evaluate 404(b) lustful disposition evidence pursuant to both: [1] *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990) and [2] *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994). Syl. Pt. 3, *Jonathan B.*, 230 W. Va. at 229, 737 S.E.2d at 260.

West Virginia allows 404(b) evidence to show lustful disposition toward children generally:

Collateral acts or crimes may be introduced in cases involving child sexual assault or sexual abuse victims to show the perpetrator had a lustful disposition towards the victim, a lustful disposition towards children generally, or a lustful disposition to specific other children provided such evidence relates to incidents reasonably close in time to the incident(s) giving rise to the indictment. To the extent that this conflicts with our decision in *State v. Dolin*, 176 W. Va. 688, 347 S.E.2d 208 (1986), it is overruled.

Syl. Pt. 2, *Edward Charles L.*, 183 W. Va. at 643, 398 S.E.2d at 125. Under *McGinnis*, the Court has a process that must be used for lustful disposition evidence:

“Where an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an *in camera* hearing as stated in *State v. Dolin*, 176 W. Va. 688, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court’s general charge to the jury at the conclusion of the evidence.”

Syl. Pt. 2, *Jonathan B.*, 230 W. Va. at 229, 737 S.E.2d at 260 (quoting Syl. Pt. 2, *McGinnis*, 193 W. Va. at 151, 455 S.E.2d at 520).

In this case, the State provided Notice of Rule 404(b) Evidence regarding Ms. Roemer. (App. at 537-39.) The State identified the purpose of the 404(b) evidence as lustful disposition toward children evidence. *Id.* On October 14, 2014, the Trial Court held a 404(b) Hearing regarding the 404(b) evidence by Ms. Roemer. (App. at 30-52.) Ms. Roemer testified at the 404(b) Hearing that Petitioner is her “dad’s cousin’s husband.” (App. at 31.) Ms. Roemer was twenty-nine (29) years old at the time of the 404(b) Hearing. *Id.* When she was “between seven and ten” years old, Petitioner would “tickle” her in the pelvic area and on a sleepover, she woke up and found Petitioner’s hand on her pelvic area on the outside of her pants. (App. at 37-8.)

The Trial Court found that the acts did occur by a preponderance of the evidence and that they “show lustful disposition towards children in general.” (App. at 58-9.) The Trial Court

noted that although the acts were alleged to have occurred nineteen (19) to twenty-two (22) years prior, the similarities were striking as the age of L.M. was seven (7), which was the same age that Ms. Roemer testified Petitioner began touching her and that both instances involved touching at Petitioner's home. (App. at 59.) The Trial Court expressly found that the evidence was relevant to show lustful disposition toward children and that "the probative value does outweigh any prejudicial effect that it would have." *Id.*

The State filed another Notice of Rule 404(b) Evidence regarding Ms. Runyon. (App. at 540-43.) The State identified the purpose of the 404(b) evidence as lustful disposition toward children evidence. *Id.* On January 22, 2015, the Trial Court held the second 404(b) Hearing. (App. at 70-102.) Ms. Runyon testified that Petitioner is her uncle. (App. at 73.) Ms. Runyon was forty-seven (47) years old at the time of the 404(b) Hearing. (App. at 76.) Ms. Runyon testified that Petitioner molested her as a child, beginning when she was four (4) or five (5) years old and continuing until she was ten (10) or eleven (11) years old. *Id.* Petitioner would have been between ten (10) and seventeen (17) years old at the time because "he is six years older than [Ms. Runyon]." (App. at 77.) Petitioner required Ms. Runyon to "perform oral sex on him and then he would also at night in bed he would rub his penis on [her] vagina." (App. at 78.) Petitioner testified at the 404(b) Hearing and admitted touching Ms. Runyon and putting his penis against Ms. Runyon's vagina. (App. at 86-92.)

The Trial Court found that Ms. Runyon was a credible witnesses and that the evidence she offered "was so similar in nature to the other 404b evidence." (App. at 101, 548-51.) The Trial Court stated that the purpose of admitting the 404(b) evidence was "to show lustful disposition" and reasoned that "[t]hese children were approximately the same age" and that Petitioner "also admitted to sexual contact." (App. at 102, 548-51.)

The State filed a Proposed Rule 404(b) Limiting Instruction. (App. at 586-88.) Petitioner stated that the proposed instruction was “fine.” (App. at 235-36.) The Trial Court read the limiting instruction to the jury. (App. at 236-37.) As part of the charge to the jury, the Trial Court gave the 404(b) instruction again. (App. at 473-74, 593.) As such, the Trial Court followed all the proper procedures regarding the use of 404(b) lustful disposition evidence.

Petitioner argues that the evidence should not have been admitted because: [1] Petitioner was a juvenile at the time of the incident with Ms. Runyon; [2] the evidence was remote in time; [3] the acts with Ms. Runyon were not similar; and [4] the 404(b) evidence was “shotgunned.” Pet’r’s Br. at 11-4. Each of Petitioner’s arguments fail.

- 1. The Trial Court did not err by admitting the 404(b) evidence regarding Ms. Runyon because there is no age restriction on lustful disposition evidence and because Petitioner admitted that the 404(b) evidence was true.**

This Court’s holding that lustful disposition evidence can be admitted does not limit the evidence to acts that were committed as an adult:

Collateral acts or crimes may be introduced in cases involving child sexual assault or sexual abuse victims to show the perpetrator had a lustful disposition towards the victim, a lustful disposition towards children generally, or a lustful disposition to specific other children provided such evidence relates to incidents reasonably close in time to the incident(s) giving rise to the indictment.

Syl. Pt. 2, *Edward Charles L.*, 183 W. Va. at 643, 398 S.E.2d at 125.

Petitioner relies on this Court’s jurisprudence which holds that “[t]his state recognizes a compelling public policy of protecting the confidentiality of juvenile information in all court proceedings.” Pet’r’s Br.; *State ex rel. Garden State Newspapers, Inc. v. Hoke*, 205 W. Va. 611, 613, 520 S.E.2d 186, 188 (1999). *State ex rel. Garden State Newspapers, Inc.* is inapposite as it was a court proceeding that involved a juvenile who was a juvenile at the time of the matter. *Id.* Petitioner does not argue that he was a juvenile at the time of his Trial. See Pet’r’s Br. at 11-2.

Similarly, Petitioner's citations to *Jeffery v. McHugh*, 166 W. Va. 379, 273 S.E.2d 837 (1981) (involving the protection of a juvenile's name who was deceased at the time of the request); W. Va. Code § 49-5-103<sup>4</sup> (2015) (which is about orders in juvenile proceedings); W. Va. Code § 18-2-5h (2014) (which is about student data); W. Va. R. App. P. 40(e) (2010) (protecting juvenile names in appellate proceedings), are all inapposite. None of Petitioner's citations suggest that a fifty-four (54) year old man, who is on Trial, has a right to exclusion of 404(b) evidence based on the fact that he was a juvenile at the time that the sexual assaults happened when Petitioner was never charged with the crime as a juvenile. This Court should not adopt a rule that would prevent a jury from hearing about a criminal defendant's lustful disposition towards young children based upon the age of the criminal defendant at that time of the 404(b) evidence. This is especially true in this case, where Petitioner, who is now fifty-four (54) years old has a pattern of sexually assaulting young girls who are related to him and where Petitioner admitted the 404(b) evidence was true.

**2. The Trial Court exercised discretion in determining that the evidence was not too remote in time and in allowing the jury to determine the amount of weight to give the 404(b) evidence.**

The length of time between the 404(b) evidence and the charged offense goes to the weight of the evidence and not to the admissibility of the evidence:

It is well understood that “[a]s a general rule remoteness goes to the weight to be accorded the evidence by the jury, rather than to admissibility.” *State v. Gwinn*, 169 W. Va. at 457, 288 S.E.2d at 535. “The admissibility of evidence concerning prior bad acts under rule 404(2) must be determined upon the facts of each case; no exact limitation of time can be fixed as to when prior acts are too remote to be admissible.” *McIntosh*, 207 W. Va. at 572, 534 S.E.2d at 768 (*quoting State v. Burdette*, 259 Neb. 679, 697, 611 N.W.2d 615 (2000)). Furthermore, “[w]hile remoteness in time may weaken the probative value of evidence, such remoteness

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<sup>4</sup> Petitioner cites to W. Va. Code § 49-5-17, which has been recodified as W. Va. Code § 49-5-103.

does not, in and of itself, necessarily justify exclusion of the evidence.” *Id.* at 573, 534 S.E.2d at 769.

*State v. Rash*, 226 W. Va. 35, 45-6, 697 S.E.2d 71, 81-2 (2010); *see also*, *State v. Parsons*, 214 W. Va. 342, 589 S.E.2d 226 (2003) (finding that fifteen to twenty years was not too remote); *State v. McIntosh*, 207 W. Va. 561, 534 S.E.2d 757 (2000) (finding that twenty-one years was not too remote). The decision regarding whether evidence is too remote is within the Trial Court’s discretion:

In syllabus point five of *Yuncke v. Welker*, 128 W. Va. 299, 36 S.E.2d 410 (1945), this Court explained: “Whether evidence offered is too remote to be admissible upon the trial of a case is for the trial court to decide in the exercise of a sound discretion; and its action in excluding or admitting the evidence will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.”

*State v. Winebarger*, 217 W. Va. 117, 124, 617 S.E.2d 467, 474 (2005).

In this case, the Trial Court considered remoteness in determining whether to permit 404(b) evidence, but found that the evidence of similarity was high because each instance involved a female relative near the same ages of L.M., who was seven (7) years old, took place at Petitioner’s home and involved similar types of touching, that the evidence was probative and that “the probative value does outweigh any prejudicial effect that it would have.” (App. at 58-9, 101-02.) It was appropriate for the jury to weigh the remoteness in time to determine how much weight to give the 404(b) evidence.

Petitioner argues that *State v. Jackson*, 181 W. Va. 447, 383 S.E.2d 79 (1989) is in conflict with *McIntosh*, 207 W. Va. at 561, 534 S.E.2d at 757. Pet’r’s Br. at 12. Petitioner is incorrect. *Jackson* is not a case where 404(b) evidence was provided to show lustful disposition. *Jackson*, 181 W. Va. at 450, 383 S.E.2d at 82. Rather, in *Jackson*, the evidence was offered in rebuttal in an effort to impeach evidence submitted by the defendant regarding defendant’s

character. *Id.* As such, *Jackson* is not in conflict with *McIntosh* and *Jackson* is not applicable to this matter.

**3. The 404(b) evidence was similar.**

Petitioner argues that the acts of Petitioner with Ms. Runyon were not similar based on the fact that she testified that she would be forced to rub his penis before oral sex and that Petitioner would touch her with her fingers and rub his penis on her vagina. Pet'r's Br. at 13-4. While there was no evidence that L.M. was required to perform oral sex on Petitioner or that he rubbed his penis on L.M.'s vagina, there was substantial evidence of similarity.

As to the act itself, L.M. testified that "he touched me in my private" and that Petitioner took her hand and used it to touch him. (App. at 189-91, 581.) Ms. Runyon testified that Petitioner would touch her with his fingers and that he would force her to touch him. (App. at 267.) Both Ms. Runyon and L.M. testified that the acts occurred on more than one (1) occasion. (App. at 190-91, 267.) Both Ms. Runyon and L.M. were close in age at the time of the sexual assault as L.M. was seven (7) and Ms. Runyon was between the ages of five (5) and ten (10) years old. (App. at 186-90, 264-65.) Both L.M. and Ms. Runyon were females who were related to Petitioner. (App. at 189-90, 264.)

**4. The 404(b) evidence was not excessive.**

Here, there was limited 404(b) evidence that was directly on point and it was neither unnecessary nor excessive. Evidence of other crimes may be improper where it goes beyond what is reasonably required:

Where the prosecution improperly introduces evidence of other criminal acts as part of the *res gestae* or same transaction beyond that reasonably required to accomplish the purpose for which it is offered, and makes remarks concerning such other crime evidence in argument for the purpose of inflaming the jury, the conviction will be reversed on the ground that the defendant was denied the fundamental right to a fair trial.

Syl. Pt. 3, *State v. Spicer*, 162 W. Va. 127, 128, 245 S.E.2d 922, 924 (1978).

Petitioner argues that the 404(b) evidence was “shotgunned.” Pet’r’s Br. at 14. Petitioner explains that “shotgunning” means that the evidence is excessive and unnecessary and that it “results from a prosecutor’s devotion of excessive trial time to the introduction of collateral crimes evidence. *Id.*”

Out of the one hundred thirty (130)<sup>5</sup> pages of the transcript devoted to the State’s case in chief, only nineteen (19) pages of the testimony were related to Ms. Roemer<sup>6</sup> and only eight (8) pages of testimony were related to Ms. Runyon.<sup>7</sup> As such, it is clear that there was not excessive use of 404(b) evidence to show lustful disposition toward children. Petitioner’s citation to *State v. Messer*, 166 W. Va. 806, 277 S.E.2d 634 (1981) is inapposite as *Messer* was a case where the majority of the evidence related to collateral acts. *Messer*, 166 W. Va. at 807, 277 S.E.2d at 636. Twenty-seven (27) of one hundred thirty (130) pages can hardly be called the majority. Additionally, unlike in *Spicer*, there was no *res gestae* 404(b) evidence. The 404(b) evidence was lustful disposition evidence and the purpose of the remarks was not to inflame the jury.

Petitioner’s citation to *State v. Thomas*, 157 W. Va. 640, 203 S.E.2d 445 (1974) is a citation to dicta. *Thomas*, 157 W. Va. at 658, 203 S.E.2d at 457 (holding that the Trial Court’s discretion could not be questioned because Petitioner did not raise the issue regarding excessive use of collateral crimes). Even if *Thomas* were applied, the evidence of lustful disposition admitted in this case does not rise to the level of concern that the *Thomas* Court expressed.

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<sup>5</sup> The State’s case in chief begins on page 186 of the Appendix and ends on page 316.

<sup>6</sup> Ms. Roemer’s testimony begins on page 237 of the Appendix and ends on page 256.

<sup>7</sup> Ms. Runyon’s testimony begins on page 263 of the Appendix and ends on page 271.

Therefore, because the admission of the 404(b) evidence must be reviewed in favor of the State; because the 404(b) evidence's probative value must be maximized; because the 404(b) evidence's prejudicial effect must be minimized; because 404(b) evidence may be used to show a lustful disposition toward children; because the State gave proper notice for the 404(b) evidence regarding both witnesses; because the Trial Court held two (2) 404(b) Hearings to evaluate the evidence; because both instances of 404(b) evidence and the current matter all involved Petitioner's involvement with a child who was related to him; because both instances of 404(b) evidence and the current matter all involved children at or near the same ages; because both instances of 404(b) evidence and the current matter all involved similar types of contact; because the Trial Court instructed the jury prior to the admission of the 404(b) evidence; because the Trial Court instructed the jury about 404(b) evidence at the time that the jury was given the jury charge; because there is no prohibition on the use of 404(b) evidence where the criminal defendant was a juvenile and where there was no court proceeding related to the actions; because Petitioner admitted that the 404(b) evidence regarding Ms. Runyon was true; because remoteness goes to the weight of the evidence and not to admissibility; because the decision of remoteness is within the discretion of the Trial Court; because the Trial Court found that the 404(b) evidence was probative; because the Trial Court found that the probative value was not outweighed by prejudice; because the jury was capable of determining how much weight to give the 404(b) evidence based on how long ago it took place; and because only twenty-seven (27) of one hundred thirty (130) pages of the State's case in chief related to the 404(b) lustful disposition evidence, this Court should affirm Petitioner's conviction and sentence.

**C. There Was Sufficient Evidence To Support Petitioner’s Conviction.**

“A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden.” Syl. Pt. 2, *State v. Strock*, 201 W. Va. 190, 190-91, 495 S.E.2d 561, 561-62 (1997) (quoting Syl. Pt. 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995)). “An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution.” *Id.* “Credibility (sic) determinations are for a jury and not an appellate court.” *Id.* “[A] jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighted, from which the jury could find guilt beyond a reasonable doubt.” *Id.*

In this case, there was sufficient evidence for the jury to convict. As to the two (2) counts of First Degree Sexual Abuse, “A person is guilty of sexual abuse in the first degree when: Such person, being fourteen years old or more, subjects another person to sexual contact who is younger than twelve years old.” W. Va. Code § 61-8B-7(a)(3) (2006). Sexual contact is defined by statute:

“Sexual contact” means 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.

W. Va. Code § 61-8B-1(6) (2007). Petitioner was not married to L.M. and was only seven (7) years old at the time of the sexual contact. (App. at 186-90.) L.M. testified that Petitioner “touched me in my private.” (App. at 189-90.) She did not know how many times it happened, but she knew it happened more than once. (App. at 190-91.) L.M. also testified that Petitioner “took [her] hand and put it” on Petitioner and told her that it was his belly button. (App. at 192.) L.M. testified that “[h]e said it was his belly button, but I didn’t fully believe him.” (App. at

191.) Moreover, L.M.'s journal, which was admitted into evidence, clearly states, "Me, My brothers, and him, were Playing a game I kept sittig (sic) on his lap every time I sat on his lap (sic) he kept on touching my middle, or getting my finger, and touching his middle." (App. at 581.) C.B. testified that he was present when L.M. was sitting on Petitioner's lap and he observed "movement under the blanket towards her lower area and [became] concerned." (App. at 224.) As such, there was sufficient evidence for the jury to find that Petitioner committed two (2) counts of First Degree Sexual Abuse.

Petitioner argues that "the notes in [L.M.'s] journal reflect coaching which had occurred over the year and more before the case was tried." Pet'r's Br. at 16. Petitioner also argues that his expert "characterized this as 'contamination of memory.'" *Id.* However, Petitioner's expert clearly stated that he found no direct evidence that anyone had deliberately coached L.M., had misled L.M., or had asked L.M. to lie. (App. at 348.) Moreover, it was up to the jury to determine the facts and the credibility of the witnesses. Petitioner would have this Court ignore the jury's verdict and make a factual finding that L.M.'s testimony was not credible. This Court should decline to do so.

As to the two (2) counts of Sexual Abuse by a Person in a Position of trust, Petitioner argues that "any evidence establishing the element of care, custody and control of the child in question is lacking. Pet'r's Br. at 17. Petitioner is incorrect. C.B. testified that the incident where he saw Petitioner move his hand under the blanket towards L.M.'s private area occurred at Petitioner's house at a time when the only people in the house were Petitioner, C.B., L.M., and C.B.'s little brother and they were playing the Wii. (App. at 223-24.) L.M. confirmed that the incident of touching occurred at the same time when she testified that it occurred while they were playing on the Wii. (App. at 190-91.) L.M. also testified that when Petitioner had her touch him

that it occurred in Petitioner's living room and that the only people around may have been her brothers, but she was not even sure that they were in the house at that time. (App. at 192.)

Petitioner cites to *State v. Longerbeam*, 226 W. Va. 535, 703 S.E.2d 307 (2010), for the proposition that to have care, custody, and control of a child, that there must be some express statement that Petitioner was in charge of the children. See Pet'r's Br. at 17-8. While Respondent agrees that Petitioner did not have care, custody, and control of L.M. just because he was her uncle, Respondent submits that the jury could find that Petitioner did have care, custody, and control of L.M. as he was the only adult in the home at the time of the sexual abuse.

Moreover, *Longerbeam* is inapposite. In *Longerbeam*, Kacy was given the care, custody, and control of the child and was still in the house with the child at all times. *Longerbeam*, 226 W. Va. at 540, 703 S.E.2d at 312. *Longerbeam* stands for the proposition that a person with care, custody, and control does not lose that care, custody, and control just because that person goes to sleep. *Id.* The distinction is important as this Court has recognized in other cases where *Longerbeam* has been distinguished. See *Clarence S. v. Ballard*, No. 14-0356, 2014 WL 6607863, at \*28 (W. Va. Nov. 21, 2014) (memorandum decision); *State v. Chic-Colbert*, 231 W. Va. 749, 759, 749 S.E.2d 642, 652 (2013); *Ballard v. Thomas*, 233 W. Va. 488, 494 fn.14, 759 S.E.2d 231, 237 fn.14 (2014).

Petitioner's attempt to claim that C.B.'s reception of a phone call from his mother was proof that C.B., a twelve (12) year old boy, was the one with care, custody, and control over his little brother and eight (8) year old sister, when they were in Petitioner's house alone with Petitioner is absurd. The jury was entitled to find that Petitioner had care, custody, and control of L.M. and her brothers because he was the only adult, because they were all at Petitioner's house, and because the children's ages were twelve (12) years old and younger.

Therefore, because all evidence must be viewed in the light most favorable to the prosecution; because all inferences and credibility assessments that the jury might have drawn must be viewed in favor of the prosecution; because the evidence was clear that Petitioner was more than fourteen (14) years old; because the evidence was clear that L.M. was only seven (7) years old at the time of the sexual contact; because the evidence was clear that Petitioner was not married to L.M.; because L.M. testified that Petitioner touched her in her “private;” because L.M. testified that the touching occurred more than once; because L.M. testified that Petitioner placed her hand on his belly button that she did not believe was his belly button; because L.M.’s journal reflects that Petitioner touched her “middle” and made her touch “his middle;” because C.B. observed Petitioner move his hand toward L.M.’s private; because C.B., C.B.’s little brother, and L.M. were at Petitioner’s house when the sexual contact occurred; because C.B. was only twelve (12) years old and he was the oldest child in the house at the time the sexual contact occurred; because Petitioner was the only adult in the house when the sexual contact occurred, this Court should affirm Petitioner’s conviction and sentence.

**D. The Trial Court Had An Obligation To Determine Whether L.M. Was Competent To Testify.**

Trial Courts have discretion to determine the competency of child witnesses:

“The question of the competency of a child as a witness in any case is always addressed to the sound discretion of the trial judge, and if it appears that a careful and full examination as to the age, intelligence, capacity and moral accountability has been made by the judge and counsel and the trial judge has concluded that he is competent, the appellate court will not reverse the ruling which permits the evidence to be introduced unless it is apparent that it was flagrantly wrong.”

Syl. Pt. 1, *State v. Jones*, 178 W. Va. 519, 519, 362 S.E.2d 330, 330 (1987) (quoting Syl. Pt. 9, *State v. Watson*, 173 W. Va. 553, 318 S.E.2d 603 (1984)).

The Trial Court did not err by examining L.M. to determine competency and the determination of competency is not a determination of credibility. A Trial Court should make a

“careful and full examination” of child witnesses to determine whether the child witness is competent to testify. *Id.* The Trial Court should inquire regarding the child’s age and should seek to determine intelligence, capacity, and moral accountability. *Id.*

Petitioner argues that the Trial Court’s finding that L.M. was competent to testify was plain error and asserts that the finding of competency amounted to a finding of credibility. *See* Pet’r’s Br. at 19. Petitioner’s argument fails.

The Trial Court properly exercised discretion in determining the competency of L.M. Prior to any examination by the State or by Petitioner, the Trial Court questioned L.M. regarding her age, her understanding of right from wrong and truth from lies, including providing an example regarding the color of the judge’s robe. (App. at 186-87.) While the Trial Court did not expressly state that L.M. was competent at the close of the questions, the Trial Court quickly made the finding on the record following the State’s direct examination of L.M:

THE COURT: Mr. Lyall, do you have any questions, and before you question the Court will make a finding that [L.M.] is a competent witness and knows the difference between the truth and a lie.

(App. at 193.) It is important to note that the Trial Court did not state that L.M. was credible or was only testifying truthfully. *See id.* Rather, the Trial Court merely found that L.M. knew the difference between truth and lies and held that she was competent to testify. *Id.* This was not a finding of credibility as Petitioner suggests.

Moreover, Petitioner failed to object to the Court’s questioning of L.M. or to the Trial Court’s finding that L.M. was competent to testify. (App. at 186-93.) Once again, Petitioner sat on his rights and now asks that this Court find plain error. Pet’r’s Br. at 19. The Trial Court’s action to determine competency is not error as such inquiry and findings are within the discretion of the Trial Court. Syl. Pt. 1, *Jones*, 178 W. Va. at 519, 362 S.E.2d at 330; Syl. Pt. 9, *Watson*,

173 W. Va. at 553, 318 S.E.2d at 603. Even if such inquiry and findings that L.M. was competent was error, such error is not plain error as this Court has repeatedly said that the Trial Court has discretion to make the inquiries and findings. *Id.* Moreover, even if it were plain error to question L.M. regarding her age and her understanding of truth and lies and to make a finding that L.M. was competent to testify, such plain error neither affected substantial rights nor seriously affected the fairness, integrity, or public reputation of the judicial proceedings. A finding of competency and the ability to understand the difference between telling the truth and telling lies is not a finding that L.M. was actually telling the truth in her testimony. The jury was still able to determine credibility and was clearly instructed that “[n]othing that I have said or done at any time during the trial is to be considered by you as . . . indicating any opinion concerning . . . the credibility of any witness.” (App. at 471.) The jury was instructed that “[y]ou are the sole judges of the credibility of the witnesses.” (App. at 472.) There was no attempt by the Trial Court to confer credibility upon L.M. merely by finding her competent to testify.

Therefore, because the Trial Court had an obligation to determine whether L.M. was competent to testify; because the Trial Court’s questions regarding L.M.’s age and understanding of truth and lies was directed at determining whether L.M. was competent to testify; because Petitioner did not object to the questioning of L.M. to determine if she was competent to testify; because the Trial Court made an express finding that L.M. was competent to testify as she understood the difference between truth and lies; because Petitioner did not object to the Trial Court’s finding that L.M. was competent to testify; because the jury was properly instructed regarding determinations regarding credibility; and because there is precedent instructing Trial

Courts to conduct inquires to determine the competency of child witnesses, this Court should affirm Petitioner's conviction and sentence.

V.

**CONCLUSION**

For the foregoing reasons and others apparent to this Court, this Court should affirm Petitioner's conviction and sentence.

Respectfully submitted,

STATE OF WEST VIRGINIA,  
*Plaintiff Below, Respondent,*

By Counsel,

PATRICK MORRISEY  
ATTORNEY GENERAL



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**CERTIFICATE OF SERVICE**

I, David A. Stackpole, Assistant Attorney General and counsel for Respondent, do hereby verify that I have served a true copy of *RESPONDENT'S BRIEF* upon counsel for Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 16th day of October, 2015, addressed as follows:

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