

IN THE SUPREME COURT OF APPEALS OF STATE OF WEST VIRGINIA
CHARLESTON

STATE OF WEST VIRGINIA,

Appellee,
Plaintiff Below,

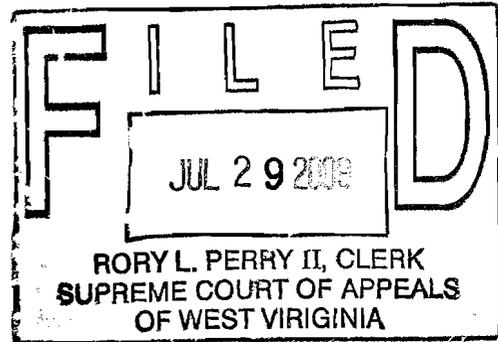
vs.

SUPREME COURT DOCKET NO. 34889
Morgan County Criminal Case No. 06-F-60

KEVIN B. PAYNE,

Appellant,
Defendant Below.

APPELLANT KEVIN B. PAYNE'S APPEAL BRIEF FROM THE JUDGMENT
OF THE CIRCUIT COURT OF MORGAN COUNTY OF OCTOBER 28, 2008



Respectfully submitted,


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**I. KIND OF PROCEEDING AND NATURE OF THE RULING
IN THE LOWER TRIBUNAL**

This petition for appeal is brought pursuant to the West Virginia Rules of Appellate Procedure from the Re-Sentencing Order entered on the 28th day of October, 2008, by the Circuit Court of Morgan County, West Virginia, in which the Honorable Gina M. Groh, denied the Appellant’s Motion for New Trial and Judgment Notwithstanding the Verdict of the Jury, and affirmed the Appellant’s convictions for sexual assault in the second degree, as contained in Count I of the Indictment returned against him, in violation of West Virginia Code §§ 61-8B-4; for sexual abuse in the first degree, as contained in Count II of the Indictment, in violation of West Virginia

Code §61-8B-7; for sexual assault in the second degree, as contained in Count III of the Indictment, in violation of West Virginia Code §§ 61-8B-4; and for sexual abuse in the third degree, as contained in Count IV of the Indictment, in violation of West Virginia Code §61-8B-9. The Court then sentenced the Appellant to a term of imprisonment of not less than ten (10) nor more than twenty-five (25) years on Count I; to not less than one (1) nor more than five (5) years on Count II; to not less than ten (10) nor more than twenty-five (25) years on Count III; and to ninety (90) days in jail upon his conviction for Count IV. The Court further ordered all sentences to be served consecutively for an aggregate sentence of not less than twenty-one (21) years, three (3) months nor more than fifty-five (55) years.

II. STATEMENT OF THE FACTS

The Appellant, Kevin B. Payne, was indicted by the Grand Jury of Morgan County at the September 2006 Term of Court for Sexual Assault in the Second Degree in Counts I and III of the Indictment; for Sexual Abuse in the First Degree in Count II; and for Sexual Abuse in the Third Degree in Counts IV and V.

The charges against the Appellant stemmed from two separate incidents of sexual assault against his step-daughter, Tanaya Fox, allegedly occurring on February 26, 2006, and sometime during the summer of 2005. On February 26, 2006, the Appellant allegedly engaged in cunnilingus with Fox assaulting her when she was asleep on a couch in the family's living room. Sometime in the summer of 2005, the Appellant allegedly again engaged in cunnilingus with Fox, again when she was asleep, but this time in her bedroom. Fox was age twelve (12) at the relevant times in question.

Disclosure of the alleged assault of February 26, 2006, was made by Fox to her mother, Tamela Younker, almost immediately after Fox said it had occurred. The next business day

Younker contacted local law enforcement in Morgan County, and spoke with Morgan County Sheriff's Deputy, Tony Link. After interviewing Fox and Younker, Link directed Younker to take Fox to Winchester Medical Center in Winchester Virginia, to be evaluated by a forensic nurse, Cythia Leheigh. Link also directed Younker to obtain a Family Protection Order to have the Appellant removed from the home.

On February 28, 2006, the forensic examination of Fox by Leheigh took place, however, no evidence of any sexual assault was garnered. Leheigh did take a statement from Fox as to what had happened on February 26, 2006 and at trial, the State was allowed to elicit this statement from Leheigh, before Fox testified over the timely objection of the Appellant. Fox did testify at trial and told the jury about the circumstances of the alleged assault on February 26, 2006, as well as a similar alleged assault in the summer of 2005. The Appellant was subsequently found guilty by the petit jury upon on all counts of the indictment. The trial court sentenced him to consecutive sentences, despite the recommendations of both counsel for the Appellant and the State to the contrary and mandated he be subject to supervised release, under West Virginia Code §62-12-26, after his release finding him to be a sexual predator.

On October 2, 2007, the Appellant's trial began. The State's first witness was Tamela Younker, the mother of the alleged victim, Tanaya Fox. Fox's date of birth was April 3, 1993. At the time of trial she was fourteen (14) years of age. (Trans. 10/02/07, Pg.144). Younker testified that she had three other children, all boys, two of which were with the Appellant. *Id.* Younker stated she lived with the Appellant at 260 South Laurel Avenue, Berkeley Springs. *Id.*

On the evening of February 26, 2006, she, the Appellant and Fox were playing cards at their house. Younker testified she had two (2) Kahluas and cream and went to bed around 1:30 or 2:00

am. (Trans. 10/02/07, Pg.146). She said the Appellant was drinking Coors Light. Id. Younker said she was sleeping in bed with Appellant, laying on his arm and between 3:00 am., and 4:00 am., the Appellant woke her up when he got up to go to the bathroom. (Trans. 10/02/07, Pg.147). Younker testified that she didn't fall back to sleep. Id. She said that she heard Appellant going to the bathroom and flushing the toilet. Id. She then heard the Appellant say, "are you okay," followed by "we can talk in the morning." (Trans. 10/02/07, Pg.147 & 148). The Appellant then came into their bedroom and said her daughter needed to talk to her. Id.

Fox had been sleeping on the couch in the adjacent living room and Younker approached her there to see what was wrong. Fox asked to speak to Younker in private in the bathroom. Both went into the bathroom and closed the door. Id. By this time, Appellant had gone back into their bedroom. Id.

In the bathroom, Fox told her mother "he touched me." When Younker asked who, Fox said "Kev" referring to the Appellant. (Trans. 10/02/07, Pg.149). Younker asked Fox when and she just repeated he touched me and she became hysterical. Id. Younker told Fox to go upstairs to her brother's room where there were bunk beds and sleep and they would discuss it in the morning. Id.

The next day, Sunday, Younker and Fox talked about the night before. Younker asked what happened and again Fox said he touched me. Younker asked where, to which Fox replied, "down there." (Trans. 10/02/07, Pg.150). Younker testified she told Fox, "I got to figure out what to do, I don't know what to do." Fox told her okay and then Younker asked Fox, "what do you want me to do?" To which Fox replied, she didn't know. Id. Younker testified she asked Fox if she wanted her to call the cops and again Fox stated "I don't know." Id.

Younker testified that initially she thought Fox was having a nightmare when she spoke to

her the night before as she was fine the next day. Id.

The following day, Younker went to work and eventually broke down and started crying. A co-worker inquired if she was alright. Younker told her no and explained what her daughter had told her. The co-worker advised Younker to see their supervisor, who in turn told Younker to report the incident to the police. (Trans. 10/02/07, Pg.151). Younker went to the Morgan County Sheriff's Department and ultimately spoke to Deputy Tony Link. Id. Link then referred her to Winchester Medical Center to have Tanaya evaluated by a forensic nurse specializing in sexual assaults. Id. Link also advised her to get a Family Protection Order (FPO) which she did. Accordingly, the Appellant was removed from the residence. (Trans. 10/02/07, Pg.152). In her FPO Petition, Younker stated that she suspected this had happened before. (Trans. 10/02/07, Pg.153). When asked why she had suspicions, Younker related a story when Fox wanted to have a sleep-over party with her girlfriends. She had previously asked Appellant if she could and he said yes. Later, she called him at work and asked if she could also invite some boys too, to which the Appellant said no. Fox got upset, hung-up the phone and went to her room. When Appellant came home from work he went into Fox's room to talk to her. Later Younker also went into Fox's room and found her laying on her bed with one leg across Appellant's leg and the other around his back. (Trans. 10/02/07, Pg.154, Ln. 5).

On February 27, 2007, Payne was removed from the family home under the provisions of an FPO. (Trans. 10/02/07, Pg.156). That afternoon, Younker picked Fox up from school; Fox was upset, threw a fit and started screaming at Younker stating, "I told you not to go, I didn't want this, I didn't want no trouble I didn't want him getting in trouble." (Trans. 10/02/07, Pg.157). Younker told Fox in reply that she felt she just had to do something after Fox made the allegations she did

against Payne. Id.

After picking her up from school, Younker took Fox to Winchester Medical Center in Winchester, Virginia, pursuant to the directions of Deputy Link. (Trans. 10/02/07, Pg.157). Fox told Younker on the way home from the hospital that no vaginal examination was done upon her. (Trans. 10/02/07, Pg.160).

On March 16, 2006, Younker asked the Family Court to dismiss the FPO between Payne and his two boys, but not between he and Fox. (Trans. 10/02/07, Pg.154). The Family Court told Younker that it either had to include all the children or none of them, so she asked the entire case be dismissed. (Trans. 10/02/07, Pg.156).

Younker went on to disclose another conversation she had with Fox a couple of days later. At that time Fox was late on her period and concerned that she might be pregnant by the Appellant. Younker asked her how this was possible because Fox said that sexual intercourse, i.e., penetration and ejaculation, had not occurred, to which Fox said she didn't know if she had been penetrated. (Trans. 10/02/07, Pg.161). Fox moved out of the family home a couple of weeks after Younker dropped the FPO. (Trans. 10/02/07, Pg.166).

During her testimony, Younker identified Defendant's Exhibit A as Fox's diary. (Trans. 10/02/07, Pg.174). Younker also told the jury about an argument she had with Fox while riding to Hancock, Maryland, which was referenced in her diary under the entry for April 15th. Younker said Fox told her she wanted to live with her dad as it was so much fun there. Younker told her she couldn't, but Fox told her that when she turned 14 she couldn't stop her. Younker said this was an ongoing fight between the two of them. (Trans. 10/02/07, Pg.186). Younker testified that the rules at Fox's father's home were less strict than at the Appellant's household. In fact, Younker had

misgivings regarding the type of clothing Fox's father would allow her to wear when she was in his custody. Particularly, said clothing was of a suggestive sexual nature and shouldn't be worn by a twelve year old. (Trans. 10/02/07, Pg.188).

Yunker also testified that on the night in question, Fox was sleeping on the living room couch which was only 12' to 15' away from Yunker's bed. (Trans. 10/02/07, Pg.189 & 190). Yunker testified that Fox had been living with her father ever since she turned fourteen (14) after receiving a modification of custody through the Family Court. (Trans. 10/02/07, Pg.201).

Deputy Tony Link testified that on February 27, 2006, at 10:00 am., Yunker came to the Morgan County Sheriff's office and eventually spoke with him. Link testified that Yunker didn't express any hesitation in believing her daughter's story at that time. (Trans. 10/02/07, Pg.208). Link advised her to go to Magistrate Court to get an emergency protection order. Next he advised her to take Fox out of school and go to Winchester Medical Center so an examination could be done by a forensic nurse. (Trans. 10/02/07, Pg.209). Link, although he did not take any formal recorded statement (audio, video or written) from Yunker next testified that Yunker told him that she believed the incident on February 27th was not the first time Fox had been sexually abused. (Trans. 10/02/07, Pg.211). Link said Yunker told him about an incident several months prior when the Appellant reportedly came home intoxicated and went to Fox's room. When Yunker opened the door, the Appellant told her to go away and she felt this was odd. Id. Yunker also said she observed Fox sitting on Appellant's lap with her legs around his waist. Id.

The State then asked Deputy Link what statements the Appellant made in his presence when Link was serving the Emergency Protective Order upon him. To which the Appellant objected as hearsay, stating that even though Payne is a party opponent, any statement he might make would still

have to be an admission against interest not to be hearsay. (Trans. 10/02/07, Pg. 212). The Court, at side-bar, inquired of the State what statement from the Appellant was attempting to be elicited. The State said the Appellant made statements to Deputy Link to ask Younker what she allowed her daughter to do the other night, i.e., letting her get drunk. (Trans. 10/02/07, Pg. 213). Counsel for the Appellant objected as the Appellant was only Fox's step-father, having no legal authority over her, and thus such a statement could not be against his penal interest. (Trans. 10/02/07, Pg. 215). The Court overruled the objection stating that since the Appellant was present when Fox was purportedly allowed to have liquor, the same would be a statement against interest made by a party in this matter and for that reason admissible. (Trans. 10/02/07, Pg.217). Whereupon, the State asked Deputy Link about the said statement, and he in fact stated the Appellant made such a statement. (Trans. 10/02/07, Pg. 218).

Fox was examined by Cindy Leheigh, forensic nurse at Winchester Medical Center on February 28, 2006. Cynthia Leheigh testified that she was a registered nurse specializing in forensic evaluations. (Trans. 10/02/07, Pg. 236). Particularly Leheigh testified that "I see patients where there is a suspicion or a patient who presents with a chief complaint of an assault or abuse whether that be physical or sexual, there is no age limitation." (Trans. 10/02/07, Pg. 237). She was qualified as a forensic nurse by the Court. (Trans. 10/02/07, Pg. 238). Leheigh stated that she interviewed Fox on February 28th and that "she was referred to our program by a Morgan County Office some information was provided to us that they were sending an adolescent with a complaint of sexual abuse." (Trans. 10/02/07, Pg. 238). When the State asked Leheigh to tell the jury what Fox had told her, the Appellant objected based on the fact that the evaluation was for forensic purposes as opposed to medical diagnosis and treatment. Counsel for the Defendant cited the Court to *Crawford*

v. Washington. (Trans. 10/02/07, Pg. 240-242). The Court allowed counsel a short recess after which counsel for the Appellant cited the Court to *State v. Shrewsbury*, 213 W.Va. 327 (2003) standing for the proposition that statements made by a child victim to a therapist were admissible in a sexual assault prosecution under the medical diagnosis or treatment exception to the hearsay rule as the victim was brought to the therapist for treatment and counseling rather than for investigative or forensic purposes. (Trans. 10/02/07, Pg. 245). Counsel argued that Deputy Link directed Younker to take Fox to Winchester Medical Center for the specific purpose to be examined by a forensic nurse, well known to local law enforcement as such. Counsel also argued that the statement of Fox was testimonial, obviously to be used in the prosecution of the case, taken by law enforcement and not, at the time, subject to cross-examination. (Trans. 10/02/07, Pg. 247).

The State argued that Leheigh's inquiries were for purposes of determining what medical treatment the child needed and what treatment she was going to recommend to her doctor and whether tests needed to be conducted for sexually transmitted disease. (Trans. 10/02/07, Pg. 248). In rebuttal, counsel for Appellant stated that Deputy Link didn't tell Younker to take her to the local hospital, where there wasn't a forensic sexual abuse nurse available, but to take her to Winchester Medical Center instead. *Id.*

The Court overruled the objection. Specifically the Court stated: "[i]t appears to the Court from the testimony of Ms. Leheigh, that there is a large medical component to what she does and that the conversations she had with the alleged victim of this matter were based on evidence she was gathering for purposes off medical diagnosis and treatment which even extended beyond the immediate issue to whether or not there was any diseases that needed to be checked out and things of that nature." (Trans. 10/02/07, Pg. 248 Ln. 22 - Pg. 249, Ln. 5).

The Court went on stating it finds “that the information was given by this alleged victim to Ms. Leheigh for purpose off medical diagnosis and treatment which does fall as noted in this case cited by Mr. Manford within a firmly rooted hearsay exception, and it has adequate indicia of reliability, therefore, the Court is going to permit this line of inquiry.” (Trans. 10/02/07, Pg. 249).

Leheigh testified that Tanaya told her that she had been sexually abused approximately 36 hours prior to her visit, . . . by a gentleman that lives in her home and had lived there approximately seven years with her. (Trans. 10/02/07, Pg. 250). Leheigh went on to read her notes: “[h]er disclosure was that she was asleep on the couch in the home and she was awakened by him with his face on her genitalia, his mouth actually was making contact with her genitals.” (Trans. 10/02/07, Pg. 251). Leheigh testified the incident also involved some digital contact, his hand with her genitalia, however, Fox was unable to determine whether there had been any vaginal penetration. Id. Leheigh went on to testify that Fox said she resisted and pushed him away; he returned later, however, and resumed the same activity. (Trans. 10/02/07, Pg. 252).

Leheigh also testified that Tanaya said this wasn’t the first time such an incident had happened; that it began when she was age 11 and there were five or six prior incidents that were similar to this one. (Trans. 10/02/07, Pg. 255).

On cross-examination, counsel for Appellant elicited testimony from Leheigh that children do often manifest symptoms as a result of being sexually assaulted, including, changes in grades, wetting the bed, sexual acting out, trouble sleeping, weight loss. Further Appellant was able to establish through Leheigh’s review of the medical records, that Tanaya didn’t exhibit any of these tell-tale signs of sexual abuse. (Trans. 10/02/07, Pg. 257).

Next to testify was Tanaya Fox. She was born on April 3, 1993, and on February 26, 2006,

she was twelve (12) years of age. (Trans. 10/03/07, Pg.15). On that date, in the evening, Fox testified that she, her mother and the Appellant were playing cards. (Trans. 10/03/07, Pg.18). She said her mother and the Appellant were drinking alcohol and that she too had a glass. (Trans. 10/03/07, Pg.19). Fox testified that Appellant asked her if she wanted a Kahlua and that her mother said it was fine, so Appellant made her several Kahula's but she only drank one. (Trans. 10/03/07, Pg.19). Fox said she didn't feel any intoxicating effects of the Kahula. (Trans. 10/03/07, Pg.20). Fox said that evening she went to bed on the couch downstairs and was wearing shorts, a T-shirt and underwear. (Trans. 10/03/07, Pg.21).

Fox testified that she woke up to find her shorts were down to her knees and that Payne was "at my private area." Id. She said Payne's mouth was at her private area. (Trans. 10/03/07, Pg. 22). She said Appellant's mouth was inside the fold in her vagina. Id. With this, Fox testified that she kicked the Appellant and he got up and ran. Id. Fox testified that a short time later, the Appellant returned and again tried to pull down her pants; she again kicked him and he left. Id. At this, Fox said she started crying and the Appellant "came out" and said what was the matter? Id. Fox said she told him she wanted to speak to her mother, but that the Appellant told her to wait until the morning. Id. Fox said that she needed to speak to her mother right then, so Appellant woke up Younker and she and Fox then went into the bathroom, where Fox told her what had happened. (Trans. 10/03/07, Pg.23).

Fox next testified that she told Younker that Payne touched her "down there." She said Younker told her to go upstairs and lay in bed with your brother (he had bunk beds) and they would talk about it in the morning. Id. The next day, Fox testified that she again spoke about this to her mother who asked her what was she supposed to do, to which Fox said she didn't know. (Trans.

10/03/07, Pg.24). Fox said the next day Younker picked her up from school, told her that the cops had taken Payne away, and took her to Winchester Medical Center.

Next, Fox testified to another similar incident with the Appellant. Fox said it was when she had gone to a party and gotten sick from drinking beer. She didn't know when it occurred except for it was probably in the summer. (Trans. 10/03/07, Pg.26). Fox testified that she thought she was twelve (12) years old at the time, and that her mother was there. Fox said that the same thing happened this time as did on February 26, 2006; this time, however, she was in her own bed in her room. (Trans. 10/03/07, Pg.28). She remembered that she was made to keep her door open because the only heater for the upstairs bedrooms was located in her room. Id. Fox said again Appellant was "using his mouth down on her vagina." Id. Fox was unable to remember anything else. (Trans. 10/03/07, Pg.29). Fox said she did not tell her mother about this occasion as she was scared.

Fox said this behavior of Appellant's had occurred repeatedly and began when she was around 11 or 12. (Trans. 10/03/07, Pg.30). She said it just started with touching, not involving his mouth. Id.

The State confronted Fox with her diary which had been admitted into evidence. Fox told the jury that Corey was her dad's stepson, was older than she and that he was cute. (Trans. 10/03/07, Pg.32). Fox admitted that no where in the diary was there any reference to her being assaulted or abused in any way by the Appellant. (Trans. 10/03/07, Pg.35). She said she was afraid to write any such accounts in her diary for fear that her mother or Appellant might find out and "have done something." (Trans. 10/03/07, Pg. 35). On cross-examination, Fox was confronted with an entry she made in the diary referencing a time on December 30th when she and Corey drank beer and got high. She acknowledged that if her mom and Appellant were to have found that entry, she would

have gotten into a lot of trouble over it which was inconsistent with her stated reasons of not making any entries of the assaults by the Appellant in her diary. (Trans. 10/03/07, Pg. 71).

Fox also confirmed that the incident that made her mom suspicious did in fact happen, however, it was innocent and did not involve any sexual actions by the Appellant. (Trans. 10/03/07, Pg.39).

Lastly, the State asked Fox about life at her father's house. Fox said her father wasn't as strict as Appellant, but she nevertheless had "certain standards" there regarding checking in on a regular basis, a curfew, and the fact that she had to do her homework and chores regularly. (Trans. 10/03/07, Pg.40).

On cross-examination, Fox admitted that the alleged incident with Payne involving the pool in the summer time probably didn't happen as she had explained since there would be no need to leave her bedroom door open for the heater to be on in the summer. (Trans. 10/03/07, Pg. 43).

Fox also stated she didn't know if she had ever told anyone else, including Link or Leheigh about the incident when she was at the pool. It wasn't in any of the discovery materials provided by the State. (Trans. 10/03/07, Pg.45).

Fox also admitted that Deputy Link repeatedly questioned her about prior occasions of sexual abuse against her by the Appellant, even to the point of suggesting references that might trigger her recollection, but that nevertheless, she couldn't recall any other times when she was assaulted by the Appellant. (Trans. 10/03/07, Pg.52 & 53).

Fox also testified that during the times she said she was assaulted by the Appellant, she had three other brothers living in the Appellant's house with her. Fox agreed that her two older step-brothers had bedrooms on the same floor as she and that her baby brother slept in her mother's room

with the Appellant. (Trans. 10/03/07, Pg.57 & 58).

Fox was also asked if she didn't in fact have a "virgin Kahlua" (no alcohol) on the night in question. She replied that "[i]n a Kahula drink alcohol is automatically in the bottle whenever you mix it with the milk." In any event, she denied that the her drink didn't contain any alcohol. (Trans. 10/03/07, Pg.59).

Fox also testified, for the first time at trial, that on February 26th she also received a shot of liquor from Appellant as well that night. This was despite the fact that she had been allegedly assaulted five or six times prior and that she knew the Appellant was trying to get her drunk that evening. (Trans. 10/03/07, Pg.63). Fox told the jury that she drank the shot just to "shut him [Appellant] up." (Trans. 10/03/07, Pg.64).

In response to Fox's direct testimony that she had been penetrated by the Appellant, either orally or digitally, the Defendant showed her a copy of the transcript from her recorded statement to Deputy Tony Link, wherein she stated that she was not penetrated by the Appellant, even after Link explained to her exactly what penetration was. (Trans. 10/03/07, Pg.73).

Also on cross, Fox told the jury that the couch on which she was allegedly assaulted on the night in question, couldn't have been 12' to 15' away from her mother's bedroom door, it was much closer. (Trans. 10/03/07, Pg.78).

Fox also admitted to writing various entries in her diary expressing her desire and intention to move to her dad's home as soon as possible so that she could be around Corey. (Trans. 10/03/07, Pg. 82 - 85). Fox also admitted that, per her diary, her main complaint about living at her mother's home with the Appellant was that it was boring and that she was required to make good grades. (Trans. 10/03/07, Pg.86).

Counsel for the Appellant also confronted Fox with her testimony that Younker was always home when she said she was assaulted by Appellant, to which Fox admitted the same but also tried to say there were times when her mother was at work when she was assaulted. (Trans. 10/03/07, Pg.98).

The State then rested its case. The Appellant then made a motion pursuant to Rule 29 of the West Virginia Rules of Criminal Procedure for a Judgment of Acquittal. The Court heard the arguments of counsel both for the Appellant and the State and in consideration of which, denied the same.

The Appellant then recalled Tamela Younker to the stand. Specifically, counsel for the Appellant asked Younker regarding the Kahula drinks Fox had testified to drinking on February 26th. Younker testified that all that Fox had to drink that evening was a “virgin Kahlua” and cream made without any alcohol. Younker stated she knew this for fact because she made the drink herself. (Trans. 10/03/07, Pg.115 - 116). Further, Younker testified she never saw Fox drink a shot of whiskey that evening, nor did she see the Appellant trying to give her drinks. Id. Younker also testified to her personal knowledge that after Fox went to live with her dad, her grades declined to mostly F’s. (Trans. 10/03/07, Pg.117). Younker also testified that she never observed any possible signs or symptoms that Fox was suffering from any sort of assaults; no loss of sleep, problems concentrating, upset stomach, no unusual weight loss, and not depressed, anxious or worried. (Trans. 10/03/07, Pg.117 - 118).

After Younker testified, the Appellant rested. The State then recalled Deputy Link in rebuttal. Link testified that Younker told him that Fox was really only drinking chocolate milk that evening, and that it wasn’t even a “virgin Kahlua.” (Trans. 10/03/07, Pg.121).

With that the State rested and the Appellant renewed his prior motion for a Judgment of Acquittal, which was again denied by the Court.

Closing arguments were made by each counsel and the jury retired to begin its deliberations at 2:39 pm. The jury reached its verdict at 6:17 pm., finding the Appellant guilty on all four counts contained in the indictment. (Trans. 10/03/07, Pg.195).

Sentencing was had on January 25, 2008, at which time the Court sentenced the Appellant as follows: not less than ten (10) nor more than twenty-five (25) years upon his conviction for sexual assault in the second degree as contained in Count I; not less than one (1) nor more than five (5) years upon his conviction for sexual abuse in the first degree as contained in Count II; not less than ten (10) nor more than twenty-five (25) years upon his conviction for sexual assault in the second degree contained in Count III; and for ninety (90) days incarceration in the Eastern Regional Jail upon his conviction for sexual abuse in the third degree as contained in County IV, with all such sentences running consecutively to each other for a combined aggregate sentence of not less than 21 years 3 months to 55 years. The Court rejected the Appellant's request for probation. The Court considered a letters from the Appellant's step-son, a family relative, Tiffany Hilton, the testimony of Sharon Lehman, another relative, Darrin Payne the Appellant's brother and Tanner Younker. The Court also considered the pre-sentence investigation and report prepared in the case. The Court also heard the recommendations of the State to sentence the Appellant to an eleven (11) to thirty (30) year sentence.¹ The Court also considered the evaluation and treatment plan of Dr. Paul Kradel which served in a large part, as the basis for the Court's sentence imposed.

¹The State recommended running the 1 to 5 sentence consecutive to the 10 to 25 year sentence but not to run the two 10 - 25 year sentences consecutive. (Sentencing Transcript, 01-25-08, Pg. 33).

III. ASSIGNMENTS OF ERROR

- 1. THAT THE TRIAL COURT COMMITTED PLAIN AND PREJUDICIAL ERROR BY ALLOWING CYNTHIA LEHEIGH, FORENSIC NURSE, TO TESTIFY TO THE HEARSAY DECLARATIONS OF THE VICTIM WHICH WERE NOT EXCEPTED UNDER RULE 803 OF THE WEST VIRGINIA RULES OF EVIDENCE.**
- 2. THAT THE TRIAL COURT COMMITTED PLAIN AND PREJUDICIAL ERROR BY ALLOWING INTO EVIDENCE THE HEARSAY STATEMENT OF THE APPELLANT WHICH WAS NOT AGAINST HIS INTEREST.**
- 3. IT WAS ERROR FOR THE COURT TO FAIL TO DIRECT A VERDICT IN FAVOR OF THE APPELLANT AT THE CLOSE OF THE STATE'S CASE-IN-CHIEF AND AT THE CLOSE OF ALL OF THE EVIDENCE, OR IN THE ALTERNATIVE, THE JURY'S VERDICT WAS CONTRARY TO THE EVIDENCE PRESENTED.**
- 4. THE CUMULATIVE WEIGHT OF ALL OF THE ERRORS SET FORTH ABOVE IS SUFFICIENT TO WARRANT THE GRANTING OF A NEW TRIAL.**
- 5. THAT THE TRIAL COURT COMMITTED PLAIN AND PREJUDICIAL ERROR BY IMPOSING A SENTENCE SO DISPROPORTIONATE TO THE CRIMES OF CONVICTION AND THUS UNCONSTITUTIONAL.**

IV. POINTS AND AUTHORITIES RELIED UPON

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|--|-------------|
| West Virginia Constitution, Article III, Section 5 | 29, 30 |
| West Virginia Code §62-12-2(e) | 29 |
| West Virginia Rules of Criminal Procedure, Rule 29 | 16, 25 |
| West Virginia Rule of Evidence, Rules 801(d) | 23, 25 |
| West Virginia Rule of Evidence, Rules 803(1) | 22 |
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V. DISCUSSION OF LAW

ARGUMENT 1

THAT THE TRIAL COURT COMMITTED PLAIN AND PREJUDICIAL ERROR BY ALLOWING CYNTHIA LEHEIGH, FORENSIC NURSE, TO TESTIFY TO THE HEARSAY DECLARATIONS OF THE VICTIM WHICH WERE NOT EXCEPTED UNDER RULE 803 OF THE WEST VIRGINIA RULES OF EVIDENCE.

The out-of-court statements made by Tanaya Fox to Cynthia Leheigh, Forensic Nurse at the

Winchester Medical Center were hearsay. The State convinced the trial court that Rule 803(4) of the Rules of Evidence permitted said hearsay as an exception under statements for purposes of medical diagnosis or treatment. Counsel for the Appellant argued that 803(4) didn't apply because the alleged statements were for forensic or investigative purposes and not for the purpose of diagnosis or treatment. Appellant pointed out to the court that Deputy Link directed Mrs. Younker to take Tanaya to the Winchester Medical Center to see a specific forensic nurse, specializing in child sexual abuse cases, Cynthia Leheigh. Deputy Link testified that he directed Tanaya to be seen by this individual to garner evidence against the Appellant. Appellant's counsel also pointed out that if the purpose of the evaluation was for medical treatment, Link would have simply directed Younker take Tanaya to the local hospital in Berkeley Springs, where there was no forensic nurse available, but there were doctors and nurses who could test for sexually transmitted disease and treat the same.

In order to admit hearsay evidence under the medical diagnosis and treatment exception, (W.Va. R.Evid. 803(4)), and to not implicate the Confrontation Clause of the United States Constitution, a two-part test must be met:

The two-part test for admitting hearsay statements pursuant to W.Va. R. Evid. 803(4) is (1) the declarant's motive in making the statements must be consistent with the purpose of promoting treatment, and (2) the content of the statement be such as is reasonably relied upon by a physician in treatment or diagnosis. *State v. Pettrey*, 209 W.Va. 449, 458, 549 S.E.2d 323, 332 (2001) citing *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990) at Syllabus Point 4.

In *Edward Charles L.*, this Honorable Court found that statements made by a child victim to a psychologist about her father's sexual behavior and sexual abuse was admissible because "not

only was the motive behind the statements made by the child consistent with promoting treatment, . . . but also, the statements were such that they would have been reasonably relied upon by the psychologist in his diagnosis and treatment of the child.” *Id.*, at 183 W.Va. At 654, 398 S.E.2d at 136.

In *Pettrey*, statements were given by child victims to a counselor who was specifically trained in counseling, primarily in play therapy. The Court noted that the children in *Pettrey*, were not brought to the counselor for investigative or forensic purposes.” The *Pettrey* Court went on to hold that: “[w]hen a social worker, counselor, or psychologist is trained in play therapy and thereafter treats a child abuse victim with play therapy, the therapist’s testimony is admissible at trial under the medical diagnosis or treatment exception to the hearsay rule, West Virginia Rule of Evidence 803(4), if the declarant’s motive in making the statement is consistent with the purposes of promoting treatment and the content of the statement is reasonably relied upon by the therapist for treatment. The testimony is *inadmissible if the evidence was gathered strictly for investigative or forensic purposes.*” *Pettrey*, 209 W.Va. At 460, 549 S.E.2d at 334. *Emphasis added.* See also: *State v. Shrewsbury*, 213 W.Va. 327, 582 S.E.2d 774 (2003).

In the case *sub judice*, Tanaya was undoubtedly taken to the hospital for forensic evaluation pursuant to the directives of Deputy Tony Link of the Morgan County Sheriff’s Department. Accordingly, under *Pettrey, Id.*, the purpose of the evaluation of the victim in this case was to garner evidence as opposed to diagnosis and treatment.

Leheigh further testified when asked what medical treatment or diagnosis did you make based upon the statements given replied: “[w]ell, due to the fact that she didn’t disclose any pain, any bleeding or any type of discharge, and also because there wasn’t penile contact or ejaculate, she

was at very low risk for sexually transmitted illness or even for traumatic injury that would need to be photographed.” (Trans. 10/02/07, Pg.252). Therefore, Leheigh already had this information as part of her initial intake and it would be readily apparent to her that no diagnostic tests were called for nor treatment necessary. Nevertheless, she continued to take Tanaya’s statement as to what happened for purposes of securing evidence in the subsequent prosecution.

The Appellant also argues that the statements are not exempted from the hearsay rule as present sense impressions (803(1)); as excited utterances (803(2)); or then existing mental, emotional or physical conditions (803(3)).

The exception for admissibility of hearsay statements under present sense impression requires a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter. This exception is premised on “substantial contemporaneity of event and statement which negates the possibility of conscious misrepresentation.” See: 2 Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers*, §8-3(B)(1) at 194.

Along those same lines, the statements do not constitute excited utterances.

The statements do not constitute then existing mental, emotional or physical condition of the declarant. This exception includes the following four types of extrajudicial statements: (1) statements of present bodily condition; (2) statements of present state of mind or emotion, offered to prove a state of mind or emotion of the declarant that is “in issue” in the case; (3) statements of present state of mind - usually intent, plan or design - offered to prove subsequent conduct of the declarant in accord with the state of mind; and (4) statements of a testator including his state of mind offered on certain probate issues. Cleckley Id., §8-3(B)(3) at 207. Clearly none of these situations

applies to the case at bar.

West Virginia Rule of Evidence 801(d)(1)(B) states:

A statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive

At the time of Leheigh's testimony, the Appellant had made no attempt to discredit Tanaya Fox's testimony by the normal means of impeachment, i.e., fabrication, parental influence or improper motive of the child, as she had not yet been called to testify by the State. Accordingly, Rule 801(d)(1)(B) would also not have allowed her prior statements (even if consistent) to Leheigh to be admitted. To do such would permit "bolstering" which has been defined as "occurring when a party seeks to enhance a witness's credibility before it has been attacked." *State v. Wood*, 194 W.Va. 525, 531, 460 S.E.2d 771, 777 (1995) citing *United States v. Toro*, 37 M.J. 313, 315 (C.M.A. 1993). "Bolstering is generally disallowed." *Id.* Along these lines, *State v. Quinn*, 200 W.Va. 432, 442, 490 S.E.2d 34, 44 (1997) holds that "under Rule 801(d)(1)(B) a prior consistent out-of-court statement of a witness who testifies and can be cross-examined about the statement, in order to be treated as non-hearsay under the provisions of said Rule, must have been made before the alleged fabrication, influence, or motive came into being." Obviously this is not the case at bar. Bolstering takes on added dimensions when the State is left with a case devoid of forensic evidence based solely upon the uncorroborated testimony of the victim.

Lastly, the statements of Tanaya Fox as testified to by Cynthia Leheigh were obviously testimonial in nature, garnered by police or quasi-law enforcement, for purposes of being introduced at trial. In this case, they were used to bolster Fox's expected testimony and were obviously given

greater importance coming from a forensic nurse in this media era of “CSI.” It is true that Tanaya Fox did in fact testify at trial and was subject to cross-examination, however, her statements to Leheigh, should have only been allowed, if at all considering *Pettrey, Id.*, after Fox had testified and been subject to cross-examination. These *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed2d 177 (2004) issues and analysis were addressed and adopted by this Court in *State v. Mechling*, 219 W.Va. 366, 633 S.E.2d 311 (2006). There was obviously a profound effect upon the jury by allowing Fox’s statements to Leheigh to come into evidence before Fox actually testified.

The State may attempt to argue that because of the hour they were calling Leheigh out of order. The Appellant still timely objected and in reply to the State’s promises that they were in fact going to call the victim, stated: “[a]nd then if the victim doesn’t testify as you plan that she will, because we never know how they are going to do, then the jury has this information. (Trans. 10/02/07, Pg.242).

ARGUMENT 2

THAT THE TRIAL COURT COMMITTED PLAIN AND PREJUDICIAL ERROR BY ALLOWING INTO EVIDENCE THE HEARSAY STATEMENT OF THE APPELLANT WHICH WAS NOT AGAINST HIS INTEREST.

The Trial Court allowed into evidence the hearsay statement of the Appellant made to Deputy Link, when he was removed from the family residence pursuant to the FPO, that “he should ask her (Yunker) what she allowed her (Fox) to do the other night, she let her get drunk.”

This statement was obviously made outside of court and offered by the State into evidence to prove the truth of the matter asserted, that Yunker was allowing Fox to get drunk and to further bolster the State’s theory that the Appellant was trying to get Fox intoxicated. Clearly part of the State’s trial strategy was to implicate Yunker as a tacit accomplice, a mother who chose her

husband over her child, in an effort to impeach her unfavorable testimony to the State. This was not an admission by any party-opponent under Rule 801(d)(2), nor was it a statement against interest under Rule 804(b)(3). It was simply hearsay which should not have been admitted and was offered to again attempt to bolster the State's case based entirely upon the victim's uncorroborated testimony. It constituted plain and prejudicial error.

ARGUMENT 3

IT WAS ERROR FOR THE COURT TO FAIL TO DIRECT A VERDICT IN FAVOR OF THE DEFENDANT AT THE CLOSE OF THE STATE'S CASE-IN-CHIEF AND AT THE CLOSE OF ALL OF THE EVIDENCE, OR IN THE ALTERNATIVE, THE JURY'S VERDICT WAS CONTRARY TO THE EVIDENCE PRESENTED.

At the close of the State's case-in-chief, the Appellant made his Motion for Judgment of Acquittal based upon the State's failure to prove the his guilt as alleged beyond a reasonable doubt. The Appellant's motion was made pursuant to Rule 29 of the West Virginia Rules of Criminal Procedure. That motion was again renewed at the close of all of the evidence.

The standard upon which the Court is to consider this assignment of error can be found in the case of *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995), and 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. In *Guthrie*, at page 174, S.E.2d edition, the Court summarized its new standard for determining when a verdict of guilt should be set aside on the grounds that it is contrary to the evidence, relying heavily upon the United States Supreme Court case of *Jackson v. Virginia*, 443 U.S.307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979):

In summary, a criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. 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. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. As we have cautioned before, appellate review is not a device for this Court to replace a jury's finding with our own conclusion. On review, we will not weigh evidence or determine credibility. Credibility determinations are for a jury and not an appellate court. On appeal, we will not disturb a verdict in a criminal case unless we find that reasonable minds could not have reached the same conclusion. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent with our decision announced today, they are expressly overruled.

The *Guthrie* Court, at page 176, went on to comment upon the requirements of the beyond a reasonable doubt standard:

The beyond a reasonable doubt standard does not require the exclusion of every other hypothesis or, for that matter, every other reasonable hypothesis. It is enough if, after considering all the evidence, direct and circumstantial, a reasonable trier of fact could find the evidence established guilt beyond a reasonable doubt.

At page 173 of the opinion the Court also stated: “Appellate courts can reverse only if no rational jury could have found the defendant guilty beyond a reasonable doubt”.

The Appellant argues that even in the light most favorable to the State, i.e., giving the State the benefit of any evidence in doubt, and crediting the State with all inferences and credibility assessments which the jury could have drawn from the evidence, reasonable minds could have not reached the same conclusion as to the Appellant’s guilt as to any of the charges against him.

The Appellant presented ample evidence, through cross-examination, to rebut the State’s allegations against him. The Appellant established a motive for the victim to lie about the alleged abuse. That motive was simply that she wanted to move from her mother’s home, where the Appellant was a disciplinarian, requiring her to comply with social norms of good behavior and make good grades. It was clearly established that there was little to no parental supervision at her

father's home where she wanted to reside. There she was allowed to associate with adults, drink beer and get high. Additionally, she was clearly infatuated with a nineteen (19) year old male, known through her diary entries as "Corey." She wrote in her diary repeatedly that she wanted to live at her father's house to be close to Corey and that she would do anything to be able to move into her Dad's home. She even had a discussion with her mother, as evidenced by a notation in the diary dated April 5 [or 15] 2005 wherein she and her mother got into an argument about her desire to move in with her father. Ultimately she was allowed to change her custody to her father.

The State presented no forensic evidence to corroborate the victim's assertions. No testing was done and possible exculpatory evidence was never tested, though collected by the State.

The victim suffered no objective symptoms of having been sexually abused by the Appellant for between 5 or 6 to 8 times over a two year period from ages 11 to 12.

The victim's demeanor on the stand, while initially consistent with a person who might have been the victim of a repeated sexual assault, changed quickly upon cross-examination. She became argumentative and hostile. Her story as how she was abused was incredible. She maintained she was assaulted on February 26, 2005, less than fifteen (15) feet away from her mother's bedroom. Her mother testified that the alleged assault could only have occurred, if true, within less than five minutes on the night in question. The victim testified that all but possibly two assaults occurred when her mother was present at the residence and that they all occurred within earshot of her younger brothers. The victim presented evidence of being assaulted after being thrown in a pool in July of 2004, which was only first disclosed during trial. This disclosure was had despite the investigating officer having repeatedly made attempts to obtain specific dates during his interview with her on February 28, 2005, to no avail.

Given all of these facts, it was clear to any rational jury that the victim's uncorroborated testimony was inherently incredible, however, the jury swayed by their passions and prejudices against the type of crime presented, chose to convict the Defendant in any event. See: Syllabus Point 5, *State v. Beck*, 167 W.Va. 830, 286 S.E.2d 234 (1981).

Accordingly, the Appellant argues that no rational jury could have found him guilty beyond a reasonable doubt of any of the charges contained in the indictment against him.

ARGUMENT 4

THE CUMULATIVE WEIGHT OF ALL OF THE ERRORS SET FORTH ABOVE IS SUFFICIENT TO WARRANT THE GRANTING OF A NEW TRIAL.

In *State v. George W.H.*, 190 W.Va. 558, 439 S.E.2d 423 (1993), the Court reaffirmed its long-standing rule that the cumulative effect of numerous errors in a trial can warrant a reversal of a conviction. Citing earlier decisions, Syllabus Point 14 from *George W.H.*, provides as follows:

Where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error. Syl. pt. 5, *State v. Smith*, 156 WVA. 385, 193 S.E.2d 550 (1972).

The circumstances of the case at bar gives rise to cumulative error. The errors recited combined to deprive the Appellant of a fair trial and thus his conviction should be set aside and a new trial granted.

ARGUMENT 5

THAT THE TRIAL COURT COMMITTED PLAIN AND PREJUDICIAL ERROR BY IMPOSING A SENTENCE SO DISPROPORTIONATE TO THE CRIMES OF CONVICTION AND THUS UNCONSTITUTIONAL.

In *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983), this Court stated in Syllabus

Point 5:

Punishment may be constitutionally impermissible, although not cruel or unusual in its method, if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity, thereby violating West Virginia Constitution, Article III, Section 5 that prohibits a penalty that is not proportionate to the character and degree of an offense.

The Appellant's prior criminal history included no crimes of violence whatsoever. His prior offenses were traffic in nature and a animal cruelty charge when he was convicted for failure to provide for a dog. He had no prior felonies nor had he ever served any sentence of incarceration. The Appellant was evaluated pursuant to the mandates of West Virginia Code §62-12-2(e) requiring a psychological, psychiatric and physical exam as a jurisdictional requirement for a person who has been convicted of a sexual offense before being considered for probation by Dr. Paul Kradel, licensed psychologist. Dr. Kradel reported that the Appellant was at low risk to re-offend. Although the Appellant dropped out of school at age sixteen (16) he nevertheless obtained his general equivalency diploma (GED). He also was generally gainfully employed as an adult.

Nevertheless, the trial court ran all of his sentences consecutively for a total aggregate sentence of not less than 21 years 3 months nor more than 55 years. The trial court was obviously concerned with two issues at the sentencing hearing: (1) the Appellant's inability to admit his guilt despite the jury's verdict and (2) the fact that the victim had been alienated by her mother and her siblings as a result of the trial.

The Appellant at sentencing acknowledged that the jury had in fact found him guilty and told the court, that although he disagreed with the verdict, he still respected the jury's decision. He said that he could not admit something that he had not done. Additionally, the alienation that obviously took place by Ms. Younker and Fox's siblings was due to Younker's disbelief of Fox and her

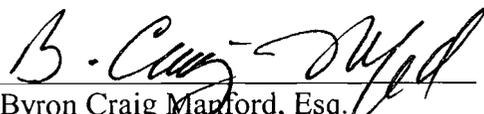
siblings being without their father. The court attributed this alienation directly against the Appellant. The Appellant admits that as a partial result of his guilty verdict, said alienation against the victim occurred, but that he did not directly encourage or counsel those said individual to turn against the victim.

Given all of these sentencing considerations, the court's sentence certainly shocks the conscience and offends the fundamental notions of human dignity, and thus violates Article III of the West Virginia Constitution, which prohibits a penalty that is not proportionate to the character and degree of an offense. At the very least, a concurrent sentence would have been the maximum that should have been imposed.

VI. CONCLUSION

Wherefore, the Defendant, Kevin B. Payne, respectfully prays that this Honorable Court acquit him of the charges of Sexual Assault in the Second Degree in Counts I and III of the Indictment; for Sexual Abuse in the First Degree in Count II; and for Sexual Abuse in the Third Degree in Counts IV and V, notwithstanding the verdict of the jury; or in the alternative, reverse the judgment of the trial court and remand the same for new trial; and for such other and further relief as the Court may deem just, necessary and proper.

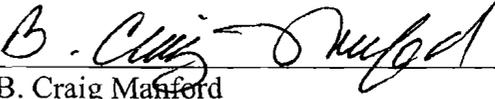
Respectfully submitted,


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Kevin B. Payne
By Counsel

VII. CERTIFICATE OF SERVICE

I, B. Craig Manford, hereby certify that I have served a true and correct copy of the foregoing Appellant's Brief upon Dawn E. Warfield, Esq., Office of the Attorney General, Appellate Division, Building 1, Room E-26, State Capitol Complex, Charleston, West Virginia 25305, by First Class United States Mail, postage prepaid, this 25th day of July, 2009.



B. Craig Manford