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NO. 34889

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

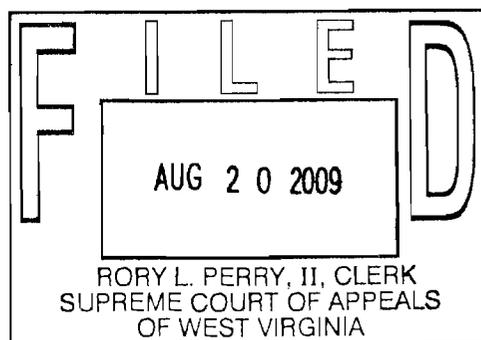
STATE OF WEST VIRGINIA,

Appellee,

v.

KEVIN B. PAYNE,

Appellant.



BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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STATE OF WEST VIRGINIA,

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BRIEF OF APPELLEE STATE OF WEST VIRGINIA

I.

**KIND OF PROCEEDING AND
NATURE OF RULING BELOW**

Following a two-day jury trial in the Circuit Court of Morgan County (Groh, J.), the jury convicted Kevin Payne, defendant below (hereinafter “Appellant”), on two counts of Second Degree Sexual Assault pursuant to West Virginia Code 61-8B-4 (Counts I and III); one count of First Degree Sexual Abuse pursuant to West Virginia Code 61-8B-7 (Count II); and, one count of Third Degree Sexual Abuse pursuant to West Virginia Code 61-8B-9 (Count IV). (R. at 242-43.) By amended order the trial court sentenced the Appellant to consecutive sentences of ten to twenty-five years on Count I; one to five years on Count II; ten to twenty-five years on Count III; and ninety days on Count IV. (R. at 290-97.)

Appellant's brief alleges five assignments of error: (1) improper admission of hearsay from State's witness Nurse Cynthia Leahy; (2) improper admission of hearsay from State's witness Deputy Tony Link; (3) sufficiency of the evidence; (4) cumulative error; and (5) disproportionate sentence.

II.

STATEMENT OF FACTS

A reasonable juror could have found that the Appellant sexually assaulted the 12-year-old daughter of his live-in girlfriend, Tamela Younker. These assaults took place in their Berkeley County, West Virginia, home where T.F.,¹ Ms. Younker, the Appellant, and several male siblings lived together. (Tr., 144, Oct. 2, 2007; Tr., 15, 18, Oct. 3, 2007.)

One February evening, T.F., her mother, and the Appellant were playing cards. (Tr., 146, Oct. 2, 2007; Tr., 18, Oct. 2, 2007.) All three, including 12-year old T.F., were drinking. Younker testified that she drank two Kahluas, and claimed she prepared a virgin (non-alcoholic) Kahlua and cream for T.F. (Tr., 146, Oct. 2, 2007; Tr., 115-16, Oct. 3, 2007.) The Appellant drank beer, Kahlua and Jagermeister.² (Tr., 146, Oct. 2, 2007; Tr., 20, Oct. 3, 2007.) T.F. testified that the Appellant served her a glass of Kahlua (not virgin), and a shot of alcohol.³ (Tr., 19, Oct. 3, 2007.) The Appellant continued to offer alcohol to T.F., but she demurred. (Tr., 19, 61, 64, Oct. 3, 2007.)

Because her bed did not have a mattress, T.F. slept on a couch in the living room. (Tr., 21, Oct. 3, 2007.) Late that evening T.F. awoke to find her shorts down around her knees, and T.F.'s

¹Due to the nature of the charges, the Appellant will refer to the victim by the victim's initials.

²Ms. Younker testified that the Appellant only drank one beer. (Tr., 146, Oct. 2, 2007.)

³T.F. testified that the alcohol upset her stomach, but did not make her feel dizzy. (Tr., 20, Oct. 3, 2007.)

mouth on her vagina, penetrating its' outer fold.⁴ (Tr., 21-22, 93, Oct. 3, 2007.) T.F. responded by kicking the Appellant, causing him to run back to his bedroom. (Tr., 22, Oct. 3, 2007.) Shortly thereafter, the Appellant tried to pull her pants down again. When she responded in the same fashion, he ran away. (Tr., 23, Oct. 3, 2007.) This time T.F. started crying. The Appellant tried to calm her down, but she yelled for her mother.

Once her mother got up, both she and T.F. went into the bathroom and shut the door.⁵ (Tr., 148, Oct. 2, 2007.) T.F. told her that the Appellant had touched her "down there." (Tr., 149-50, Oct. 2, 2007; Tr., 23, Oct. 3, 2007.) That afternoon, after the Appellant had left the house, T.F. again told her mother that the Appellant had touched her vagina. (Tr., 149-50, Oct. 2, 2007.)

The following Monday, Ms. Younker took her daughter to the Berkeley County Sheriff's Department.⁶ (Tr., 151, Oct. 2, 2007.) After speaking with Ms. Younker, Deputy Sheriff Tony Link advised her to take T.F. to a hospital in Winchester, Virginia, for medical treatment and an evaluation. Ms. Younker also obtained an emergency protection order from the family court prohibiting the Appellant from having any further contact with T.F. In her application Ms. Younker

⁴T.F. was wearing a pair of basketball shorts and a white t-shirt and underwear. (Tr., 31, Oct. 3, 2007.)

⁵T.F. did not want to speak with her mother while the Appellant was present. (Tr., 23, Oct. 2, 2007.)

⁶Ms. Younker testified that T.F. became enraged when she learned that her mother had notified the police. (Tr., 157, Oct. 2, 2007.) T.F. later testified that she could not recall being angry, but that she was scared. (Tr., 25, Oct. 3, 2007.) Clearly, the jury credited the victim's testimony over her mother's.

stated that she suspected that this sort of sexual abuse had occurred before.⁷ (Tr., 153-54, Oct. 2, 2007; R. at 157.)

Deputy Link served the petition and removed the Appellant from the house. (Tr., 152, Oct. 2, 2007.) He testified that the Appellant said that he could not believe Ms. Younker would “pull this shit” and told the Deputy to ask Ms. Younker whether she had allowed her daughter get drunk that night.⁸ (Tr., 213, Oct. 2, 2007.) On March 16, 2006, Ms. Younker dropped the petition, and allowed the Appellant back into the house. Consequently, T.F. moved in with her father. (Tr., 154, Oct. 2, 2007; Tr., 17, Oct. 3, 2007.)

On February 28, T.F. was interviewed and examined by Registered Nurse Cynthia Leahy at the Winchester Medical Center in Virginia. Along with being an RN, Ms. Leahy was trained as a forensic nurse examiner. (Tr., 236, Oct. 2, 2007.) She took T.F.’s full medical history to determine if she was at risk for pregnancy, sexually transmitted diseases or other injuries requiring further medical treatment.⁹ (Tr., 237, 239, Oct. 2, 2007.) Since T.F. did not disclose any pain or bleeding, and because there was no penile contact or ejaculation, Nurse Leahy determined that T.F. was at low

⁷On one occasion Ms. Younker walked in on her daughter and the Appellant sitting on her daughter’s bed. T.F. was laying on her bed with one leg on the Appellant’s leg, and one leg wrapped around the Appellant’s back. (Tr., 154, Oct. 2, 2007.) T.F. later testified that the Appellant did not assault her on that occasion.

⁸Appellant objected to the admission of Appellant’s statements to Deputy Link as hearsay, not fitting under any recognized exception. (Tr., 15, Oct. 3, 2007.)

⁹Defense counsel objected to the admission of any statements made by the victim to Nurse Leahy as hearsay and a *Crawford* violation. (Tr., 240, Oct. 2, 2007.) The victim testified for the State. Defense counsel’s cross-examination covers 62 pages of transcript. (Tr., 41-104, Oct. 3, 2007.) The trial court ruled that the examination included a large medical component and was admissible under West Virginia Rule of Evidence 803(4) (statements for purpose of medical diagnosis and treatment).

risk for sexually transmitted diseases or traumatic injury. (Tr., 252, Oct. 2, 2007.) T.F. chose not to consent to a forensic examination. (*Id.*)

Before taking T.F.'s statement, Nurse Leahy asked T.F.'s mother to step out. (Tr., 240, Oct. 2, 2007.) T.F.'s statements to Nurse Leahy were consistent with what she had told her mother. (Tr., 250-52, Oct. 2, 2007; R. at 4001.) She told Nurse Leahy that she was sleeping when she was awakened by the Appellant's face on her genitalia. She resisted and pushed him away. A short time later, the Appellant returned. The second time T.F. kicked him away and cried for her mother. (Tr., 252, Oct. 2, 2007; R. at 4001.)

Deputy Link spoke to T.F. that following day at the Children's Advocacy Center in Martinsburg. (R. at 1006.) Her description of the incident was consistent with what she had told her mother, and what she had told Nurse Leahy. On February 26, she was sleeping on the couch when she felt the Appellant pulling her pants down. (R. at 1006-07.) The Appellant placed his mouth "down there" into her crotch. (*Id.*) T.F. pushed the Appellant away, and ran out of the room. T.F. told Deputy Link that the Appellant began touching her shortly after her 11th birthday. The Appellant would use his hands and mouth to touch her vagina, and her breasts. (R. at 1006.)

This was not the first time the Appellant sexually assaulted T.F. (Tr., 25, Oct. 3, 2007.) On another occasion T.F. attended a pool party with her family.¹⁰ While at the party she drank a bottle of beer which made her sick. (Tr., 25-26, Oct. 3, 2007.) The Appellant was also drinking. (Tr., 28, Oct. 3, 2007.) When they returned home, T.F. fell asleep in her bedroom. The Appellant came into

¹⁰T.F. could not remember when this incident took place. (Tr., 26, Oct.3, 2007.)

her room, laid down beside her, and placed his mouth on her vagina. (Tr., 28, Oct. 3, 2007.) Again, T.F. pushed the Appellant away. (Tr., 29, Oct. 3, 2007.) She did not tell her mother this time.¹¹ (*Id.*)

The defense claimed that T.F.'s allegations were false; the product of a child who wanted to move from her mother's house to the allegedly less restrictive environment of her father's house.¹² The defense produced a diary written by T.F. between April and December 2005 in which she stated that she wanted to live with her father because she was enamored of a young man named Corey who lived there periodically. T.F. did not mention the Appellant's repeated assaults, but the last entry in her diary was dated December 2005, almost two months before T.F. told her mother about Appellant's predatory conduct.

It took the jury just three hours and thirty-eight minutes to return their verdict. (Tr., 195, Oct. 3, 2007.) The trial court sentenced the Appellant on January 25, 2008. (Tr., 1. Jan. 25, 2008.) At sentencing the Appellant continued to claim that he was innocent. (Tr., 25, Jan. 25, 2008.) His pre-sentence report revealed a criminal history including three arrests for larceny, and one for animal cruelty. He received probation before judgment on his first larceny, was placed on a year's probation

¹¹She testified that she was scared, and did not think her mother would believe her. (Tr., 29, Oct.3, 2007.)

¹²While living with her father, T.F. had to check in every hour if she went somewhere, and tell him where she was going before she left. She had to be on the porch by 8:00 and in the house by 9:00. Before she could go outside she had to finish her homework and complete her chores. (Tr., 40, Oct. 3, 2007.)

on his second, and fined upon his plea to animal cruelty.¹³ The Appellant was also served with an emergency protective order by the Morgan County Magistrate Court on August 11, 2004.¹⁴

After considering arguments of counsel, the defense's witnesses, Appellant's psychological examination, and the pre-sentence report the trial court sentenced Appellant to consecutive sentences of ten to twenty-five, one to five, ten to twenty-five, and ninety days. (Tr., 40-41, Jan. 25, 2008.)

III.

ARGUMENT

A. T.F.'S STATEMENTS TO FORENSIC NURSE LEAHY WERE ADMISSIBLE AS STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT.

1. The Standard of Review.

"We have held that '[a] trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard.'" *McKenzie v. Carroll Intern. Corp.*, 216 W. Va. 686, 693, 610 S.E.2d 341, 348 (2004), quoting Syl. pt. 4, *State v. Rodussakis*, 204 W. Va. 58, 511 S.E.2d 469 (1998).

2. Discussion.

The Appellant first claims that the trial court erroneously admitted hearsay testimony from forensic nurse Cynthia Leahy under the medical testimony exception to the hearsay rule. *See* W. Va. R. Evid. 803(4). Appellant contends that the Nurse Leahy was not a medical provider, and that the victim was referred to Nurse Leahy by Deputy Link solely for forensic purposes. The

¹³The pre-sentence report's pages are not numbered. It appears between pages 250 and 251 on the Record.

¹⁴This order pre-dates the order obtained by Ms. Younker on February 27, 2006.

Appellant also argues that Nurse Leahy's testimony violated his right to confrontation pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004).

This Court need not spend much time on the Appellant's *Crawford* issue. *Crawford* is a case arising under the Confrontation Clause to the United States Constitution. The statement admitted in *Crawford* was from an absent witness. The same cannot be said in the instant case. The Appellant was afforded a full and fair opportunity to cross-examine the declarant; *i.e.*, T.F. In fact, defense counsel referred to Nurse Leahy three times during his opening citing alleged inconsistencies between what T.F. told her mother and what she told the nurse. (Tr., 128, 137, 139, Oct. 2, 2007.) See *State v. Reed*, 223 W. Va. 312, 320 n.3, 674 S.E.2d 18, 27 n.3 (2009) ("The Confrontation Clause contained in the Sixth Amendment to the United States Constitution and Section 14, Article III of the West Virginia Constitution bars the admission of a testimonial statement by a witness *who does not appear at trial*, unless the witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness.") (emphasis added).

Appellant's hearsay argument fares no better. In *State v. Martin M.*, 971 A.2d 828 (Conn. App. 2009), the defendant raised the same argument. A defendant charged with sexually abusing his minor victim also argued that the forensic nurse practitioner was not in the "chain of medical treatment, and that the victim had been referred to the nurse by the police." *Martin M.*, 971 A.2d at 835.

The Appeals Court of Connecticut ruled:

The key on which the issue of admissibility of the victim's statement turns is the purpose of the examination and that the victim had understood that she was going to [Nurse Practitioner] Kanz so she could be examined for injuries she may have sustained.

Id. at 835. See also Syl. pt. 5, *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990):

The two part test set 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 purposes of promoting treatment, and (2) the content of the statement must be such as is reasonably relied upon by a physician in treatment or diagnosis.

The examination took place a day after the Appellant assaulted T.F. T.F. remembers talking to a nurse, not a forensic nurse. (Tr., 25, 56, Oct. 3, 2007.) Ms. Younker testified that she took her daughter to Winchester Hospital to be checked. (Tr., 157, Oct. 2, 2007.) Nurse Leahy, an expert in the area of forensic nursing, testified that her forensic examination had a medical component to it. (Tr., 236, Oct. 2, 2007; R. at 51-52.) See *Webster v. State*, 827 A.2d 910, 920 (Md. App. 2003) (statement given for dual medical/forensic purposes admissible under 803(4) if statement has some value to medial diagnosis and treatment). The examination took place in an examining room located in the hospital's emergency room. Nurse Leahy took T.F.'s full medical history to determine whether she was at risk for pregnancy or sexually transmitted disease or other injuries that may require further medical evaluation. This information was then relayed to the treating physician. (Tr., 237, Oct. 2, 2007.)

Even if this Court were to find the testimony inadmissible hearsay, the error is harmless. As stated above, the State called declarant as a witness during its case-in-chief. Counsel the Appellant had a full and fair opportunity to cross-examine her. 2 Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers*, 8-1(A)(6)(c) at 113 (3d ed. 1994).

B. APPELLANT'S STATEMENTS TO DEPUTY LINK WERE ADMISSIBLE AS AN ADMISSION BY A PARTY OPPONENT UNDER WEST VIRGINIA RULES OF EVIDENCE 801(d)(2)(A).

1. The Standard of Review.

“We have held that ‘[a] trial court’s evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard.’” *McKenzie v. Carroll Intern. Corp.*, 216 W. Va. at 693, 610 S.E.2d at 348, quoting Syl. pt. 4, *State v. Rodussakis, supra*.

2. Discussion.

Appellant next claims that the court erroneously admitted testimony by Deputy Link overheard while the Deputy removed the Appellant from the home pursuant to the Family Violence Petition. Specifically, the Appellant told the Deputy, “he should ask her [Younker] what she allowed her [T.F.] to do the other night she [Younker] let her [T.F.] get drunk.”

Throughout the trial one of the issues in question was whether the twelve-year old victim drank any alcohol the evening of the last assault. The Appellant called Ms. Younker who testified that she served her daughter a “virgin” (no alcoholic) Kahlua and cream. The victim testified that the Appellant fixed her a Kahlua and cream containing alcohol, and continued to fix them for her throughout the evening.

A party’s own statement may be used against the party. *See* 2 Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers*, 8-2(E) at 139 (3d ed. 1994). *See also* W. Va. R. Evid. 801(d)(2)(A). An appellant speaks at his own risk and may be compelled to explain his prior statements if subsequently used against him. The appellant may not argue that his own statements are not sufficiently reliable because he did not have an opportunity to cross-examine

himself. Such a position lacks merit. Paul Rice, *Evidence: Common Law and Federal Rules of Evidence* at 477 (4th ed. 2000).

C. THE VICTIM'S TESTIMONY, STANDING ALONE, SUFFICIENTLY SUPPORTED THE APPELLANT'S CONVICTION.

1. The Standard of Review.

In *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995), this Court adopted the federal standard of review for sufficiency of the evidence as set forth in *Jackson v. Virginia*, 443 U.S. 307; (1979): a verdict of guilty will not be set aside due to insufficiency of the evidence if, reviewing the evidence in the light most favorable to the prosecution, the appellate court finds that "any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt" 194 W. Va. at 667, 461 S.E.2d 173 (quoting *Jackson*). The Court made it clear that the burden is on a defendant to overturn the presumption of correctness in a jury's verdict, and that the State is entitled to all inferences in favor of that verdict.¹⁵ The Appellant has not met that burden.

2. Discussion.

The Appellant next claims that his conviction was not supported by constitutionally sufficient evidence. Specifically, Appellant contends that the victim had a motive to lie, that the State failed to present any forensic evidence in support of T.F.'s claims, and that T.F.'s story was inherently incredible.¹⁶

¹⁵"[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." *Guthrie*, 194 W. Va. at 670, 461 S.E.2d at 175.

¹⁶All of this evidence was presented to, and rejected by, the jury.

The Appellant's position ignores the appropriate standard of review. As stated above, this Court must view all of the evidence in a light most favorable to the prosecution, and must credit all inferences and credibility assessments in favor of the State. Also, uncorroborated victim testimony standing alone, does, as a matter of law, support a sexual assault conviction, as long as it is not inherently incredible. Syl. pt. 5, *State v. Beck*, 167 W. Va. 830, 286 S.E.2d 234 (1981).

T.F. testified that she was born on April 3, 1999. (Tr., 15, Oct. 3, 2007.) The night of February 26, 2006, T.F., her mother, and the Appellant were playing cards. The Appellant, with Ms. Younker's permission, mixed a Kahlua and cream for T.F. T.F. also drank a shot of alcohol. Although the Appellant mixed more drinks for T.F., she didn't drink them. (Tr., 19, Oct. 3, 2007.) The Appellant was drinking Kahlua and Jagermeister. (Tr., 20, Oct. 3, 2007.)

Early the next morning, T.F. woke to find her pants at her knees and the Appellant's mouth inside the fold of her vagina. (Tr., 21-22, Oct. 3, 2007.) This was not the first time this had happened. T.F. testified about an earlier incident in which the Appellant's mouth made contact with her vagina. (Tr., 25-29, Oct. 3, 2007.) She also testified that the Appellant placed his hands on her breasts. (Tr., 31, Oct. 3, 2007.)

T.F.'s mother, Tamela Younker, testified that she spoke to her daughter at approximately four o'clock in the morning. T.F. was crying when she spoke to her and would not talk in front of the Appellant. (Tr., 149-50, Oct. 2, 2007.) T.F. told her mother that the Appellant touched her. Later that afternoon, after the Appellant had left, T.F. again told her mother that he had touched her "down there." (Tr., 149-50, Oct. 2, 2007.) In her application for an emergency Family Protective Order Ms. Younker stated that she suspected that this was not the first time her boyfriend assaulted T.F. (Tr., 153, Oct. 2, 2007.)

Morgan County Sheriff's Deputy Tony Link testified that Tammy Younker contacted him on February 27 about the most recent incident with T.F. (Tr., 207-08, 227, Oct. 2, 2007.) The following day, Deputy Link took a statement from T.F. in which she said that the victim began assaulting her when she was eleven. The Appellant would use his hands and his mouth to touch her vagina and breasts. The last time he had assaulted her was February 26, 2007. T.F. stated that the Appellant pulled down her pants and touched her vagina with his mouth. (R. at 1006.)

Cynthia Leahy, forensic nurse from the Winchester Medical Center, testified that T.F. told her that she had been sexually abused by the Appellant. (Tr., 250, Oct. 2, 2007.) Again T.F. said that she was lying on the couch early Sunday morning when the Appellant pulled her pants down and touched her vagina with his mouth. (Tr., 251, Oct. 2, 2007.) Again, T.F. stated that she pushed the Appellant away twice. After the second time she cried for her mother. (Tr., 252, Oct. 2, 2007.)

Clearly, given the above evidence, construed in a light most favorable to the State, there was sufficient evidence to justify a conviction.

D. SINCE THERE WAS NO ERROR, THERE WAS NO CUMULATIVE ERROR.

1. The Standard of Review.

The Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*. Syl. pt. 4, *Burgess v. Porterfield*, 196 W. Va. 178, 179, 469 S.E.2d 114, 115 (1996).

2. Discussion

The Appellant's next assignment of error relies on the cumulative error doctrine. West Virginia law is clear that the cumulative error doctrine will not apply unless "the cumulative effect

of numerous errors committed during the trial prevented the defendant from receiving a fair trial.”
State v. Plumley, 181 W. Va. 685, 694, 384 S.E.2d 130, 139 (1989) (quoting *State v. Smith*, 156
W. Va. 385, 193 S.E.2d 550 (1972)).

West Virginia law is clear that in a case where there are no harmless errors, the cumulative error doctrine is “inappropriate.” *State v. Carrico*, 189 W. Va. 40, 47, 427 S.E.2d 474, 481 (1993). This Court has held that the cumulative error doctrine is inapplicable when there is only one meritorious assignment of error in a case. *State v. Beard*, 194 W. Va. 740, 757, 461 S.E.2d 486, 503 (1995). As this case is devoid of cumulative error, the Appellant’s cumulative error argument should fail.

E. THE COURT’S SENTENCE WAS A REASONABLE EXERCISE OF ITS DISCRETION.

1. The Standard of Review.

As a general rule, “[s]entences imposed by the trial court, if within statutory limits and if not based upon some [im]permissible factor, are not subject to appellate review.” Syl. Pt. 4, *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982); accord Syl. Pt. 2, *State v. Shaw*, 208 W. Va. 426, 541 S.E.2d 21 (2000); Syl. Pt. 2, *State v. Farmer*, 193 W. Va. 84, 454 S.E.2d 378 (1994). Subject to certain narrowly drawn exceptions, this Court has consistently held that sentencing decisions rest within the sound discretion of the trial court. “The Supreme Court of Appeals reviews sentencing orders . . . under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.” Syl. Pt. 1, in part, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997). The balance struck by the sentencing judge after weighing competing sentencing factors, reviewing all of the documentation, and observing the demeanor of the witnesses, will not be disturbed by this Court unless it is manifestly unsupported by reason. *State v. Redman*, 213

W. Va. 175, 181, 578 S.E.2d 369, 375 (2003) (“Our system of criminal jurisprudence views a trial court’s discretion during the sentencing phase of a criminal proceeding as a critical component of the process. . . . ‘Circuit court judges have a right to believe that so long as they have not violated a law or acted in a nefariously discriminatory way in imposing sentences, this Court will not sift through the nooks and crannies of their decisions determined on finding that which is not there.’”) (quoting *State v. Head*, 198 W. Va. 298, 306, 480 S.E.2d 507, 515 (1996) (Cleckley, J., concurring)); *State v. Cooper*, 172 W. Va. 266, 273, 304 S.E.2d 851, 857 (1983).

2. Discussion.

Appellant next claims that his sentence was constitutionally disproportionate to the underlying offenses. He points to a lack of a serious criminal history, a report by psychologist Paul Kradle, that he earned his GED, and was employed at the time of the offense. The court sentenced Appellant to sentences well within the statutory deadlines. Thus, it is not the length of each individual sentence, but the trial court’s decision to run the sentences consecutively which lies at the heart of his claim.

In the case at bar, the Appellant repeatedly assaulted the 12-year-old daughter of his live-in girlfriend. The nature of these crimes is both repugnant and predatory. See *State v. Woodson*, 222 W. Va. 607, 671 S.E.2d 438 (2008) (sentencing court permitted to base sentence, in part, upon predatory nature of offense). The Appellant refused to admit his culpability to psychologist Kradle.¹⁷ Regarding treatment Dr. Kradle found, “If he becomes involved in treatment, he will need to be more forthcoming about his sexual interests and behaviors. He was quite defensive during testing and if this sample of behavior carries over into treatment he may try to minimize and deny his sexual

¹⁷Dr. Kradle’s report is located between page numbers 257 and 258.

problems and avoid change. Although he reports that he needs counseling, he does not go so far as to indicate that he needs treatment to help him understand and control his sexual behavior.” (Payne Rp’t at 6.)

Although the Sexual Adjustment Inventory test suggested that the Appellant’s Sexual Assault Scale and Incest Scale were in the low range, Dr. Kradle qualified these results, “SAI test results indicate that Mr. Payne is attempting to minimize sex-related information. Test results need to be viewed with caution due to Mr. Payne’s defensiveness in answering test questions.” (Payne Rp’t at 7.) Kradle characterized Appellant’s performance on the AASI-2 (Abel Assessment of Sexual Interests - 2) as consistent with men who have sexually abused a child under 18 years, and are attempting to conceal this abuse. (Payne Rp’t at 8.)

Kradle did not recommend probation. He did say, “*If Mr. Payne is granted a suspended sentence or probation, it is my recommendation that he be identified as an individual who needs intensive supervision, close monitoring and mandatory participation in a sex-offender specific treatment program.*” (Payne Rp’t at 10; emphasis added.)

Although Payne’s criminal history was predominantly traffic offenses and misdemeanors, he was the subject of another Emergency Protective Order entered August 2004. (PSI at 4.) The Appellant also had three separate convictions for theft, one of which resulted in one year’s probation, and an animal cruelty charge. Appellant’s record also demonstrates that leniency does not work. His first theft arrest resulted in probation before judgment, his third theft arrest was remanded to the stet docket. Despite this, the Appellant continued to re-offend.

The trial court also pointed out that the victim could expect little support from her family, who, much like the Appellant, were in denial. (Sent. Hr’g at 38-39.)

IV.

CONCLUSION

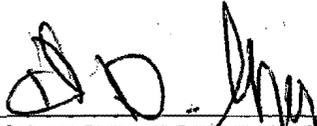
For the foregoing reasons, the judgment of the Circuit Court of Morgan County should be affirmed by this Honorable Court.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Appellee,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

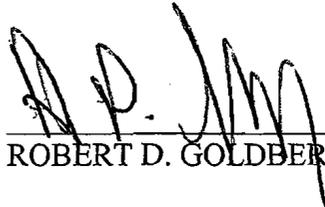


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CERTIFICATE OF SERVICE

I, ROBERT D. GOLDBERG, Assistant Attorney General and counsel for the Appellee, do hereby verify that I have served a true copy of the Brief of Appellee upon counsel for the Appellant by depositing said copy in the United States mail, with first-class postage prepaid, on this 20th day of August, 2009, addressed as follows:

To: B. Craig Manford, Esq.
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