

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 35680

STATE OF WEST VIRGINIA,

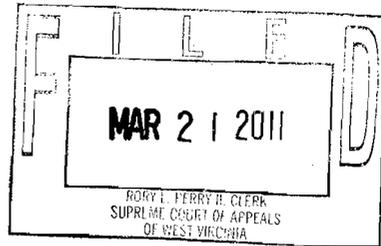
Respondent,

v.

TRACY L. HAID,

Petitioner.

**Appeal from a final order
of the Circuit Court of Jackson
County (08-F-35)**



Petitioner's Brief

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COMES NOW the Petitioner, Tracy L. Haid, by counsel, George J. Cosenza, and respectfully presents this Petitioner's Brief pursuant to the West Virginia Rules of Appellate Procedure.

ASSIGNMENTS OF ERROR

- I. THE CIRCUIT COURT OF JACKSON COUNTY ERRED WHEN IT WOULD NOT ALLOW THE PETITIONER TO ASK THE ALLEGED VICTIM ABOUT PRIOR SEXUAL CONDUCT, I.E., ANAL INTERCOURSE.**
- II. THE CIRCUIT COURT OF JACKSON COUNTY ERRED WHEN IT DENIED THE DEFENDANT'S MOTION FOR ACQUITTAL AFTER THE CLOSE OF EVIDENCE AND THE VERDICT.**
- III. THE CIRCUIT COURT OF JACKSON COUNTY ERRED WHEN IT REFUSED TO INSTRUCT THE JURY THAT IT DID NOT NEED TO FIND THE VICTIM'S TESTIMONY INHERENTLY INCREDIBLE TO FIND THE PETITIONER NOT GUILTY.**

STATEMENT OF THE CASE

At the time of the alleged offense, the Petitioner was a thirty-nine (39) year old single man who was working for Barbe, Parsons and Barnaby as its IT director. [D.R. p.494]. He was divorced, very active in the lives of his two (2) children and was a member of the Mt. Alto Church of Christ. He was in a band and was involved in a number of community activities. [D.R. pp. 497-498].

From time to time the Petitioner engaged in social networking on the internet. He had a personal profile on Yahoo that included his age (38) and photos of himself and his two children. [D.R. p. 498]. While chatting on the internet, he came across a profile entitled

“Girl Rocks Hard”. It was the profile of the alleged victim, Sadie Smith. Ms. Smith’s profile showed her age as eighteen (18) years old. [D.R. p. 507].

Ms. Smith spent a good deal of time socially networking on the internet, as well, and chatting with others that did the same. Her nickname was “baby girl”. She would chat with strangers, including men, engage in sexual talk and “make things up” during the course of her chats. [D.R. pp. 383-384].

In late 2006, the Petitioner and Ms. Smith began chatting. Mr. Haid told her about his ex-wife and children. There was no doubt that Ms. Smith knew that the Petitioner was thirty-eight (38) years old. Because of her profile, the Petitioner was under the impression that Ms. Smith was eighteen (18). [D.R. pp. 507-510].

On February 20, 2006, the Petitioner and Ms. Smith arranged to meet. She told Mr. Haid where to pick her up. [D.R. pp. 510-512]. She did not tell anyone she was going to meet the Petitioner, including her boyfriend and her parents. [D.R. pp. 385-386].

After work, Mr. Haid went to the prearranged meeting place and picked up Ms. Smith. It was dark and foggy and although Ms. Smith appeared to be young, the Petitioner believed she was eighteen (18) by virtue of her Yahoo profile and their previous conversations on the internet.¹ Ms. Smith knew that the Petitioner was in his thirties in the same way. [D.R. pp. 388-390]. When she opened the car door, it was apparent that Mr. Haid was significantly older, however, Ms. Smith got into the car and never asked to be let out. [D.R. p. 397]. The

¹Ms. Smith’s profile was admitted into evidence during the trial.

Petitioner intended to take Ms. Smith to band practice and took her to his home to pick up his guitar. While at Mr. Haid's home, Ms. Smith began getting telephone calls from a person he believed to be her boyfriend. [Her phone records showing she received the calls were admitted into evidence at the trial.] The Petitioner began questioning her about the calls and about her age. Ms. Smith admitted to being sixteen (16). At that point, the Petitioner asked Ms. Smith to leave. He never had any type of sexual contact with her. They got into the car and he dropped her off near her boyfriend's home. [D.R. pp. 512-515].

After she was dropped off, Ms. Smith went to her boyfriend's home and attended a birthday party. [D.R. pp. 443-444]. She didn't report any type of inappropriate behavior by the Petitioner. [D.R. pp. 445-450]. She repeatedly attempted to contact Mr. Haid, but he refused to speak with her after an initial conversation with her. [D.R. pp. 517-518].

Approximately one (1) month after the encounter between the Petitioner and Ms. Smith, she reported to members of her church that she had been sexually assaulted by the Petitioner. The police were called and she gave a statement saying the Petitioner had taken her into his bedroom while at the house and had oral sex with her, digitally penetrated her vagina and engaged in anal intercourse. During the course of her statement to the investigating officer, Ms. Smith admitted having looked at Mr. Haid's profile and knew he was in his thirties. [D.R. p. 472]. She said that Mr. Haid had pulled her jeans and underwear down to her ankles and used neither a condom nor lubrication during the anal intercourse. [D.R. pp. 411, 416, 442-443].

After taking the statement from Ms. Smith, not much of an investigation was conducted. The Petitioner was contacted and fully cooperated with the investigation. Mr. Haid denied having any type of sexual contact with Ms. Smith. [D.R. pp. 473-479].

At that point, the investigation stopped. A computer was taken from Ms. Smith by the police but it was never analyzed. Nothing was retrieved from Mr. Haid's home. [D.R. pp. 343-354]. The investigation was characterized by the Prosecuting Attorney at the trial as "slipshod". [D.R. p. 342].

The only witnesses called at trial by the State were the two investigating officers and Ms. Smith. There was no medical or other expert testimony concerning physical or emotional injury to Ms. Smith.

Mr. Haid testified on his own behalf, denying any type of inappropriate behavior with Ms. Smith. Character testimony was offered on the Petitioner's behalf which was un rebutted. [D.R. pp. 552-561].

After considerable deliberation, the jury acquitted the Petitioner of all three (3) counts of sexual assault in the second degree and one (1) count of sexual third degree. He was found guilty on two (2) counts of sexual assault in the third degree.

SUMMARY OF ARGUMENT

The Petitioner argues that the Circuit Court of Jackson County erred with regard to three (3) issues of law. First, it is the position of the Petitioner that the Court misinterpreted the application of the rape shield statute, codified in West Virginia Code §61-8(B)-11(b), by

preventing the Petitioner from asking questions of the victim regarding her experience with anal intercourse. Her description of that act by the Petitioner would have been improbable and impacted upon her credibility if she had no such prior experience.

Secondly, the Petitioner argues that the Court erred when it denied his motion for acquittal after the close of evidence and verdict because of the obvious compromise verdict returned by the jury.

Finally, the Petitioner argues that the Court erred in its instructions to the jury concerning the credibility of the alleged victim.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner does not believe that oral argument under Rev. R.A.P. 18(a) is necessary unless the Court determines that other issues arising upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

ARGUMENT

I. THE CIRCUIT COURT OF JACKSON COUNTY ERRED WHEN IT WOULD NOT ALLOW THE PETITIONER TO ASK THE ALLEGED VICTIM ABOUT PRIOR SEXUAL CONDUCT, I.E., ANAL INTERCOURSE.

West Virginia Code § 61-8B-11(b) provides as follows:

(b) In any prosecution under this article evidence of specific instances of the victim's sexual conduct with persons other than the defendant, opinion evidence of the victim's sexual conduct and reputation evidence of the victim's sexual conduct shall not be admissible: Provided, That such evidence shall be admissible solely for the purpose of impeaching credibility, if the victim first makes his or her previous

sexual conduct an issue in the trial by introducing evidence with respect thereto.

The foregoing statute provides an exception to the general exclusion of evidence of prior sexual conduct of a victim of sexual assault. Under the statute, evidence of (1) specific instances of the victim's sexual conduct with persons other than the defendant, (2) opinion evidence of the victim's sexual conduct and (3) reputation evidence of the victim's sexual conduct can be introduced solely for the purpose of impeaching the credibility of the victim only if the victim first makes his or her previous sexual conduct an issue in the trial by introducing evidence with respect thereto. *State v. Guthrie*, 205 W.Va 326, 518 S.E.2d 83 (1999).

During the course of the trial, Ms. Smith testified that the Petitioner engaged in anal intercourse with her. She testified that she was wearing sneakers, jeans and underwear. She stated that Mr. Haid pulled her jeans and underwear below her knees, bent her over and proceeded to penetrate her anally with his penis, without the use of a condom or any lubrication. [D.R. pp. 367-369, 411, 416, 441-443]. The Petitioner asked the Court to allow him to ask questions of the victim about her experience with anal intercourse believing that she had no such prior experience. [D.R. pp. 416-422]. If, as expected, Ms. Smith stated she had no sexual experience, then the jury could infer that her testimony about the anal intercourse was not credible considering the circumstances she described about how it occurred and the absence of any medical testimony concerning injury to her as a result of the act.

By describing the act between her and the Petitioner, Ms. Smith put her previous sexual conduct, or lack of it, in issue and therefore, the Petitioner should have been permitted to explore same. The Court denied the Petitioner's request.

THE COURT: And the reason is, I think the premise for it is entirely speculative, and I don't think it is supported by the evidence that has been produced so far, and I don't see how delving into this young lady's previous sexual history would help the jury understand or prevent manifest injustice to Tracy Haid, so I'm going to deny your motion to cross-examine what is barred by the rape shield statute.

II. THE CIRCUIT COURT OF JACKSON COUNTY ERRED WHEN IT DENIED THE DEFENDANT'S MOTION FOR ACQUITTAL AFTER THE CLOSE OF EVIDENCE AND THE VERDICT.

Rule 29(c) of the West Virginia Rules of Criminal Procedure states, in pertinent part, as follows:

If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within ten days after the jury is discharged...

In *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978) and *State v. Rogers*, 167 W.Va. 358, 280 S.E.2d 82 (1981), the West Virginia Supreme Court of Appeals set forth the standard the Court must employ in considering a post-verdict motion for acquittal:

In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done.

In the case before the Court, the Petitioner was charged by indictment with three (3)

counts of sexual assault in the second degree and three (3) counts of sexual assault in the third degree. The jury convicted the Petitioner of two (2) counts of sexual assault in the third degree. Although contrary to the testimony of the alleged victim, Ms. Smith, evidence was adduced during the trial that the Petitioner believed she was eighteen (18) years of age by viewing her profile on Yahoo, which was the internet vehicle by which the parties were communicating. A copy of her profile showing her age as eighteen (18) was identified by Ms. Smith and introduced into evidence at trial. The chats, which Ms. Smith claimed would show she told the Petitioner that she was fifteen (15), were on a computer in possession of the State and were not produced by the prosecution at trial. Further, former State Trooper Marion, the investigator in the case, testified that the victim had told him that she had looked at the Petitioner's Yahoo profile and knew he was thirty-five (35). In addition, the Petitioner testified that his profile clearly indicated he was thirty-nine (39) and contained a picture of him and his two (2) children. A copy of that photograph was sent to Ms. Smith and introduced into evidence at trial. After a period of chatting, the parties agreed to meet. Ms. Smith testified that the Petitioner contacted her, however, her telephone records, subpoenaed by the State, but introduced into evidence by the Petitioner, clearly showed that Ms. Smith contacted him. This contradiction in testimony was rampant throughout Ms. Smith's entire testimony during the trial, and, while such contradictions did not rise, in the Court's eyes, to being inherently unreliable, certainly cast doubt upon her credibility. When the parties met, it was dark. Ms. Smith got into the Petitioner's vehicle and they proceeded to his home,

where the victim testified she was sexually assaulted. The Petitioner, however, maintained that when they got to his home, she was getting calls on her cell phone, and while overhearing the conversations, realized Ms. Smith was underage. He immediately left his residence and took her to the home of her boyfriend. The allegations made by Ms. Smith were completely uncorroborated. There was no medical evidence showing an assault. She did not mention any injury, e.g., bleeding, that surely would have accompanied an anal assault as she described. There was no forensic type of evidence. There was no testimony from anyone who had contact with her, up to the time of her disclosure, that indicated they noticed anything wrong with Ms. Smith. This is incredible, considering the ordeal described by her at the hands of Mr. Haid. On the other hand, the phone records clearly support the contention of the Petitioner that Ms. Smith was receiving phone messages, while in his company. Based on those phone records and the time line established by Ms. Smith, it is doubtful the assault could have occurred.

The prosecution summed it up best, when it labeled the investigation as slipshod. The Petitioner has no criminal record, produced uncontroverted character testimony, has been a productive citizen with no indication of deviant behavior, and who is a father, coach, and Sunday school teacher, who appears to have been convicted on speculation and compromise. This is a case where credibility of the witnesses was the key. If the jury believed Ms. Smith was sexually assaulted, how could they not convict on **all** counts of sexual assault in the third degree?

The trial court in this case, as in all cases, serves as a gatekeeper to insure that justice is done. Sometimes, it is a difficult task. However, if the jury truly followed the instructions of the Court based upon the evidence adduced at trial, the verdict should have been not guilty or, perhaps, resulted in no verdict at all. As Justice Cleckley reminded us in his concurring opinion in *State v. Houston*, 197 W.Va. 215, 475 S.E.2d 307 (1996), “Nevertheless, the “gatekeeper” role of the trial judge should not be undetermined. First, except where a jury acquits in a criminal case, judges remain as a check on juries in the extreme case - one where the judge thinks that a rational jury could reach only one result.”

Based on the forgoing, the Court should have granted the Petitioner’s motion for acquittal and entered a judgment accordingly.

III. THE CIRCUIT COURT OF JACKSON COUNTY ERRED WHEN IT REFUSED TO INSTRUCT THE JURY THAT IT DID NOT NEED TO FIND THE VICTIM’S TESTIMONY INHERENTLY INCREDIBLE TO FIND THE PETITIONER NOT GUILTY.

As part of its instructions to the jury, the Court included a paragraph regarding the uncorroborated testimony of an alleged victim:

THE COURT: Well, tell me the objection you found so far.

MR. COSENZA: Well, I just - - on page 6, when you talk about - - the second full paragraph - - a conviction for the crimes charged by the indictment may be obtained or rest on the uncorroborated testimony of the alleged victim, unless you determine that such testimony is inherently incredible. The term “inherently incredible” means more than a contradiction, inconsistency, or lack of corroboration. For the jury to decide that testimony is inherently incredible, you must decide that there has been a showing of complete untrustworthiness. In this regard, you should scrutinize her testimony with care caution.

Petitioner's counsel requested the following language be added:

And then I would like to add, "However, you do not need to find Sadie Smith's testimony inherently incredible to find the defendant not guilty."

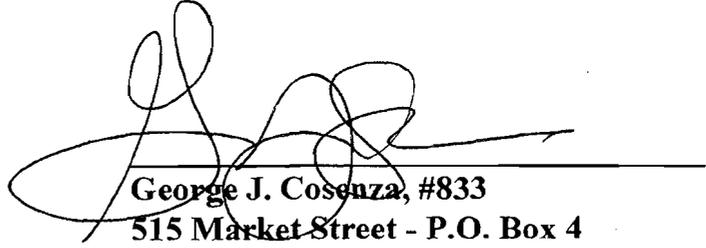
A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, as reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law. 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, so 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. *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (W.Va. 1995).

In the foregoing instruction given by the Court, the jury is essentially told that they can find the Petitioner guilty on the uncorroborated testimony of the victim; **unless** they find her testimony to be "inherently incredible". In other words, since there was no corroboration of Ms. Smith's testimony, the only way to acquit was if they found her to be inherently incredible. The Petitioner believes this assertion to be misleading and not an accurate statement of the law which was why he wanted the court to include the language suggested.

CONCLUSION

Based on the foregoing, the Petitioner respectfully requests that the Court reverse his conviction of two (2) counts of sexual assault in the third degree.

Dated this 21 day of March, 2011.



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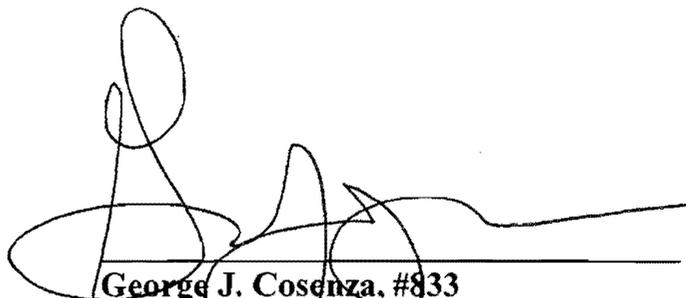
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CERTIFICATE OF SERVICE

I hereby certify that on this 21 day of March, 2011, true and accurate copies of the foregoing **PETITIONER'S BRIEF** were deposited in the U.S. Mail contained in a postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

Thomas W. Smith
Managing Deputy Attorney General
Office of the Attorney General
State Capitol, Room E-26
Charleston, WV 25305

A handwritten signature in black ink, appearing to read "George J. Cosenza", is written over a horizontal line. The signature is stylized and somewhat cursive.

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