IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1992 Term

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No. 21146

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STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee,

v.

CHESTER ANDREW WALTER,
Defendant Below, Appellant

Appeal from the Circuit Court of Putnam County
Honorable Clarence L. Watt, Judge
Civil Action No. 90-F-26

REVERSED AND REMANDED

Submitted: September 15, 1992
Filed: October 9, 1992

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The Opinion of the Court was delivered PER CURIAM.

JUSTICE NEELY concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "In a criminal case where the state confesses error, urges that the judgment be reversed and that the defendant be granted a new trial, this Court, upon ascertaining that the errors confessed are reversible errors and do in fact constitute cause for the reversal of the judgment of conviction, will reverse the judgment and grant the defendant a new trial." Syllabus, State v. Goff, 159 W.Va. 348, 221 S.E.2d 891 (1976).

2. "This Court is not obligated to accept the State's confession of error in a criminal case. We will do so when, after a proper analysis, we believe error occurred." Syllabus point 8, State v. Julius, 185 W.Va. 422, 408 S.E.2d 1 (1991).

Per Curiam:

The appellant, Chester Andrew Walter, was convicted of sexual abuse in the first degree, sexual assault in the first degree, and incest on September 21, 1990. All charges involved his four-year-old son, Timothy Walter.

During post-trial motions for judgment notwithstanding the verdict or a new trial, the assistant prosecuting attorney who tried the case conceded on the record that the State's evidence was wholly insufficient to convict on the second and third counts of the indictment, which alleged first-degree sexual assault and incest. Although the trial judge requested that the prosecution join the defense and prepare a written motion to dismiss these two counts, this apparently did not happen.

Consequently, the State now confesses error on these two charges, admitting that "there is no evidence in the record to support the element of sexual intrusion necessary to each of said counts."[1]

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[1]According to W.Va. Code § 61-8B-3(a) (1989), a person is guilty of first-degree sexual assault when:

> (1) Such person engages in sexual intercourse or sexual intrusion with another person and, in so doing:
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> (i) Inflicts serious bodily injury upon anyone; or

The defendant argues that there is also insufficient evidence to sustain his conviction on the remaining charge of first-degree sexual abuse.

The alleged abuse in this case occurred sometime during the period from April, 1989, to July, 1989, when Amy Walter states that she began working outside the home sixteen hours a day. Her husband, the defendant, cared for their two young sons, Timmy, then three, and Dustin, age two. According to Amy, it was during this time that the boys began exhibiting unusual behavior. She "found both boys in the bathtub, one giving oral sex to the other," and "they were having a few nightmares. They'd wake up screaming."

The defendant and his wife separated for the final time on August 5, 1989. He had filed for divorce earlier in this marriage, but they later reconciled and had their second son. Amy states that the boys' nightmares continued, and on one occasion she found them

(..continued)

> (ii) Employs a deadly weapon in the commission of the act; or
>
> (2) Such person, being fourteen years old or more, engages in sexual intercourse or sexual intrusion with another person who is eleven years old or less.

West Virginia Code § 61-8-12(b) (1989) states that "[a] person is guilty of incest when such person engages in sexual intercourse or sexual intrusion with his or her father, mother, brother, sister, daughter, son, grandfather, grandmother, grandson, granddaughter, nephew, niece, uncle or aunt."

"practicing sex" on each other. She also felt that the boys demonstrated a fear of their father.

When Amy applied for welfare benefits, she was referred to the Child Advocate Office and then to Child Protective Services, who referred the children to Pam Rockwell, a private sexual assault counselor. In her deposition testimony, Rockwell states that she met with both boys for the first time for about an hour on September 13, 1989. A second interview with both boys took place on September 20, 1989, and a third on January 8, 1990. The fourth interview on February 13, 1990, marked the first time that she saw Timmy alone. The next interview with Timmy occurred three months later on May 13, 1990, and the last interview took place on June 26, 1990.

The defense maintains that Pam Rockwell's testimony was the only evidence in the case from which the jury could have inferred that any sexual contact with Timothy Walter had occurred or that the defendant had engaged in such activity or that it had been done for purposes of sexual gratification of the defendant or the child. According to the defense, there was absolutely no evidence whatsoever of sexual intercourse, sexual intrusion, or even the slightest degree of penetration. For this reason, the defense made pre-trial motions in limine to exclude Rockwell's hearsay testimony. However, the testimony was admitted over defense objection as "statements made by Timothy Walter for the purpose of obtaining medical treatment."

On appeal, the defense argues that the defendant was entitled to a directed verdict or a new trial on the first-degree sexual abuse charge. The defense argues that the State failed to prove that the defendant was over fourteen years of age or that the alleged touching of Timmy was for the purpose of gratifying the sexual desires of either the defendant or the alleged victim.[2] Further, the defense contends that the State's sole evidence of the requisite "sexual contact" is Rockwell's hearsay testimony, and that even if this testimony is admissible, it is insufficient to support a conviction for first-degree sexual abuse.

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[2]West Virginia Code § 61-8B-7(a) (1989) provides that "[a] person is guilty of sexual abuse in the first degree when:

> (1) Such person subjects another person to sexual contact without their consent, and the lack of consent results from forcible compulsion; or
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> (2) Such person subjects another person to sexual contact who is physically helpless; or
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> (3) Such person, being fourteen years old or more, subjects another person to sexual contact who is eleven years old or less.

(Emphasis added.) In this case, "sexual contact" was defined for the jury by State's Instruction 2, which stated that:

> As used by the Court in this case, sexual contact means any intentional touching, either directly or through clothing, of any part of the sex organs of another person, or intentional touching of any part of another person's body by the actor's sex organs, where the victim is not married to the person and the touching is done for the purpose of gratifying the sexual desire of either party.

At trial, Assistant Prosecuting Attorney Mark Sorsaia was arguing the issue of the admissibility of Rockwell's testimony when he told the judge that because four-year-old Timmy was unable to testify, and because he had decided not to use a videotaped interview of Timmy which was conducted by a State police officer, Rockwell's testimony "will be the only direct evidence I have that the Defendant molested this child . . . . You know, Pam Rockwell is my case, Your Honor." (Emphasis added.)

As we noted above, the State confesses error on two of the three convictions that it obtained in this case, those for first-degree sexual assault and incest. In the syllabus of State v. Goff, 159 W.Va. 348, 221 S.E.2d 891 (1976), we stated that:

> In a criminal case where the state confesses error, urges that the judgment be reversed and that the defendant be granted a new trial, this Court, upon ascertaining that the errors confessed are reversible errors and do in fact constitute cause for the reversal of the judgment of conviction, will reverse the judgment and grant the defendant a new trial.

More recently, in State v. Julius, 185 W.Va. 422, 408 S.E.2d 1, 12 n.14 (1991), we clarified our position by noting that "sometimes . . . the State's confession of error will not result in a complete reversal of the case." "This Court is not obligated to accept the State's confession of error in a criminal case. We will do so when, after

a proper analysis, we believe error occurred." Syl. pt. 8, State v. Julius, 185 W.Va. 422, 408 S.E.2d 1 (1991).

The case now before us is one which clearly merits reversal. The State admits that there was absolutely no evidence of sexual intercourse or intrusion, and such evidence is a necessary element of both first-degree sexual assault and incest. The defendant was convicted in spite of the fact that these charges required proof of a specific degree of sexual contact which quite obviously did not exist, and he was undoubtedly prejudiced by the cumulative effect of the two erroneously obtained convictions. It is impossible to discern the degree to which these two convictions infected the only remaining charge for first-degree sexual abuse, or to ascertain precisely upon what evidence the jury based this conviction.

Accordingly, as a result of the State's confession of error and our determination that such error did occur, we reverse the judgment of the Circuit Court of Putnam County on the defendant's convictions of first-degree sexual assault and incest. The judgment is also reversed as to the defendant's conviction for first-degree sexual abuse, and this case is remanded for a new trial.

Reversed and remanded;
new trial awarded.