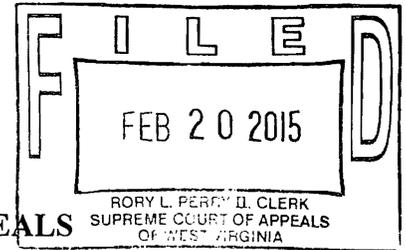


Docket No. 14-00968



**WEST VIRGINIA SUPREME COURT OF APPEALS**

**RICHARD WAKEFIELD,**

**Defendant - Appellant**

vs.

**STATE OF WEST VIRGINIA,**

**Plaintiff - Appellees**

**APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA**

**PETITIONER'S REPLY BRIEF**

JAMES T. KRATOVIL (W.Va. Bar #2103)  
KRATOVIL LAW OFFICES PLLC  
211 W. Washington Street  
Charles Town, WV 25414  
Telephone No. (304) 728-7718  
Fax No. (304) 728-7720  
Email: [kratovil@charlestownlaw.com](mailto:kratovil@charlestownlaw.com)  
Counsel for Appellant

## TABLE OF CONTENTS

TABLE OF CONTENTS	2
TABLE OF AUTHORITIES	3
STATEMENT OF THE CASE	4
ARGUMENT	4
I. The Circuit Court Abused it's Discretion in Evidentiary Ruling	4
II. The Circuit Court erred in limiting the examination of a witness	5
III. The Court erred in allowing the jury to consider second degree sexual assault and third degree sexual assault.	5
IV. The Court erred in allowing the bailiff to have a conversation with a juror about a potential witness.	6
CONCLUSION	7
CERTIFICATE OF SERVICE	8

## TABLE OF AUTHORITIES

Crawford v. Washington 541 U. S. 36, 124 S. Ct. 1354, 128 L. Ed. 2d 177 (2004)

Daubert v. Merrill Dow Pharmaceuticals, Inc., 505 U.S. 579, 113 S. Ct. 2786 125 L.Ed. 2d 469 (1993)

State v. Boyd 160 W. Va. 234, 233 S.E. 2d 710 (1977)

W.Va. Code 61 8B-1(4)

W.Va. Code 61-8B-1(5)

## STATEMENT OF THE CASE

The Petitioner would adopt and re-allege the statement of the case in the original Brief.

## ARGUMENT

### I. The Circuit Court Abused its Discretion in Evidentiary Ruling.

A. The Petitioner re-alleges that the State's expert witness Trinkia Porrata, is an expert in a field she has invented and that she has created from thin air. In Daubert v. Merrill Dow Pharmaceuticals, Inc., 505 U.S. 579, 113 S. Ct. 2786 125 L.Ed. 2d 469 (1993) the United States Supreme Court indicated that courts were not free to allow testimony of so called expert witnesses in fields of science that have not been extensively studied. Courts are required to challenge the science to see if there is any basis in the scientific community to support their theories.

In this case, without an iota of evidence, Trinkia Porrata was allowed to bring in the idea that there was some sort of date rape drug used. The evidence showed that the alleged victim was tested by the State's own lab and there was no evidence of any kind of substance used on the alleged victim, except alcohol. (JA 628).

The only mention of GHB was introduced by Ms. Porrata (JA 622). The Court failed to adequately balance the serious consequences of allowing testimony of a theoretical GHB intoxication, which is universally despised, with the prejudicial effect of such a testimony.

The failure of the Court to follow the three step process outlined in the West Virginia Rules of Evidence allowing the pure speculation without any scientific or fact support, of the speculation that a date rape drug was used seriously undermined the Defendant's case and

misleads the jury. It calls upon the jury to say “what if.”

**II. The Circuit Court erred in limiting the examination of a witness.**

In this case Billy Carper testified that the alleged victim was rubbing his head, she was laughing, giggling and pulling at him (App 455-56). She successfully pulled him into the back seat of the truck driven by the Defendant. When they got to Carper’s house, the Defendant got out the truck and left them in the truck, locked in. No questions were allowed as to what happened in the back of the truck during the trip home or when they got there.

One of the witnesses, a forensic nurse, testified that the alleged victim had a slight vaginal tear (App 529-31).

Was that tear caused by activities that took place in the back of the truck? It is impossible to know since the questions were prohibited. The Defendant was denied the opportunity to pursue a legitimate alternative theory of defense.

The alleged victim’s lack of memory of what happened on the trip home and once she got there (App. 574) makes it imperative that the full story be told. The new rule (Rule 412) makes the case that the Defendant should be allowed to provide an alternative theory to show the alleged victim’s injuries were caused by someone else.

**III. The Court erred in allowing the jury to consider second degree sexual assault and third degree sexual assault.**

In Petitioner’s Brief, pages 19 and 20 were inadvertently switched.

The Petitioner, looking that the evidence in a most favorable to the State, committed two acts. He was convicted of four crimes.

In this case, the Defendant’s acts against the alleged victim did not constitute four crimes.

Second and third degree sexual assaults are different crimes, but they have some of the same elements. In one - the victim was mentally incapacitated W. Va. Code 61 8B-1(4) and other the alleged victim is physically helpless 61-8B-1(5).

She was one of the other, not both.

**IV. The Court erred in allowing the bailiff to have a conversation with a juror about a potential witness.**

The fact that a conversation took place between a juror and the bailiff about a potential witness is clear. The fact that there was no judicial inquiry on the record of that conversation was clear.

Crawford v. Washington 541 U. S. 36, 124 S. Ct. 1354, 128 L. Ed. 2d 177 (2004) requires that the Defendant be part of any communication with the finder of fact. Especially out of court communication.

Counsel for the State made a valid point that there was no objection at trial to the procedure which is true.

It is our position that the error was plain. It rises to a constitution level.

In State v. Boyd 160 W. Va. 234, 233 S.E. 2d 710 (1977) the court recognized the constitutional principle of confrontation. In that case the court said that the state was required to show beyond a reasonable doubt what transpired was harmless.

In this we cannot determine what happened since the Court failed to follow the proper procedure by bringing the jury back into open court and inquiring of all of the parties. The court failed to do this and deprived the Defendant of his constitutional confrontational right.

**CONCLUSION**

Based upon the foregoing the Court should grant the Defendant a new trial.

Respectfully submitted,

RICHARD WAKEFIELD  
*Appellant*

By Counsel.



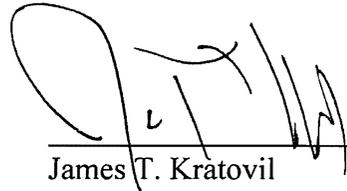
---

James T. Kratovil WV State Bar #2103  
KRATOVIL LAW OFFICES PLLC  
211 W. Washington Street  
Charles Town, WV 25414

**CERTIFICATE OF SERVICE**

I, James T. Kratovil, Esquire, counsel for defendant, hereby certify that I served the foregoing *Petitioner's Brief* upon the Prosecuting Attorney, by hand delivering a true copy thereof to the below listed address on this the 18<sup>th</sup> day of February, 2015:

Brandon C. H. Sims  
Assistant Prosecuting Attorney  
Jefferson County  
110 N. George  
Charles Town, WV 25414

  
James T. Kratovil