

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-1766

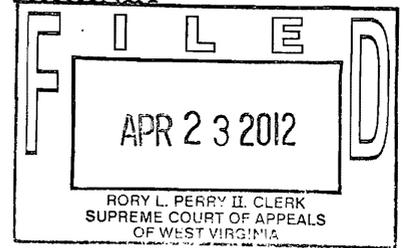
STATE OF WEST VIRGINIA,

*Plaintiff Below,  
Respondent,*

v.

HENRY B. HARRIS,

*Defendant Below,  
Petitioner.*



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**BRIEF ON BEHALF OF RESPONDENT**

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**DARRELL V. MCGRAW, JR.  
ATTORNEY GENERAL**

**THOMAS W. RODD  
ASSISTANT ATTORNEY GENERAL  
812 Quarrier Street, 6th Floor  
Charleston, West Virginia 25301  
Telephone: (304) 558-5830  
State Bar No. 3143  
E-mail: [twr@wvago.gov](mailto:twr@wvago.gov)**

*Counsel for Respondent*

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BRIEF ON BEHALF OF RESPONDENT

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I.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

In early October of 2000, the Hancock County Sheriff's Department received letters from four women--M.R.W., S.S.P, C.S.V, and B.J.H.<sup>1</sup> The letters described instances of sexual abuse and/or assault that were committed by the Petitioner Henry B. Harris against the women who wrote the letters between the years of 1975 and 1985--when the women were young children. (App. at 14-17.)

In one letter, M.R.W. wrote that between the years of 1982 to 1985, when M.R.W. was between the ages of five and six years old,

I would try to hide from [the Petitioner] he would always find me [] and when he did find me he would take off my pants start feeling my private part then slick [sic] his finger in me and I would cry asking him to stop and say your hurting me he

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<sup>1</sup>Because the instant case involves sensitive matters, the women's initials are used.

would just put his hand over my mouth and keep going till [sic] he stopped on his own. [The Petitioner] always told me if I told anyone he would hurt me and my mother he told me he would kill my mom so I never said anything.

....

When I think back of my childhood I can't remember no good things all I can Remember [sic] is [the Petitioner] and all the Hell he put me through.

(*Id.* at 28-29.)

After further investigation,<sup>2</sup> the Hancock County Sheriff's Department obtained a warrant for the arrest of the Petitioner, who was then living in the State of New Mexico. (*Id.* at 301.) The Petitioner was returned to the jurisdiction of Hancock County, West Virginia; and in the April term of 2002, the Petitioner was indicted by a grand jury on seven counts charging criminal sexual conduct against the four women during the period of time from January 1, 1974 to January 1, 1985.

(*Id.* at 1-4.)

On August 16, 2002, the Petitioner moved to sever the counts of the indictment for trial. (*Id.* at 89.) Subsequently, the Petitioner was tried on count seven of the indictment, where the alleged victim was B.J.H. On October 31, 2002, the Petitioner was found not guilty on count seven. (*Id.* at 123.) The State then elected to try counts one and two of the indictment. (*Id.* at 346-47.) The alleged victim in this trial was M.R.W. (*Id.* at 92.) The trial on counts one and two began on December 6, 2002. (*Id.* at 341.)

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<sup>2</sup>On February 8, 2002, two Hancock County deputies interviewed C.S.V.; she told the deputies that she was the Petitioner's sister, and that the Petitioner had sexually assaulted her in 1974 and 1979, when C.S.V. was four years old. (App. at 38-39.) For a full description of the conduct against M.R.W. that led to the Petitioner's conviction in the instant case, *see* Direct Testimony of M.R.W. (*Id.* at 376-89.) The other women's letters are in the record at App. 13-30.

At trial, B.J.H. testified that the Petitioner was her uncle, and that during the period of time specified in counts one and two of the indictment, the Petitioner frequently visited and stayed for months at a time at different family members' dwellings in Hancock County (and nearby East Liverpool, Ohio). (*Id.* at 364.) B.J.H. identified the Petitioner in time-stamped photographs that were taken at family members' dwellings. (*Id.* at 365-68.)<sup>3</sup>

The dates in count one were “[f]rom on or about January 1, 1982 through December 5, 1983”; and in count two “from on or about December 6, 1982 through December 31, 1984.” (*Id.* at 1-2.) These overlapping periods of time were also set forth in the jury’s charge, which was agreed to by the Petitioner. (*Id.* at 346-47.) The jury was told by the prosecution that they were being asked to find the Petitioner guilty of two instances of sexual assault--one at each of two different locations in Hancock County, and each instance occurring during a specific time period (*id.* at 502-04); the Petitioner’s counsel specifically cross-examined M.R.W. about incidents at the two locations. (*Id.* at 389.)

M.R.W. testified that during the relevant time period the Petitioner babysat M.R.W. “quite often” in Hancock County. (*Id.* at 379.) M.R.W. testified in detail about various acts of sexual assault performed against her by the Petitioner when she was a child. (*Id.* at 381-82.) M.R.W. testified that

one time I was sleeping in the room in the back he came in there. It was late at night and he come out of the kitchen and he had something in his hand. I don’t know if it was a hot dog or something. I was lying on the couch sleeping and he tried to place this in me. I started moving around and started crying.

(*Id.* at 382.)

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<sup>3</sup>In 1984, the West Virginia Human Services initiated abuse and neglect proceedings as a result of reports of abuse by the Petitioner against M.R.W. and her siblings; the Petitioner left the area and no criminal charges resulted. (*See, e.g.* App. at 137-43.)

In her testimony, M.R.W. identified two specific locations in Hancock County where she remembered that sexual assaults by the Petitioner had occurred--(1) at a residence on "Route 208," and (2) at an aunt's house in Newel, on Mahaffey Road. (*Id.* at 380-83.) When M.R.W. was asked how often the sexual assaults occurred, she replied "every time he would watch me . . . more than ten [times]; a dozen." (*Id.* at 383.) There was no objection to this testimony.

C.S.V. testified that she was M.R.W.'s older sister, and that she and M.R.W. lived together in the late 1970's and early 1980's. (*Id.* at 404.) Ms. V. testified that the Petitioner never had a permanent residence, and that the Petitioner would stay at different family members' dwellings in and around Hancock County when Ms. V. and M.R.W. were children. (*Id.* at 405.)

Kathy Custis, the Petitioner's sister, also testified that the Petitioner stayed with family members between the years 1975 and 1984. (*Id.* at 419.) Ms. Custis testified that she remembered two occasions when the Petitioner babysat M.R.W.'s mother's children. (*Id.* at 421.) When asked about the accuracy of the Petitioner's claim that "[the Petitioner] went into the military at 17 and he didn't have anything to do with his family after he went into the military," Ms. Custis testified that this assertion was inaccurate. (*Id.* at 424.) When asked about the accuracy of the Petitioner's claim that "he really doesn't know his nieces and nephews, just by pictures," Ms. Custis testified that the statement was inaccurate. (*Id.*)

Irma McCraw, the Petitioner's mother, testified that the Petitioner stayed in and around Hancock County, off and on, until at least 1984. (*Id.* at 443.) Ms. McCraw stated: "He's very likeable. The kids loved him. He got their confidence. He was good to them. . . . You wouldn't think he was a monster. You wouldn't mistrust him. . . . I used to trust him to watch my kids. I really loved and trusted Hank." (*Id.* at 444.)

Mrs. McCraw further testified: “[The Petitioner] was here. He knows these kids and he knows them well and they knew [the Petitioner] and they loved [the Petitioner] until they found they couldn’t trust him any longer.” (*Id.* at 453.)

Ms. McCraw also testified that the Petitioner had contact with M.R.W. during the period of time specified in counts one and two of the indictment. (*Id.*)

The Petitioner testified that he had lived in many different locations across the country--as a patient at Veterans’ Administration Hospitals, and at his family members’ and ex-wife’s houses. (*Id.* at 458-71.) The Petitioner testified that between 1974 and 1975 he was at a Pittsburgh VA hospital (*id.* at 461); that in 1977 he was in California (*id.* at 462); that in 1979 he was between Texas and Colorado (*id.* at 462-63); that in 1980 and 1981 he lived with a sister in New York (*id.* at 463), and went to a VA hospital in Michigan (*id.*); that in 1983 he was in Colorado with his brother Danny (*id.* at 464); and that between 1983 and 1985 he was between Michigan and Pennsylvania. (*Id.* at 464-65.)

The Petitioner denied any presence in Hancock County--and therefore any opportunity to commit sexual assault--during the periods of time specified in counts one and two of the indictment. (*Id.* at 461-65.) He denied any contact with M.R.W. during these periods of time, and he denied any sexual misconduct against M.R.W. (*Id.* at 477-78.) On cross-examination, the Petitioner admitted to helping his mother with a restaurant in the Hancock County area: “I think it was in ‘85 . . . it might have been ‘81.” (*Id.* at 472-73.)

In rebuttal to the Petitioner’s testimony, the State called Sarah Lake from the U.S. Department of Veteran’s Affairs. Ms. Lake testified that she had reviewed the Petitioner’s file and that there was no record on file showing the Petitioner’s VA hospitalization between the years of

1973 and 1984. (*Id.* at 481.) She stated that while some of the complete medical records may have been purged, the VA did preserve documentation of which VA hospitals the Petitioner visited and when. (*Id.*) Ms. Lake testified that in 1986 the Petitioner requested a change of address to East Liverpool, Ohio. (*Id.* at 482.)

On December 6, 2002, the jury returned a verdict of guilty on both counts of sexual assault in the first degree against M.R.W. (*Id.* at 261.) The Petitioner was sentenced to a period of not less than ten (10) years but not more than twenty (20) years confinement for each count, to run consecutively, with a fine of ten thousand (10,000) dollars for each count. (*Id.* at 282-83.) On December 19, 2002 and January 7, 2003, the prosecution dropped the remaining charges against the Petitioner. (*Id.* at 269-71.)

The Petitioner's **sole assignment of error** in the instant appeal of his conviction to the West Virginia Supreme Court of Appeals is that

The Circuit Court of Hancock County erred by improperly permitting the state to introduce evidence pertaining to the Petitioner's prior, extraneous bad acts, otherwise prohibited by Rule 404(b) of the West Virginia Rules of Evidence, without, first, conducting a hearing, as recommended by the holding set forth in Syllabus Point 2 of *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994), to determine the admissibility of the same; or providing the jury a curative instruction, once it came in for their consideration"

(Pet'r's Br. at 1.)

In support of this assignment of error, the Petitioner claims that when M.R.W. was asked how often the incidents of sexual assault occurred, her testimony stating "every time he would watch me . . . more than ten [times]; a dozen." (App. at 383) was inadmissible evidence of "other crimes, wrongs, or acts" that was used by the prosecution "to prove character of [the Petitioner] in order to show that he . . . acted in conformity therewith." Rule 404(b), W. Va. R. Evid. The Petitioner also

claims that there was no *McGinnis* hearing to determine the purported “other crimes” evidence’s admissibility--and that the purported “other crimes” evidence was not accompanied by a limiting instruction to the jury. *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994). As noted, the Petitioner did not object to this evidence during his trial; nor was there any pre-trial request to exclude the evidence, or to have a hearing about the evidence, or to give a limiting instruction.

## II.

### SUMMARY OF ARGUMENT

The Petitioner’s claim that his conviction should be overturned because “other crimes” evidence was erroneously presented to the jury is without merit.

In fact, as shown in the following discussion, the evidence in question was not “other crimes” evidence--it was *direct evidence* of the charged offenses. Moreover, the Petitioner never objected to the evidence’s admission, so that any claimed error in the evidence’s admission is subject to a harmless error analysis--and the admission does not meet that stringent test. For these reasons, the Petitioner’s conviction should be upheld.

## III.

### STATEMENT REGARDING ORAL ARGUMENT

The Respondent believes that this case can be decided without oral argument.

## IV.

### ARGUMENT

M.R.W.’s testimony of multiple acts of sexual assault against her during the time periods specified in counts one and two of the indictment was *direct evidence*, not “other crimes” evidence.

While no West Virginia case appears to have addressed this issue, the issue was addressed in *State v. Amina*, 170 P.3d 880 (Haw. 2007).

In *Aimina*, the Hawaii court stated:

Amina argues that “the [C]omplainant's testimony that sexual assault occurred on occasions other than as [s]he described in the bedroom, kitchen or car amounted to other bad acts and were inadmissible under HRE Rule 404(b).” He further argues that the circuit court “plainly erred in admitting such highly prejudicial evidence.” We disagree with Amina's arguments.

Amina was charged with three counts of first degree sexual assault, with each count alleging that the offense was committed within about a two-year or three-year span of time. The Complainant was not able to specify the particular dates of the sexual assaults, but described sexual assaults occurring in Amina's bedroom, in the kitchen, and in Anima's car between the time she was in kindergarten and the second grade. The Complainant testified that Amina sexually assaulted her on more than one occasion in the bedroom and in the car. . . .

**We conclude that the Complainant's testimony challenged by Amina was not other act evidence under HRE Rule 404(b), but constituted direct evidence of the charged offenses.** *State v. Arceo*, 84 Hawai'i 1, 27, 928 P.2d 843, 869 (1996). In *Arceo*, the Hawai'i Supreme Court stated:

[W]e hold as a threshold matter that, by virtue of the vulnerabilities to which child victims of repeated instances of sexual abuse are susceptible, the prosecution may, at its option, seek a single conviction by charging multiple acts, each of which constitutes a separate and distinct sexual assault, within a single count of an indictment or complaint. We therefore hold that, if the prosecution does so, then testimony regarding any or all of the multiple acts is direct evidence of the charged offense and does not implicate other crimes, wrongs, or acts with which HRE 404(b) is concerned. Thus, . . . we hold that the probative value of the testimony would outweigh the danger of unfair prejudice to the defendant and would survive a challenge under HRE 403.

Amina was charged with three counts of committing sexual assaults that occurred over spans of time. Under *Arceo*, the Complainant's testimony that sexual assaults took place in Amina's bedroom and in Amina's car on more than one occasion was admissible as direct evidence of the charged offenses. The circuit court did not err, much less plainly err, in admitting the Complainant's testimony.

(*Id.* at \*3.) (emphasis added.)

In *State v. Arceo*, 928 P.2d 843, the case cited in *Amina, supra*, the court stated:

In cases involving a continuing pattern of sexual abuse of very young children, in which the evidence consists primarily of the children's statements, it is not likely that they will clearly identify the specific instances when particular acts took place. The difficulty of presenting testimony limited to a specific incident in such cases was discussed in *State v. Brown*, 55 Wash. App. 738, 780 P.2d 880 (1989):

Particularly when the accused resides with the victim or has virtually unchecked access to the child, and the abuse has occurred on a regular basis and in a consistent manner over a prolonged period of time, the child may have no meaningful reference point of time or detail by which to distinguish one specific act from another. The more frequent and repetitive the abuse, the more likely it becomes that the victim will be unable to recall specific dates and places. Moreover[,] because the molestation usually occurs outside the presence of witnesses, and often leaves no permanent physical evidence, the [prosecution's] case rests on the testimony of a victim whose memory may be clouded by a blur of abuse and a desire to forget.

(*Id.* at 868.) The *Arceo* court continues:

Combining the analyses set forth in *Aldrich* and *Covington, supra*, we hold as a threshold matter that, by virtue of the vulnerabilities to which child victims of repeated instances of sexual abuse are susceptible, the prosecution may, at its option, seek a single conviction by charging multiple acts, each of which constitutes a separate and distinct sexual assault, within a single count of an indictment or complaint. We therefore hold that, if the prosecution does so, then testimony regarding any or all of the multiple acts is “direct evidence of the charged offense” and does not implicate “‘other’ crimes, wrongs, or acts with which HRE 404(b) is concerned.”

(*Id.* at 869.) (footnote omitted.)

The reasoning and holding of these Hawaii decisions is directly applicable to the instant appeal.

The Petitioner was convicted of two counts charging him with committing two sexual assaults against M.R.W.--each in a different location and during a specific time period. M.R.W. testified without objection to multiple instances of sexual assault at both locations during the two time periods. The jury concluded that the Petitioner had committed at least one assault at each location during the relevant time period.

Thus, in the instant case--just as in *Arceo, supra*--the evidence before the jury was evidence of “multiple acts [presented to support one] . . . count of an indictment or complaint”; and--also as in *Arceo*--M.R.W.’s “testimony regarding any or all of the multiple acts is *direct evidence* of the charged offense and does not implicate “other crimes, wrongs, or acts” with which [Rule] 404(b) is concerned.” (*Id.* at 869.) (emphasis added.) For this reason, the Petitioner’s argument that M.R.W.’s testimony constituted impermissible 404(b) evidence is without merit.<sup>4</sup>

Additionally, even if one were to assume *arguendo* that M.R.W.’s (rather minimal) testimony of multiple instances of assault was 404(b) evidence, the receipt of that evidence by the jury is not grounds for reversing the jury’s verdict and the Petitioner’s conviction.

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<sup>4</sup> While it is not necessary to reach the issue in the instant case, it should be noted that:

“Collateral acts or crimes may be introduced in cases involving child sexual assault or sexual abuse victims to show the perpetrator had a lustful disposition towards the victim, a lustful disposition toward children generally, or a lustful disposition to specific other children provided such evidence relates to incidents reasonably close in time to the incident(s) giving rise to the indictment. . . .” Syllabus Point 2, in part, *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990).

Syl. Pt. 3, *State v. Rash*, 226 W. Va. 35, 697 S.E.2d 71 (2010).

The initial reason that M.R.W.'s testimony, even if seen as "other crimes" evidence, was not grounds for reversing the Petitioner's conviction, is that there was no objection to the testimony. As this Court stated in *State v. DeGraw*, 196 W. Va. 261, 470 S.E.2d 215 (1996),

We agree with the State's contention that the Appellant's claim of error under Rule 404(b) is precluded from appellate review based on his failure to state this authority as ground for his objection before the trial court. West Virginia Rule of Evidence 103(a)(1) provides, in pertinent part, that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . [i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the *specific* ground of objection, if the specific ground was not apparent from the context . . ."

(*Id.* at 272, 470 S.E.2d at 226.)

Thus, only if the presentation of M.R.W.'s testimony to the jury constituted "plain error" could it serve as grounds for reversal of the Petitioner's conviction:

An unpreserved error is deemed plain and affects substantial rights only if the reviewing court finds the lower court skewed the fundamental fairness or basic integrity of the proceedings in some major respect. In clear terms, the plain error rule should be exercised only to avoid a miscarriage of justice. The discretionary authority of this Court invoked by lesser errors should be exercised sparingly and should be reserved for the correction of those few errors that seriously affect the fairness, integrity, or public reputation of the judicial proceedings.

Syl. Pt. 7, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996). The Petitioner has not argued that the admission of the testimony constituted "plain error." However, this Court has held that: "[t]his Court's application of the plain error rule in a criminal prosecution is not dependent upon a defendant asking the Court to invoke the rule. We may, *sua sponte*, in the interest of justice, notice plain error." Syl. Pt. 1, *State v. Myers*, 204 W. Va. 449, 513 S.E.2d 676 (1998)

The standard for "plain error" is set out in Syllabus Point 4 of *State v. Johnson*, 210 W. Va. 404, 557 S.E.2d 811 (2001): "To trigger application of the "plain error" doctrine, there must be (1)

an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.’ Syl. Pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).”

Applying this standard to M.R.W.’s testimony, it can be seen that plain error did not occur when the jury heard her testimony. Nothing in the record suggests M.R.W.’s testimony contained anything so egregiously prejudicial or erroneous that it would satisfy the final two prongs of the plain error test. M.R.W.’s testimony simply mentioned that the incidents of sexual assault occurred several times at each location and during the relevant time periods. This Court has stated “[e]ven when all three prerequisites are established, whether to correct error remains discretionary with the appellate court. *Olano* instructed us on the criteria for the exercise of this discretion. We should correct error which caused a “**miscarriage of justice**,” that is, conviction of an innocent person.” *State v. LaRock*, 196 W. Va. 294, 317, 470 S.E.2d 613, 636 (1996) (emphasis added).

Nothing in the record suggests that the jury in the instant case would have returned a different verdict in the absence of M.R.W.’s testimony regarding multiple assaults.

Additionally, the Petitioner’s Brief refers to the fact that the charge to the jury references “various” instances of sexual assault for each count. (Pet’r’s Br. at 7.)<sup>5</sup> This language, if anything, *added* to the prosecution’s burden. Furthermore, when asked by the circuit court “[i]s there anything counsel would like to put on the record regarding the charge or anything for that matter?[,]” the

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<sup>5</sup>The charge required the jury to find, for example: “(As to Count Two)[,] 1. The defendant . . . 2. In Hancock County, West Virginia, 3. from on or about the 6th day of December, 1982, through December 31, 1984, *at various times*, 4. did engage in sexual intercourse and sexual intrusion . . .” (App. at 257-58.) (emphasis added.)

Petitioner's counsel replied "No, Your Honor." (App. at 516-17.) Any complaint about the language in the charge is thus waived and forfeited.

V.

**CONCLUSION**

For the foregoing reasons, this Court should uphold the Petitioner's conviction.

*Respectfully submitted,*

STATE OF WEST VIRGINIA,  
*Respondent*

By counsel,

DARRELL V. MCGRAW, JR.  
ATTORNEY GENERAL



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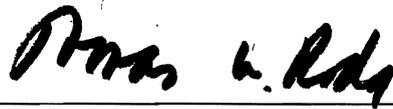
THOMAS W. RODD  
ASSISTANT ATTORNEY GENERAL  
812 Quarrier Street, 6th Floor  
Charleston, West Virginia 25301  
Telephone: (304) 558-5830  
State Bar No. 3143  
E-mail: [twr@wvago.gov](mailto:twr@wvago.gov)

*Counsel for Respondent*

CERTIFICATE OF SERVICE

I, THOMAS W. RODD, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the *BRIEF ON BEHALF OF RESPONDENT*, upon Petitioner's Counsel by depositing said copy in the United States mail, with first-class postage prepaid, on this 23 day of April, 2012, addressed as follows:

To: Brent A. Clyburn, Esq.  
The Law Office Brent A. Clyburn  
R.R. 3 Box 529 A  
Wheeling, West Virginia 26003



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THOMAS W. RODD