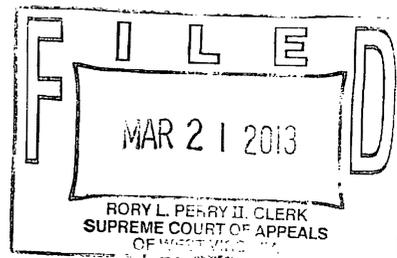


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO.: 12-0301



BRYAN MAGGARD,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BREIF

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ASSIGNMENTS OF ERROR

- I. Trial Court Erred by Allowing the Prosecution to Question the Victim Regarding Petitioner's Sexual Past and Portraying him as a Past Sexual Predator.**
- II. The Trial Court Erred by Excluding Statements Made on Twitter by the Alleged Victim Based on the Rape Shield Statute.**
- III. The Trial Court Erred by Refusing to Strike Juror Number 38 Teresa Ferguson-Crossan for Cause.**
- IV. There was Insufficient Evidence Before the Jury to Sustain a conviction of Count I of the Indictment.**

ARGUMENT

- I. The Trial Court Erred by allowing the Prosecution to Question the Victim Regarding Petitioner's Sexual Past and Portraying Him as a Past Sexual Predator.**

Rule 103(a)(1) of the West Virginia Rules of Evidence requires that a "timely objection of motion to strike appears on record." The Respondent cannot argue that the Petitioner failed to make a timely objection because the Petitioner's Counsel clearly objects immediately upon the solicitation of the testimony. By doing so, the Petitioner clearly takes the Respondent's argument outside of those cases that would hold that failure to object on the record operates as a waiver. Knowing he cannot rely on this position, the Respondent tries to attack the second portion of the rule.

Rule 103(a)(1) of the West Virginia Rules of Evidence also governs the need for specificity of an objection. That rule provides that an objection must be stated with specificity "if the specific ground was not apparent from the context." R. Evid. 103(a)(1). In this case, the objection raised by defense counsel as to the state's solicitation of the Defendant's past sexual reputation, when put in context of what was being solicited and

when it was being solicited, clearly reveals its impropriety as being reputation and character evidence. It is apparent from the record that the statements “heard how he is” and “Yes. And how he was that he just wants to be with—he just wants to get one thing from girls” clearly implicates or insinuates that the Defendant is a sexual predator which is an attack on his character. Accordingly, defense counsels objection that “heard how he is” is a statement that is “completely outside of the scope of what is going on here” when taken in context with the fact that the State was soliciting this type of testimony on direct examination of the victim shows that the objection was not based on anything other than to say that the scope of the trial is not to convict the Defendant of past sexual conduct or reputation.

The Respondent says that this objection was “cryptic and enigmatic” in an attempt to manufacture other possibilities for its meaning other than the obvious. However, the Respondent’s attempt to misconstrue the meaning of this objection actually provides support as to why the meaning of the objection was apparent on its face without further need to specify. The respondent argues that “[a]t best, an objection that testimony is ‘outside of the scope’ brings not to mind, Rule 404(b), but Rule 611(b)(2).” (Res. Br. pg. 7). Again however, when taken in the correct context of when the objection was made, during direct examination of J.C., this argument is not legally correct, let alone convincing. Rule 611(b)(2) of the West Virginia Rules of Evidence address the “Scope of Cross Examination.” J.C. was the first witness called by the state and at the time the state sought to get this testimony before the jury the Defendant’s counsel had yet to begin his cross-examination of J.C.. To argue that the Defendant’s counsel was arguing that the

J.C.'s testimony was beyond the scope of cross-examination based on Rule 611(b)(2) is illogical.

As its back up argument, the Respondent states that the Petitioner's objection could be one based on relevancy. Again however, this makes absolutely no sense when the improper comments are taken into context. As stated above, these comments clearly attack the Defendant's character and reputation and make him out to be a sexual predator and those types of attacks are relevant to the facts or issues in sexual assault cases, but are specifically barred due to their prejudicial effect on the jury. Defense counsel's objection that "heard how he is" is "outside of the scope of what is going on here" simply does not equate to a relevancy argument.

This trial was being held to determine what the defendant did or did not do on the date in question, not what he did in the past and an attempt to portray him as a sexual predator was outside of the that mission. At the time the objection was raised the judge did not attempt to clarify the grounds on which the defense counsel asserted the objection and the state's prosecutor likewise did not respond which is indicative that the apparent nature of the objection was understood. Finally, and perhaps most importantly, the Respondent does not argue that the Defendant is wrong in his assertion that the testimony was improper, he only hopes to persuade the court into denying the rightful decision based on the failure of defense counsel to say some magic words. Those magic words were not necessary in this instance under Rule 103(a)(2) as the attack on the defendants sexual reputation was facially apparent. Therefore the Trial Court's ruling should be reversed.

II. The Trial Court Erred by Excluding Statements Made on Twitter by the Alleged Victim Based on the Rape Shield Statute.

Again the Respondent is not arguing or contesting the accuracy of the Petitioner's argument that the twitter statements were not protected by the Rape Shield Statute. Instead, the Respondent is arguing position that is exactly that in which he said the Petitioner could not do in its first assignment of error. The Respondent is transforming the original objection from one based upon the Rape Shield Statute into one based on relevance in an attempt to evade the correct result that the twitter statements weren't protected under the Rape Shield Statute.

The state's prosecutor argued that the twitter comments were protected under the Rape Shield laws because, as the prosecutor states, if the twitter comments have "anything to do with what she does with anyone else, that is protected by the Rape Shield. (Vol. IV pg. 119). The Court sustained the objection stating that "I am going to sustain the objection that it is not pertaining to this case." *Id.* Inherent in every Rape Shield argument is that the Rape Shield is attempting to protect evidence that doesn't necessarily pertain to this case. For example, evidence that relates to a victim's other sexual encounters with someone other than the defendant clearly doesn't relate to the case at hand and would be protected by the Rape Shield. Therefore, when the trial court made its ruling that sustained the prosecutor's Rape Shield argument stating that the evidence did not pertain to this case he was clearly ruling upon the belief that the State had successfully argued that it was protected material. That is why he stated very clearly "I'm going to sustain the objection." (See Appx. Vol. IV. pg 171). If the Trial Court was going to sustain the objection on other grounds he would have surely articulated those new grounds. The decision was based upon the Rape Shield, which is what the parties

were arguing at the time, and because the objection was sustained, it was in error because the evidence did not come within the Rape Shield Protection.

III. The Trial Court Erred by Refusing to Strike Juror Number 38 Teresa Ferguson-Crossan for Cause.

There are two standards set forth in *State v. West*, 157 W.Va. 209 (1973). The first is whether or not the potential juror is an “employee” some law enforcement arm of the state and the second is whether the potential juror has a “tenuous relationship” with the law enforcement arm of the state. *See id.* An “employee” is subject to automatic disqualification; a person with “tenuous relationship” to an employee is subject to further voir dire. *See State v. Beckett*, 172 W.Va. 817, 823 (1983). To be clear, it is the Petitioner position that Juror Ferguson-Crossan, as an employee of the City of Huntington as a Court Clerk, is an “employee” within the meaning of the first standard of *West* and should therefore have been disqualified despite her answers during voir dire.

The Respondent states in his brief that “*West* does not bear the weight the Petitioner would give it.” (Res. Br. pg. 12). In support the Respondent cites *State v. Beckett*, 172 W.Va. 817 (1983) for the proposition that the “tenuous relationship” language in *West* is still subject to further voir dire to determine bias. *Id.* However, the *Beckett* case and the remaining cases relied upon by the Respondent are fundamentally different from that of *West* in that those case do not involve an “employee” of the law enforcement arm of the State but people who have some other relationship with those “employees.” For example, in *Beckett* the Court was determining whether the sister of a magistrate judge and the brother of a deputy fell within the “tenuous relationship” language of *West* not the “employee” language.

The Petitioner has shown that Juror Ferguson-Crossan was an employee of the City of Huntington as a Court Clerk and her duties involved the collection of fines handed out by law enforcement and therefore she should have be automatically disqualified despite her answers on Voir Dire.

IV. There was Insufficient Evidence Before the Jury to Sustain a Conviction of Court I of the Indictment.

The verdict in this case was clearly inconsistent and contradictory; however, the Petitioner does not assert this as a ground for appeal, but rather to support the fact that there was clearly an insufficient amount of evidence before the jury to allow them to sustain a conviction on Court I of the Indictment. The Respondent states that the jury could have found guilt based on the victims testimony that the Defendant digitally penetrated her vagina and that she said no and pushed him away; (Res. Br. pg. 23) however, this evidence is identical to the evidence presented as to Court II of the Indictment that the defendant penetrated J.C.'s vagina with his penis and she told him no and pushed him away in which the jury acquitted.

The evidence in this case was the same on both counts – virtually identical. Further, the state did not offer alternative theories on each of the two Counts and there was no evidence offered by the state that made J.C.'s testimony more or less likely on Count I than Count II or vice versa. No evidence suggested that it was impossible for the Defendant to have committed the charge in Count II but not Count I. The only evidence that there was a crime committed was J.C.'s testimony that she said no and pushed the Defendant away and the fact that the jury chose not to believe that testimony on Count II but not on Count I clearly shows that its verdict was unreasonable and unsupported by the evidence even when viewing it in a light most favorable to the Prosecution.

Taking the juries inconsistent and compromise verdict in conjunction with the fact that the jury stated to the trial judge during deliberations that they were 8-4 in favor of Not Guilty on both counts and further elaborating their position of Not Guilty by explaining that “our situation evolves around the evidence” (See Appx. Vol. V pg. 396) and “[t]here isn’t solid – there is not enough solid evidence” (See Appx. Vol. V. pg 396) shows that the evidence was insufficient.

This was a compromise verdict based on identical evidence and therefore the conviction on Count I should not be affirmed as the evidence was as insufficient as it was on Count II of the Indictment.

CONCLUSION

Wherefore, the Petitioner respectfully requests this Court to set aside his conviction and remand his case back to the trial court for a new trial.

Respectfully submitted

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CERTIFICATE OF SERVICE

I, Connor Robertson, do hereby verify that I served the "Petitioner's Reply to Respondent's Brief" this 18th day of March, 2013, via U.S. Mail, postage prepaid, addressed to the following:

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