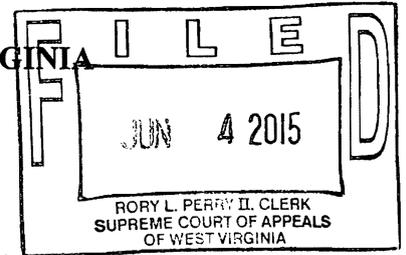


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 15-0037



STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

vs.

NICHOLAS VARLAS,

Defendant Below, Petitioner.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

	Page
I. STATEMENT OF THE CASE	2
II. SUMMARY OF THE ARGUMENT	8
III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION	9
IV. ARGUMENT.....	10
A. The Trial Court’s Exclusion Of Text Messages From The Victim’s On-Again-Off-Again Boyfriend Was Not Error As Petitioner Was Free To Cross-Examine The Victim Regarding The Pressure Applied To Her By The Text Messages, As The Text Messages Contained Information That Would Serve To Impugn and Harass The Victim Further, And As The Text Messages Included Statements That Would Usurp The Jury’s Function In Determining Credibility	10
1. The Trial Court Properly Excluded The Text Messages Under The Rape Shield Statute.....	12
2. Petitioner’s Right To A Fair Trial Was Not Violated	15
3. Petitioner’s Rights To Confrontation And Of Cross-Examination Were Not Violated	19
B. Petitioner’s Claim, That The Trial Court Erred By Admitting Expert Testimony Regarding Rape Trauma Syndrome From Officer Robertson, Fails Because Petitioner Did Not Object To The Trial Court’s Characterization Of The Testimony As Expert Testimony, Because Petitioner Did Not Object On The Grounds Of Hearsay, Because Officer Robertson’s Testimony Was Not Expert Testimony, And Because Officer Robertson’s Testimony Was Not Testimony Regarding Rape Trauma Syndrome.....	22
V. CONCLUSION	29

TABLE OF AUTHORITIES

Cases	Page
<i>Com. v. Joyce</i> , 382 Mass. 222, 415 N.E.2d 181 (1981).....	21
<i>Davis v. Alaska</i> , 415 U.S. 308, 94 S. Ct. 1105 (1974)	20, 21
<i>Gentry v. Mangum</i> , 195 W. Va. 512, 466 S.E.2d 171 (1995)	28
<i>Mayhorn v. Logan Med. Found.</i> , 193 W. Va. 42, 454 S.E. 2d 87 (1994)	28
<i>Olden v. Kentucky</i> , 488 U.S. 227, 109 S. Ct. 480 (1988)	21
<i>State v. Edward Charles L.</i> , 183 W. Va. 641, 398 S.E.2d 123	26
<i>State v. Guthrie</i> , 205 W.Va. 326, 518 S.E.2d 83 (1999)	<i>passim</i>
<i>State v. Jackson</i> , 181 W. Va. 447, 383 S.E.2d 79 (1989)	27
<i>State v. Jonathan B.</i> , 230 W. Va. 229, 737 S.E.2d 257 (2012)	10, 17, 18
<i>State v. M.M.</i> , 163 W.Va. 235, 256 S.E.2d 549 (1979)	28
<i>State v. McCoy</i> , 179 W. Va. 223, 366 S.E.2d 731 (1988)	26, 27
<i>State v. Morris</i> , 227 W. Va. 76, 705 S.E.2d 583 (2010)	22
<i>State v. Mullens</i> , 179 W. Va. 567, 371 S.E.2d 64 (1988)	19
<i>State v. Quinn</i> , 200 W. Va. 432, 490 S.E.2d 34 (1997)	12
<i>State v. Robert Scott R., Jr.</i> , 233 W. Va. 12, 754 S.E.2d 588(2014) (<i>per curiam</i>)	12
 Statutes	
W. Va. Code § 61-8B-11 (1986)	10
 Other Authorities	
W. Va. R. Evid. 412 (2014).....	11
W. Va. R. Evid. 701 (2014).....	23, 26, 27

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RESPONDENT'S BRIEF

COMES NOW, Respondent, State of West Virginia, by counsel, David A. Stackpole, Assistant Attorney General and responds to Petitioner's Brief. Petitioner was convicted, following a jury trial, of one (1) count of Sexual Assault in the Second Degree and one (1) count of Attempt to Commit Sexual Abuse in the First Degree. Petitioner was sentenced to one (1) to three (3) years on the Attempt to Commit Sexual Abuse in the First Degree conviction with the sentence to begin immediately. Petitioner was sentenced to a term of ten (10) to twenty-five (25) years suspended sentence for the Sexual Assault in the Second Degree with a period of five (5) years of probation to begin following the sentence for Attempt to Commit Sexual Abuse in the First Degree. This Court should affirm Petitioner's conviction and sentence.

I.

STATEMENT OF THE CASE

On August 12, 2012, N.S. went with her best friend, her best friend's two (2) children, and her best friend's boyfriend to Petitioner's house. (App. at 134-36.) She had never met Petitioner before that day. *Id.* Petitioner made drinks and they were "hanging out." (App. at 139-40.) One (1) of N.S.'s best friend's children "would not go to sleep," so N.S.'s best friend left for a while to "drive him to sleep." (App. at 140.) During that time Petitioner sent texts to N.S.:

Aug 12, 2012 2:08 AM
You should suck my dick
Nooooo. Lol.
Yeah
Nope!!
You will
Nope!
It will be fun
Nope!!!
Let me eat that pussy
Naww.
You think just like me
Noperz!
Aug 12, 2012 2:58 AM
Lets in The living room
@_@
Lets in The living room
Come on nickole

(App. at 142-53, 294-95.)

N.S.'s best friend returned for a while, but left again taking her two (2) children and her boyfriend with her. (App. at 157.) N.S. was alone with Petitioner. *Id.* During that time, Petitioner took his shirt off and began kissing N.S. (App. at 160.) N.S. kissed Petitioner back "the first time or two." *Id.* Then Petitioner "wouldn't quit it and he kept getting more and more forceful." *Id.* N.S. moved her "head out of the way and dodged the kisses." *Id.* But Petitioner

kept kissing her, so she told him “no” and placed her hands against his shoulders to try to stop him. (App. at 161.) Petitioner put his weight on N.S. wedging her into the corner of the couch. *Id.* N.S. kept telling Petitioner no “[a]nd at one point he said, more or less, do you mean no or are you just saying that.” (App. at 162.) N.S. told him “yeah, I mean no.” *Id.* Nonetheless, Petitioner told her she was beautiful and put his hand down her shorts, but was unable to get under her underwear before she was able to remove his hand. (App. at 162-63.) N.S. was pushing against Petitioner’s shoulders and did not realize that Petitioner had pulled his pants down until Petitioner pushed N.S.’s shorts and underwear to the side and inserted his penis into her vagina. (App. at 164-65.) Petitioner kept his penis inside her vagina “until he gets off and he pulls out and finishes in his hands and then goes in the other room.” (App. at 165.)

N.S.’s best friend returned shortly after that and they came up with an excuse to leave. (App. at 166-67.) N.S. did not tell her best friend what happened at the time. (App. at 167.) Petitioner urged N.S. to stay, but she declined and Petitioner wanted a kiss before she left and she gave him a hug or a kiss. (App. at 168.)

N.S. then communicated with her on-again-off-again boyfriend. (App. at 169, 184-85.) She told him what happened and he wanted her to report it to the police. (App. 170.) She went home and slept “for a couple hours” before her on-again-off-again boyfriend came and took her to the police station. *Id.*

Officer Timothy Robertson, Jr. (hereinafter “Officer Robertson”) and Detective Lester Skinner met with Petitioner, who agreed to give the police a statement after being advised of his *Miranda* rights. (App. at 262-63.) Petitioner admitted to the police that he was with N.S. that night, but claimed that he had no sexual contact with her. (App. at 264.)

A sexual assault kit was done on N.S. and the evidence was sent to the laboratory for DNA analysis. (App. at 240-42.) DNA analysis conclusively revealed Petitioner's spermatozoa on N.S.'s shorts. (App. at 226-28.)

On November 4, 2013, Petitioner was indicted on two (2) counts: [1] Sexual Assault in the Second Degree and [2] Attempt to Commit Sexual Abuse in the First Degree. (App. at 8.) On September 3 and 4, 2014, a jury trial was held. During the trial, Petitioner admitted that he lied to police about not having sex with N.S. and claimed that the sex was consensual. (App. at 345-51.)

On the morning of trial, Petitioner argued for the right to admit text messages between N.S. and her on-again-off-again boyfriend. (App. at 62-6.) Petitioner made a proffer of the evidence and the Trial Court ruled that it was not admissible, dependent upon the evidence:

MR. HERSHBERGER: Your Honor, there are. There's a number of text messages between the alleged victim's and her on-again-off-again boyfriend. At one point she does -- she indicates -- the very first text message I have from his is that, Hey, if you cheat on me tonight I guess we're done. They then argue a number of days, Your Honor, over that. Then they also go into that night when the boyfriend finds out she's with another guy. He threatens her and goes on, if you sleep with anyone else tonight we're done. And then after the alleged assault there's a number of text messages where she told him she was assaulted and he doesn't necessarily believe her and says, If you don't report this you're a whore and I don't believe you.

My concern is that it shows a pattern between her and her alleged boyfriend. I don't know if that other cheating was true. They seem to have this issue with infidelity in this relationship which I believe also goes to her possibly claiming this as a sexual assault when it may not have been.

MR. BARKI: Your Honor, that's ridiculous. Under rape shield you can't get into other sexual conduct or other problems with the boyfriend. We've discussed the issue about the text messages afterwards and I think it's appropriate. If he wants to -- first off, the boyfriend's not listed as a witness in the case. If he wants to question the victim regarding her reluctance to report the crime, I think that's relevant. But this whole issue about whether she did or didn't cheat on him a couple days before and whether or not they were arguing or whether their

relationship was on the rocks or off the rocks, that's classic rape shield. That's what you don't get into with regard to these cases.

MR. HERSHBERGER: Your Honor, there's more to it than that. Under the rape shield the Court must also consider the harm of the defendant. There are considerations for the Court to make. She goes on in some of text messages even talking about her and the on-again-off-again boyfriend had sex two days, and the text messages that third day is, I can't come over. And she says, Fine, I'm going to go cheat on you. He says, Why are you going to cheat. And she says, Because I can't go a whole day without sex.

With all of that I think that is getting into the consideration that the Court has to look at in the rape shield. This does fall within that. The Court must also -- that is not absolute. There are some considerations the Court would have to make.

THE COURT: I tend to agree with the prosecutor. I think part of the text messages may be admissible. Anything that has to do with her prior sexual behavior is band (sic) by the rape shield statute. The allegation that he put pressure on her to bring the charge is admissible. I don't think that's covered by the rape shield at all. That most of her prior behavior is not good -- I don't know if her alleged argument with the boyfriend is an issue in this case. So that might come in after we hear some testimony. But if it's related directly to sex, I just think that it comes out as it relates only to her alleged boyfriend. If she said to the boyfriend, I have to go visit him for sex, that could open the door some. But not much.

(App. at 62-5.)

Despite the Trial Court's ruling, in his opening statement, Petitioner raised the issue of the text messages:

You'll also hear about a series of text messages from an on-again-off-again boyfriend of the victim immediately after this, later that night into the morning. You will hear that this gentleman is the father of her child. They're in an on-again-off-again relationship. You will hear that he does not believe her and indicates that he will not --

(App. at 125.) The State objected. (App. at 125-26.) The Trial Court ruled that the only part that was admissible was "the fact of the pressure he applied to her." (App. at 127.)

Petitioner cross-examined N.S. (App. at 172-90.) During cross-examination, Petitioner elicited testimony from N.S. about the text messages:

Q. Now, afterwards, after you confided in him, he sends you a series of text messages, correct?

A. When?

Q. After the alleged incident, after you leave, after you call him.

A. When I fell asleep he did.

Q. Okay. And were there any text messages that you respond to that night from him after you leave his house?

A. Probably.

Q. Okay. He is putting pressure on you to report this to the police?

A. Yes.

Q. And you don't want to do that?

A. No.

Q. And he's using very vulgar terms towards you in order to get you to report that, correct?

A. Correct.

(App. at 186-87.) At that time, Petitioner argued for allowing the text messages to come in claiming that “[i]t does [add light] to the amount of pressure that [N.S.’s on-again-off-again boyfriend] was putting on [N.S.]” (App. at 189.) The Trial Court ruled that “there’s already been testimony to the effect that he used foul language when he was putting the pressure on her.” *Id.*

Officer Robertson testified during the trial. (App. at 238-75.) He testified that he had training by the West Virginia State Police regarding sexual assault victims, which included training that sexual assault victims are often reluctant to come forward because they are ashamed or embarrassed. (App. at 257-59.) Officer Robertson only investigated one (1) other sexual

assault case. *Id.* Officer Robertson also testified that N.S. was “very quiet and not forthcoming with a lot of information.” *Id.*

During Officer Robertson’s testimony regarding what he learned in training, Petitioner objected on the grounds that Officer Robertson did not have sufficient qualification to testify as an expert. *Id.* Although the State did not list Office Robertson as an expert, did not move his admission as an expert, and did not elicit expert testimony from Officer Robertson, the Trial Court used the word expert one (1) time in referring to Officer Robertson’s testimony:

MR. HERSHBERGER: Objection, Your Honor. I believe we’re still getting to the point of eliciting -- I don’t believe any of that means he’s a psychological expert, Your Honor, and obviously have the police officer testify to that. Especially given he’s only had one other sexual assault case.

THE COURT: I think he can testify as an expert as to what he has learned in class, and I’m going to permit that. Keeping in mind this is not his personal experience. It’s what he’s been told by someone during training.

(App. at 257-59.)

In his closing argument, Petitioner argued that N.S.’s on-again-off-again boyfriend was using text messages to put pressure on her to force her to report it to the police. (App. at 374-75.)

Following the trial, the jury found Petitioner guilty of both counts of the Indictment. (App. at 384.) Petitioner filed a Motion for New Trial based on the issue of the excluded text messages, but did not raise the issue of expert testimony. (App. at 445-50.) Then, Petitioner filed a Supplemental Memorandum of Law in Support of Motion for New Trial, which raised ineffective assistance of counsel and the excluded text messages, but did not raise the issue of expert testimony. (App. at 451-57.) Petitioner also filed a Second Supplemental Memorandum of Law in Support of Motion for New Trial alleging juror misconduct, but did not raise the issue of expert testimony. (App. at 476-78.)

On December 18, 2014, the Trial Court held a Hearing regarding the Motion for New Trial, took testimony from the juror, and denied the Motion for New Trial. (App. at 407-43.) The Trial Court sentenced Petitioner to a term of one (1) to three (3) years on the conviction for Attempt to Commit Sexual Abuse in the First Degree and to a term of ten (10) to twenty-five (25) years for the conviction for Sexual Assault in the Second Degree. (App. at 407, 436-37, 489-93.) The Trial Court ordered that the one (1) to three (3) year sentence begin immediately and that the sentence of ten (10) to twenty-five (25) years be suspended and that following the one (1) to three (3) year sentence, Petitioner begin a period of five (5) years of probation. *Id.* This appeal followed.

II.

SUMMARY OF THE ARGUMENT

Petitioner was not denied the right of confrontation or cross-examination. Petitioner was permitted to cross-examine the victim regarding the text messages from her on-again-off-again boyfriend as to the pressure that was applied upon her to report the sexual assault. Petitioner was permitted to argue motive for fabrication based upon the text messages in his closing arguments.

Petitioner was not permitted to introduce the actual text messages, which would have included statements that she was lying about the sexual assault, statements that she did not fight back enough, and statements that she was “whoring around.” None of those statements were proper for a jury to hear as such statements merely suggest that N.S. was sexually promiscuous and as such statements seek to provide the jury an opinion about whether or not N.S. is lying about the sexual assault from someone who was not even called as a witness at trial. The jury is the body charged with determining credibility and the on-again-off-again, non-witness

boyfriend's opinion as to whether or not the victim was telling the truth about the sexual assault can serve no purpose other than to usurp the jury's role.

As to the Trial Court's use of the word expert regarding Officer Robertson's testimony, Petitioner did not object on the basis of hearsay. Petitioner did not object to the Trial Court's uses of the word expert in describing Officer Robertson. Petitioner's objection occurred prior to the Trial Court's use of the term.

Moreover, a single use of the term "expert" by the Trial Court does not make Officer Robertson an expert. This is especially true where the State did not disclose Officer Robertson as an expert, did not move that Officer Robertson be qualified as an expert, and where Officer Robertson did not offer an opinion or provide specialized or technical knowledge. Officer Robertson testified as to what he personally observed regarding N.S. and testified to what he learned in training. To the extent that Officer Robertson stated that he learned in training that most sexual assault victims do not report the assault immediately, Petitioner admits that such information is not specialized knowledge, but is "common knowledge." A fact witness is not transformed into an expert because he has "common knowledge." The distinguishing features of an expert witness is specialized or technical knowledge. As such, Officer Robertson testified as a fact witness and the Trial Court's single reference to Officer Robertson as an expert was, at most, mere harmless error.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

All the issues raised by Petitioner have been authoritatively decided. The facts and legal arguments are adequately presented in the Briefs and the Appendix. The decisional process would not be aided by Oral Argument. This matter is appropriate for a Memorandum Decision.

IV.
ARGUMENT

Petitioner raises two (2) assignments of error: [1] error in excluding text messages based on the rape shield law and [2] error in admitting expert testimony of Officer Robertson. Pet'r's Br. at 5. Both of Petitioner's claims fail.

A. The Trial Court's Exclusion Of Text Messages From The Victim's On-Again-Off-Again Boyfriend Was Not Error As Petitioner Was Free To Cross-Examine The Victim Regarding The Pressure Applied To Her By The Text Messages, As The Text Messages Contained Information That Would Serve To Impugn and Harass The Victim Further, And As The Text Messages Included Statements That Would Usurp The Jury's Function In Determining Credibility.

This Court reviews a Trial Court's findings regarding the admissibility of evidence pursuant to the rape shield statute under an abuse of discretion standard. *State v. Jonathan B.*, 230 W. Va. 229, 236, 737 S.E.2d 257, 264 (2012) (citations omitted).

The Trial Court did not err in excluding text messages between N.S. and her on-again-off-again boyfriend under the rape shield statute. West Virginia has a statute designed to protect victims of rape and sexual assault:

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.

W. Va. Code § 61-8B-11(b) (1986). The West Virginia Rules of Evidence also provide protections against disclosure of such evidence:

- (a) Prohibited Uses. The following evidence shall not be admissible in a civil or criminal proceeding involving alleged sexual misconduct:
- (1) evidence offered to prove that a victim engaged in other sexual behavior;
 - (2) evidence offered to prove a victim's sexual predisposition; or

(3) evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct and reputation evidence of the victim's sexual conduct in any prosecution in which the victim's lack of consent is based solely on the incapacity to consent because such victim was below a critical age, mentally defective, or mentally incapacitated.

(b) Exceptions.

(1) *Criminal Cases*. The court may admit the following evidence in a criminal case:

(A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

(B) except as provided in (a)(3), evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor;

(C) 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 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; and

(D) evidence whose exclusion would violate the defendant's constitutional rights.

W. Va. R. Evid. 412(a)-(b) (2014).

This Court has held that the purpose of the rape shield statute is to “to protect the victims of sexual assault from humiliating and embarrassing public fishing expeditions into their sexual conduct; to overcome victims' reluctance to report incidents of sexual assault; and to protect victims from psychological or emotional abuse in court as the price of their cooperation in prosecuting sex offenders.” *State v. Guthrie*, 205 W.Va. 326, 339, 518 S.E.2d 83, 96 (1999).

In this case, Petitioner sought to admit text messages from the sexual assault victim, N.S., and her on-again-off-again boyfriend, who was not a witness and did not testify in this matter. Pet'r's Br. at 8-28. It does not appear from the record that the Trial Court was ever given a copy of the text messages that Petitioner sought to introduce at trial. (*See App. at 62-5.*) The only place in the record that the text messages are actually spelled out is in Petitioner's Motion for a New Trial. (*App. at 445-49.*) Moreover, the text messages as provided in the Motion for New Trial and in Petitioner's Brief are typed out rather than screen shots as were provided by the

State for the text messages that the State had admitted into evidence. (See App. at 292-95.) Instead of providing the Trial Court a copy of the proposed text messages, Petitioner made a proffer of what the texts would provide. (App. at 62-5.)

Petitioner argues that the exclusion of the text messages was improper for three (3) reasons: [1] the text messages did not fall within the scope of the rape shield statute; [2] exclusion violated Petitioner's right to a fair trial; and [3] exclusion violated Petitioner's right to confrontation. All of Petitioner's claims fail.

1. The Trial Court Properly Excluded The Text Messages Under The Rape Shield Statute.

The text messages as described by Petitioner in his proffer and as listed in Petitioner's Brief and Motion for New Trial were properly excluded by the Trial Court. "Rule 404(a)(3) of the West Virginia Rules of Evidence provides an express exception to the general exclusion of evidence coming within the scope of our rape shield statute." Syl. Pt. 3, *Guthrie*, 205 W. Va. at 330, 518 S.E.2d at 87. "This exception provides for the admission of prior sexual conduct of a rape victim when the trial court determines *in camera* that evidence is (1) specifically related to the act or acts for which the defendant is charged and (2) necessary to prevent manifest injustice." *Id.*; Syl. Pt. 3, *State v. Quinn*, 200 W. Va. 432, 490 S.E.2d 34 (1997); *State v. Robert Scott R., Jr.*, 233 W. Va. 12, 754 S.E.2d 588, 591-92 (2014) (*per curiam*).

In this case, prior to trial, Petitioner made a proffer related to text conversations between N.S. and her on-again-off-again boyfriend regarding his concern she might cheat on him, his statements that he does not believe that she was assaulted, and his calling her a "whore." (App. at 62-5.) Petitioner argued a "pattern between [N.S.] and her alleged boyfriend" regarding "infidelity." *Id.* The State pointed out that issues of sex between N.S. and the on-again-off-again boyfriend and any issues of her previously cheating on him are barred by the rape shield

statute. *Id.* The Trial Court correctly ruled that “[t]he allegation that he put pressure on her to bring the charge is admissible.” *Id.* The Trial Court also correctly ruled that N.S.’s prior sexual behavior is banned by the rape shield statute. *Id.*

It is easy for this Court to see how Petitioner intended to use these text messages to impugn the victim. In Petitioner’s opening statement, Petitioner mentioned the text messages and makes two (2) claims regarding them: [1] that N.S. fathered a child to her on-again-off-again boyfriend and [2] that her on-again-off-again boyfriend did not believe her allegations of sexual assault. (App. at 125.) Petitioner sought to sully N.S. by pointing out her prior sexual history – why else would the fact that she had a child be relevant to this sexual assault case? – and to attack N.S.’s credibility by inserting her on-again-off-again boyfriend’s opinion. *See id.* Moreover, Petitioner does not just seek to impugn N.S. before the Trial Court and the jury, Petitioner’s blatant attempt to sully her reputation extends to this appeal. Petitioner’s Brief mentions that the on-again-off-again boyfriend is the “father of her child” no less than five (5) times. Pet’r’s Br. at 5, 6-7, 9, 10, 22. There is no need keep bringing up the fact that N.S. has a child with her on-again-off-again boyfriend, unless you want to imprint on the hearers’ minds that this is a woman with a sexual past. That is the implied message given to the jury in Petitioner’s opening statement: N.S. had sex with this man, had his child, and he believes that she is lying about the sexual assault. It is improper and the Trial Court was right in excluding the evidence.

Petitioner argues that the text messages provide a proper purpose of demonstrating that N.S. was pressured into reporting the sexual assault to the police. Pet’r’s Br. at 8-28. The Trial Court agreed and permitted testimony regarding the pressure. (App. at 62-5.) That is why Petitioner was permitted to cross-examine N.S. regarding the text messages as to the pressure

that her on-again-off-again boyfriend applied to her. (App. at 186-87.) The Trial Court even allowed Petitioner to point out that the on-again-off-again boyfriend used “very vulgar terms” in order to convince her to go to the police and report the sexual assault. *Id.* Petitioner was permitted to argue in his closing argument about how N.S.’s on-again-off-again boyfriend was using text messages to put pressure on her to force her to report the sexual assault to the police. (App. at 374-75.)

Petitioner argues that he should have been allowed to put the actual text messages into evidence. Pet’r’s Br. at 8-28. Petitioner argues that the cross-examination did not get across the “full import as to what those text messages did” because “[t]hey were more than pressure, they were threats” she had to file charges or the relationship is over. Pet’r’s Br. at 15. However, Petitioner could have made that point through cross-examination without the admission of the text messages. The Trial Court never prohibited Petitioner from asking whether the texts that N.S.’s on-again-off-again boyfriend threatened to end their relationship if she did not report the sexual assault. Petitioner could have asked, but chose not to ask and now claims that somehow the text messages would have made the point that he could have made in cross-examination. That is because Petitioner wants to get the jury to hear things like: “[s]o you just let it happen?;” “I think you fucked him on your own will;” “you should of hit or bit him if you didn’t wanna fuck him;” “[i]f it was rape, you would of already called the cops;” and “good job whoring around.”¹ (App. at 446-48.) None of these statements are proper under the rape shield statute and the Trial Court correctly excluded them. Moreover, to the extent that the text messages include a person’s statements regarding his belief as to whether N.S. is telling the truth about the sexual assault, such texts invade the province of the jury as it is the jury’s job to determine

¹ This Court should note that at no point in the record does Petitioner seek to introduce the text messages with the improper parts redacted.

credibility. While some of the texts related to the acts for which Petitioner was charged, there is no manifest injustice to Petitioner by excluding texts that do no more than harass the victim, impugn the victim's reputation by calling her a whore, and attack the victim's credibility by allowing this non-party to claim that she is lying. *See* Syl. Pt. 3, *Guthrie*, 205 W. Va. at 330, 518 S.E.2d at 87. If there is manifest injustice, it would be in admitting the texts and allowing Petitioner to harass, humiliate, and degrad the victim one (1) more time.

Therefore, because Petitioner's proffer regarding the texts related to allegations of prior infidelity, calling N.S. a whore, and the on-again-off-again boyfriend's concern about N.S. cheating; because Petitioner's opening statement demonstrates that Petitioner sought to focus on N.S.'s past sexual conduct in having a child; because Petitioner's opening statement demonstrates that Petitioner sought to focus on N.S.'s on-again-off-again boyfriend's opinion that she was lying about the sexual assault; because Petitioner was permitted to cross-examine N.S. regarding the text messages applying pressure by her on-again-off-again boyfriend that she report the sexual assault; because Petitioner was permitted in closing argument to argue the text messages placing pressure on N.S. to report the sexual assault; because the non-witness, non-party, on-again-off-again boyfriend's opinion about whether or not N.S. was sexually assaulted is improper and usurps the jury's role; and because there is no proper purpose for showing the jury texts that claim that N.S. "let it happen" and was "whoring around," this Court should affirm Petitioner's conviction and sentence.

2. Petitioner's Right To A Fair Trial Was Not Violated.

The Trial Court's decision to exclude the text messages did not violate Petitioner's right to a fair trial. This Court has adopted a test regarding claims that the rape shield statute violated the right to a fair trial:

The test used to determine whether a trial court's exclusion of proffered evidence under our rape shield law violated a defendant's due process right to a fair trial is (1) whether that testimony was relevant; (2) whether the probative value of the evidence outweighed its prejudicial effect; and (3) whether the State's compelling interests in excluding the evidence outweighed the defendant's right to present relevant evidence supportive of his or her defense. Under this test, we will reverse a trial court's ruling only if there has been a clear abuse of discretion.

Syl. Pt. 6, *Guthrie*, 205 W.Va. at 326, 518 S.E.2d at 83.

In this case, Petitioner was not excluded from presenting testimony about the issues that he claims should have been admitted: the pressure applied to N.S. by her on-again-off-again boyfriend to report the sexual assault. Petitioner was permitted to cross-examine N.S. regarding the text messages and to offer all the testimony regarding the pressure and reasons for N.S. to lie that were part of Petitioner's theory. (App. at 186-87.) Petitioner was allowed to argue the issues at closing arguments. (App. at 374-75.) Petitioner was merely precluded from admitting the actual text messages containing a multitude of inappropriate statements. *See supra*.

Applying the three (3) *Guthrie* factors, it is clear that the Trial Court properly excluded the actual text messages containing the improper information. First, the evidence included relevant material regarding the pressure asserted upon N.S. to report as pointed out by Petitioner. However the evidence also included irrelevant materials, including the on-again-off-again boyfriend's opinion that N.S. was lying about the sexual assault, statements suggesting that N.S. did not do anything to stop the sexual assault, and statements calling N.S. a whore. (App. at 446-48.) Far more of the text message material was irrelevant than relevant. As such, the Trial Court permitted Petitioner to elicit the relevant material upon cross-examination, while excluding the text messages and keeping out the irrelevant material.

Second, *Guthrie* requires a balancing of the probative value with the prejudicial effect. Syl. Pt. 6, *Guthrie*, 205 W.Va. at 326, 518 S.E.2d at 83. Here, the probative value of showing

the pressure that was applied to N.S. to report the sexual assault was easily obtained by permitting Petitioner to cross-examine N.S. regarding the text messages. The probative value of the messages alone does not outweigh the danger of unfair prejudice that would occur by placing evidence before the jury that would usurp the jury's role in determining credibility by putting the on-again-off-again boyfriend's belief that N.S. was lying into evidence; that would occur by allowing the jury to see that her on-again-off-again boyfriend was calling her a whore, implying that she has a reputation or history of sleeping around; that would occur by suggesting that she did not do enough to stop the sexual assault such as biting and hitting Petitioner. (App. at 446-48.) Such statements would only create an unfair prejudice. The Trial Court deftly navigated the difficult task of admitting and excluding evidence in this matter by permitting cross-examination of the probative material, while excluding the admission of the prejudicial material.

Third, the State's compelling interest in excluding the evidence more than outweighed Petitioner's right to present relevant evidence supportive of his defense. Syl. Pt. 6, *Guthrie*, 205 W.Va. at 326, 518 S.E.2d at 83. The State has a very compelling interest in keeping a non-party, non-witness from informing the jury that they should not believe that N.S. was sexually assaulted because she did not immediately report the assault to the police. The State's interest in protecting the victim from further harassment, such as having to tell the jury that her own on-again-off-again boyfriend was so supportive in her time of need that he called her a liar and a whore. (App. at 446-48.) Petitioner was never kept from presenting the relevant evidence supportive of his defense because the Trial Court permitted Petitioner to inquire on cross-examination about the relevant issues regarding the text messages. (App. at 186-87.) Applying the three (3) prong analysis of *Guthrie*, it is clear that Petitioner was not deprived of his right to a fair trial.

Petitioner's attempt to analogize this matter to *State v. Jonathan B.*, 230 W. Va. 229, 737 S.E.2d 257 (2012) fails. Pet'r's Br. at 21. In *Jonathan B.*, a rape victim had a notebook that she had written in after the rape. *Jonathan B.*, 230 W. Va. at 240, 737 S.E.2d at 268. In the notebook, the victim claimed that she had only had sex with one (1) person and identified that person to be someone other than the accused. *Id.* This Court held that the Trial Court abused its discretion in finding the notebook inadmissible, reasoning that the notebook was probative, the notebook did not imply promiscuity, and the notebook could be used to attack the victim's credibility. *Id.* This case is not *Jonathan B.* Unlike in *Jonathan B.*, where the notebook did not imply promiscuity, here, the text messages referred to N.S. as a whore. While it is true that the notebook in *Jonathan B.* was to be used to attack the victim's credibility, the credibility was about her own inconsistent statement, where here, Petitioner seeks to attack the N.S.'s credibility through statements of a non-party, non-witness, on-again-off-again boyfriend, which suggest that the sexual assault did not occur, that the sex was consensual, that she let it happen, and that she did not do enough to try to get away. (App. at 446-48.) The fact that the notebook was written by the victim in *Jonathan B.*, but that the text messages were not written by the victim in this matter distinguishes the two (2) cases and highlights how the text messages could only serve to usurp the jury's role in determining credibility. Moreover, there is nothing in *Jonathan B.* to suggest that the Trial Court in that case permitted the defendant to cross-examine the victim regarding the notebook. Here, Petitioner was able to cross-examine the victim about the text messages. Contrary to Petitioner's assertion that *Jonathan B.* supports his claim that the text messages should have been admissible, *Jonathan B.* serves to highlight the reason that the Trial Court needed to exclude the text messages.

Petitioner waxes poetic about the right to “examine a witness’s motive to fabricate” and claims that he was restricted from being able to present the text messages “which evidence N.S.’s motive to fabricate the allegations against Petitioner.” Pet’r’s Br. at 22-3. The Trial Court never limited Petitioner’s right to cross-examine N.S. regarding her motive to fabricate. Petitioner did cross-examine her and did elicit information about how she was pressured into reporting the sexual assault and how her on-again-off-again boyfriend even used vulgar language to pressure her. (App. at 186-87.)

Therefore, because the text messages contained a mixture of relevant and not relevant materials; because Petitioner was permitted to obtain all relevant materials through cross-examination; because the probative value of the text messages was not outweighed by the danger of unfair prejudice; because the text messages contained information that would do no more than harass and impugn the victim and usurp the jury’s function in determining credibility; because the State’s compelling interest outweighed Petitioner’s right to use the text messages; and because Petitioner was able to argue the pressure from the text messages in his closing argument, this Court should affirm Petitioner’s conviction and sentence.

3. Petitioner’s Rights To Confrontation And Of Cross-Examination Were Not Violated.

The Trial Court’s decision to exclude the text messages did not violate Petitioner’s right to confront witnesses or Petitioner’s right of cross-examination. “The Sixth Amendment to the United States Constitution guarantees an accused the right to confront the witnesses against him.” Syl. Pt. 1, *State v. Mullens*, 179 W. Va. 567, 568, 371 S.E.2d 64, 65 (1988). “The Sixth Amendment right of confrontation includes the right of cross-examination.” *Id.*

In this case, the State and Petitioner are in entire agreement that a defendant has a right to confront his or her accuser, that cross-examination is an important part of the right to

confrontation, and that the rape shield statute does not shield a victim's motive to fabricate a false rape charge. Pet'r's Br. at 25. However, Petitioner seeks to beguile this Court into believing that Petitioner was denied his right to confront the victim and that he was precluded from cross-examining N.S. regarding her motive to fabricate the sexual assault. Pet'r's Br. at 25-8.

Petitioner's claims ignore the fact that Petitioner was permitted to confront N.S. regarding her motive to fabricate the charges. (App. at 186-87.) Petitioner did cross-examine her regarding the pressure put on her from her on-again-off-again boyfriend to report the charge to the police. *Id.* Petitioner was free to inquire whether her on-again-off-again boyfriend was threatening to break up the relationship if she did not report the assault. (App. at 62-6.) Petitioner was permitted to argue at closing that N.S. was pressured into making the report. (App. at 374-75.) At no point did the Trial Court deny Petitioner the right to confront or cross-examine the victim regarding the issue of her credibility as Petitioner suggests.

Petitioner was not required to put on evidence, but chose to call witnesses and to testify. (App. at 304-57.) Petitioner could have subpoenaed N.S.'s on-again-off-again boyfriend to testify in this matter and could have introduced evidence from him regarding the pressure that he applied in trying to get N.S. to report the sexual assault, including his threat to her to break off the relationship. Petitioner did not do so. Instead, Petitioner merely wanted to use N.S.'s on-again-off-again boyfriend's text messages to impugn the victim's character and to show the jury that her own boyfriend did not believe her that she was assaulted, but believed that the sex was consensual.

Petitioner cites to *Davis v. Alaska*, 415 U.S. 308, 318, 94 S. Ct. 1105 (1974), for the proposition that the right of confrontation includes "cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of witnesses." Pet'r's Br. at 26. In *Davis*, the

Trial Court denied any cross-examination regarding a witness “being on probation under a juvenile court adjudication,” which allowed “his categorical denial of ever having been the subject of any similar law-enforcement interrogation [to go] unchallenged.” *Davis*, 415 U.S. at 313-14, 94 S. Ct. at 1109. Unlike in *Davis*, here Petitioner was able to challenge the witness with the issue of motive to fabricate and was allowed to ask questions regarding the text messages. The Trial Court merely denied the admission of the actual text messages because of all of the other matters contained within the text messages.

Petitioner asserts that this case is analogous with *Olden v. Kentucky*, 488 U.S. 227, 109 S. Ct. 480 (1988). Pet’r’s Br. at 26. Petitioner is incorrect. In *Olden*, the criminal defendant sought to introduce evidence of the victim’s reason to fabricate the rape. *Olden*, 488 U.S. at 230, 109 S. Ct. at 482. However, unlike in this case, the defendant in *Olden* did not seek to introduce text messages from a non-party, non-witness, which called the victim a whore, suggested that the victim was lying about the sexual assault, and suggested that the victim did not do enough to get away. In *Olden*, the criminal defendant merely sought to introduce evidence that she was living with another man at the time of trial in order to assert his “theory of the case was that [the victim] concocted the rape story to protect her relationship with [her live-in boyfriend], who would have grown suspicious upon seeing her disembark from [the] car.” *Id.* Unlike in *Olden*, where the criminal defendant was unable to admit any evidence of the victim’s cohabitation, here, Petitioner was permitted to cross-examine the victim regarding the text messages that applied pressure on N.S. to report the sexual assault by her on-again-off-again boyfriend. *Olden* is inapposite.

Additionally, Petitioner’s quotation to *Com. v. Joyce*, 382 Mass. 222, 415 N.E.2d 181 (1981), demonstrates that the Trial Court was correct in excluding the text messages. Pet’r’s Br.

at 27. “Reasonable cross-examination to show motive or bias has long been a matter of right.” *Joyce*, 382 Mass. at 229, 415 N.E.2d at 186. Petitioner did not want reasonable cross-examination. Petitioner sought unreasonable cross-examination that would disparage the victim and tread on the jury’s role as finder of fact regarding credibility determinations. The Trial Court provided Petitioner with reasonable cross-examination: cross-examination of the issues of pressure applied by the text messages without admission of the text messages.

Therefore, because Petitioner was permitted to cross-examine N.S. regarding the text messages; because Petitioner was able to elicit information from N.S. showing that her on-again-off-again boyfriend applied pressure on her to report the sexual assault; because Petitioner was permitted to argue that the pressure placed on her was a basis for fabricating the sexual assault claim; and because the admission of the text messages would create improper prejudice that would outweigh the probative value; and because Petitioner did not even subpoena the on-again-off-again boyfriend to testify in the matter, this Court should affirm Petitioner’s conviction and sentence.

B. Petitioner’s Claim, That The Trial Court Erred By Admitting Expert Testimony Regarding Rape Trauma Syndrome From Officer Robertson, Fails Because Petitioner Did Not Object To The Trial Court’s Characterization Of The Testimony As Expert Testimony, Because Petitioner Did Not Object On The Grounds Of Hearsay, Because Officer Robertson’s Testimony Was Not Expert Testimony, And Because Officer Robertson’s Testimony Was Not Testimony Regarding Rape Trauma Syndrome.

“The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.” Syl. Pt. 1, *State v. Morris*, 227 W. Va. 76, 78, 705 S.E.2d 583, 585 (2010) (quoting Syl. Pt. 1, *State v. Nichols*, 208 W. Va. 432, 541 S.E.2d 310 (1999); Syl. Pt. 6, *State v. Kopa*, 173 W. Va. 43, 311 S.E.2d 412 (1983)).

The Trial Court did not abuse its discretion because the Trial Court did not admit Officer Robertson as an expert in this matter and because Officer Robertson did not testify regarding rape trauma syndrome. Rule 701 of the West Virginia Rules of Evidence provides the requirements for testimony by a fact witness:

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness's perception;
- (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

W. Va. R. Evid. 701 (2014).

In this case, the State did not seek to admit Officer Robertson as an expert. The State did not list Officer Robertson on the State's Expert Disclosure, but rather disclosed him as a fact witness. (App. at 15-7, 498.) To the extent that Petitioner complains that "the State failed to disclose Officer Robertson as an expert witness in accordance with West Virginia Rule of Criminal Procedure 16(E), which denied the defense an opportunity to prepare and present rebuttal expert testimony," Petitioner was not denied the opportunity to prepare and present rebuttal expert testimony as Officer Robertson was not used as an expert. Moreover, Officer Robertson's testimony was not rebuttable, as demonstrated by Petitioner's admission that Officer Robertson's testimony amounted to "common knowledge." See Pet'r's Br. at 31, 33.

In addition to not listing Officer Robertson on the expert disclosure, the State did not move that Officer Robertson be qualified as an expert in any field. *Compare* (App. at 222-23) (where the State moved that Meredith Chambers of the West Virginia State Police Forensic Laboratory's DNA Section be qualified "as an expert in the field of biochemistry and DNA analysis") *with* (App. at 237-75) (where there is no motion from the State to qualify Officer

Robertson as an expert in any field). The State never sought to use Officer Robertson as an expert witness and Officer Robertson's testimony was as a fact witness.

Petitioner's entire assertion of error revolves around his claim that Officer Robertson "was permitted to testify as an expert." Pet'r's Br. at 28-34. The only basis for Petitioner's assertion that Officer Robertson was treated as an expert was the Trial Court's statement permitting Officer Robertson's testimony regarding his training:

Q. Okay. In your experience and training in handling these types of matters, is it unusual for sexual assault victims to be reluctant in reporting of sexual assault?

MR. HERSHBERGER: Objection, Your Honor. I don't believe we've established to the point necessary what his training and experience in sexual assault cases are.

THE COURT: Do you have anything additional to offer on his experience?

MR. BARKI: Sure.

BY MR. BARKI:

Q. In addition to this, have you had training at any academies or any continuing law enforcement education on how to deal with sexual assault victims and interviewing sexual assault victims?

A. Yes. Through the West Virginia State Police, they hold multiple courses and classes teaching officers different aspects of investigation.

Q. Sure. And in addition to that, during your practical day-to-day work, have you had the opportunity to assist and investigate reports of sexual assaults on other occasions, other than the case before the Court here today?

A. I have only investigated one other case.

Q. And, again, in your -- in your training at the state police academy, did they go through the handling or interviewing of sexual assault victims?

A. Yes, they did.

Q. Okay. And in that training did it touch on the issues of handling sexual assault victims, the emotional stress of these events and how to conduct these interviews?

A. Yes. They gave us a brief highlight of how victims of sexual assault would react to you and others, and also advised us that most victims usually don't come forward due to the fact --

MR. HERSHBERGER: Objection, Your Honor. I believe we're still getting to the point of eliciting -- I don't believe any of that means he's a psychological expert, Your Honor, and obviously have the police officer testify to that. Especially given he's only had one other sexual assault case.

THE COURT: I think he can testify as an expert as to what he has learned in class, and I'm going to permit that. Keeping in mind this is not his personal experience. It's what he's been told by someone during training.

Go ahead.

THE WITNESS: In the training we were administered, they advised us that most sexual assault victims never come forward, they're too ashamed or embarrassed.

BY MR. BARKI:

Q. So in this particular case, was that [N.S.] initially reports to you, she is -- as you have indicated, she's very quiet and not forthcoming with a lot of information; is that correct?

A. That's correct.

(App. at 257-59.) The State agrees that the Trial Court used the word expert and stated that the testimony related to something that he was told in training and was not personal experience.

(App. at 259.) However, that isolated statement by the Trial Court does not convert Officer Robertson into an expert witness. Moreover, Petitioner failed to object to the Trial Court's statement using the word expert and never objected on the basis of hearsay. (App. at 257-60.)

Had Petitioner objected to the admission of Officer Robertson as an expert following the Trial Court's statement, then the Trial Court could have either gone through the process for actually admitting Officer Robertson as an expert or, more likely, clarified that Officer Robertson was not

an expert and that the Trial Court misspoke using the word expert related to this witness. However, the Trial Court was never given the opportunity, because Petitioner failed to object to the Trial Court's use of the word expert.

Even if this Court were to determine that Petitioner's objection that occurred prior to the Trial Court's statement using the word expert was sufficient to preserve the issue, then the Trial Court's statement amounts to no more than harmless error. This is seen by looking at the content of Officer Robertson's testimony. The only testimony from Officer Robertson regarding this issue is that he had training regarding sexual assault victims, that he learned that "most victims usually don't come forward," and that the reluctance to come forward is based upon the fact that the victims are "too ashamed or embarrassed." (App. at 258-59.) Officer Robertson's testimony that sexual assault victims are reluctant to come forward is testimony that was based upon Officer Robertson's training that was helpful to understanding N.S.'s reluctance to report and was not based on any scientific, technical, or other specialized knowledge. *See* W. Va. R. Evid. 701.

Officer Robertson's statement about the reluctance of sexual assault victims to come forward is not, as Petitioner would have this Court believe, expert testimony regarding rape trauma syndrome. Pet'r's Br. at 30-3. As Petitioner admits, "[r]ape trauma syndrome is a complex psychological diagnosis." Pet'r's Br. at 31. "[T]his Court pointed out that rape trauma syndrome is a phrase coined to describe those physical and emotional symptoms and behaviors frequently experienced by rape victims." *State v. Edward Charles L.*, 183 W. Va. 641, 658-59, 398 S.E.2d 123, 140-41 (citing *State v. McCoy*, 179 W. Va. 223, 366 S.E.2d 731 (1988)). This Court has described rape trauma syndrome as a two (2) phase process:

Burgess and Holmstrom describe rape trauma syndrome as an acute stress reaction to a life-threatening situation, usually occurring as a two-phase reaction.

During the first phase, the acute phase, the victim experiences a great deal of disorganization in her life-style. The acute phase is characterized by certain physical and emotional reactions, including fear, humiliation, anger, revenge, and self-blame. The acute phase is followed by the “long-term process” or “reorganization phase,” characterized by tendencies to change residences and telephone numbers and to turn to family members for support.

McCoy, 179 W. Va. at 226, 366 S.E.2d at 734 (citing Burgess & Holmstrom, *Rape Trauma Syndrome*, 131 Am. J. Psychiatry 981 (1974)). Officer Robertson was never asked and did not opine that N.S. exhibited the signs or symptoms of a sexual assault victim. (App. at 257-60.) Instead, Officer Robertson merely testified that N.S. was “very quiet and not forthcoming with a lot of information.” (App. at 259.) Testimony that N.S. was “very quiet and not forthcoming with a lot of information” is testimony of a fact witness with personal knowledge that was helpful to understanding N.S.’s testimony and was not based on any scientific, technical, or other specialized knowledge. *See* W. Va. R. Evid. 701. Officer Robertson’s testimony was not expert testimony regarding rape shield trauma syndrome. As such, there was no need to qualify Officer Robertson as an expert in the field of rape shield trauma syndrome pursuant to *State v. Jackson*, 181 W. Va. 447, 448, 383 S.E.2d 79, 80 (1989), as suggested by Petitioner.

That Officer Robertson did not testify as an expert is seen in Petitioner’s concession that Officer Robertson’s testimony was common knowledge rather than specialized knowledge: “[t]he fact that sexual assault victims are hesitant to come forward because they are ashamed or embarrassed is common knowledge and demonstrates no advanced understanding of the subject.” Pet’r’s Br. at 33. As such, Officer Robertson’s testimony demonstrates that he did not testify as an expert, but rather as a fact witness to issues within his personal experience or within his training and within common knowledge. The Trial Court’s use of the term “expert” one (1) time does not convert Officer Robertson’s testimony into expert testimony any more than calling a house built out of straw “a brick house” will make it wolf proof. Because Officer Robertson’s

testimony was not expert testimony, there was no need for the Trial Court to conduct the two-step inquiry² into Officer Robertson's qualification as Petitioner asserts. *See* Pet'r's Br. at 31.

Petitioner cites to *Mayhorn v. Logan Med. Found.*, 193 W. Va. 42, 46, 454 S.E. 2d 87, 91 (1994), for the proposition that an expert may rely upon hearsay for the basis of the expert's opinion. Pet'r's Br. at 30. However, Officer Robertson does not provide any opinion testimony. (App. at 258-60.) Rather Officer Robertson testified as to what he learned in his training and to what he observed about N.S. *Id.* Petitioner never raised a hearsay objection and even if the statement was hearsay, it was not the basis for an opinion as no opinion was rendered. *Id.* As such, *Mayhorn* is inapposite.

Petitioner claims that *State v. M.M.*, 163 W.Va. 235, 240, 256 S.E.2d 549, 553 (1979) is analogous to this matter. Pet'r's Br. at 33. *M.M.* is also inapposite. *M.M.* is about expert testimony regarding juvenile rehabilitation. *M. M.*, 163 W. Va. at 242, 256 S.E.2d at 554. There was not issue of expert testimony about juvenile rehabilitation in this matter. To the extent that Petitioner argues that in both *M.M.* and this case there was expert testimony from an officer who was not adequately qualified to be an expert, Petitioner is wrong. Officer Robertson did not testify as an expert witness as Officer Robertson never gave an expert opinion on any subject. (App. at 258-60.) As such, *M.M.* is not analogous to this matter.

² Syl. Pt. 5, *Gentry v. Mangum*, 195 W. Va. 512, 515, 466 S.E.2d 171, 174 (1995), provides for a two-step inquiry regarding expert witness testimony:

In determining who is an expert, a circuit court should conduct a two-step inquiry. First, a circuit court must determine whether the proposed expert (a) meets the minimal educational or experiential qualifications (b) in a field that is relevant to the subject under investigation (c) which will assist the trier of fact. Second, a circuit court must determine that the expert's area of expertise covers the particular opinion as to which the expert seeks to testify.

Petitioner also argues for the first time that “[t]he evidence offered by Officer Roberson was clearly hearsay as it was an out of court statements offered for their truth.” Pet’r’s Br. at 28. Petitioner did not raise any hearsay objections to the Trial Court regarding Officer Robertson’s testimony as to his training. (App. at 258-59.) As such, he deprived the Trial Court of the opportunity to rule on that basis and waived the right to raise the issue now.

Therefore, because Petitioner did not object on the basis of hearsay; because Petitioner did not object to the Trial Court’s use of the word expert regarding Officer Robertson’s testimony; because the State did not seek to use Officer Robertson as an expert as demonstrated by the State’s expert witness disclosure and by the lack of a motion to admit Officer Robertson as an expert; because the Trial Court’s one (1) reference to Officer Robertson as an expert does not transform Officer Robertson’s testimony into expert testimony; because Officer Robertson never offered any expert opinion; because officer Robertson testified to what he learned in training and to what he observed regarding N.S.; and because Petitioner concedes that Officer Robertson’s testimony was not specialized, but rather common knowledge, this Court should affirm Petitioner’s conviction and sentence.

V.

CONCLUSION

For the foregoing reasons and others apparent to this Court, this Court should affirm Petitioner’s conviction and sentence.

Respectfully submitted,

STATE OF WEST VIRGINIA,
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By Counsel,

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CERTIFICATE OF SERVICE

I, David A. Stackpole, Assistant Attorney General and counsel for Respondent, do hereby verify that I have served a true copy of *RESPONDENT'S BRIEF* upon counsel for Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 4th day of June, 2015, addressed as follows:

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