

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**State of West Virginia,
Plaintiff Below, Respondent**

vs) **No. 11-1233** (Fayette County 10-F-66)

**Kevin C.,
Defendant Below, Petitioner**

FILED

November 19, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Kevin C.’s¹ appeal, filed by counsel Richard Lorensen, arises from the Circuit Court of Fayette County, wherein petitioner was fined \$5,000 and sentenced to twenty-five to one hundred years in prison, followed by fifty years of supervised release for his convictions of twenty-four counts of first degree sexual assault. The sentencing order was entered by the circuit court on July 29, 2011. The State, by counsel Michelle Duncan Bishop, filed a response in support of upholding petitioner’s convictions.

This Court has considered the parties’ briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Petitioner was tried by a jury in April of 2011 for twenty-four counts of first degree sexual assault against his stepdaughter. Several witnesses testified at trial, including State expert witness Dr. Joan Phillips. As Dr. Phillips explained her physical exam of the victim, the State asked if she in “any way categorize[d]” the cases she analyzes. Upon this question, petitioner’s trial counsel objected and explained out of the presence of the jury that Dr. Phillips did not go into any sort of scoring in her report regarding her physical exam of the victim and that her testimony was the first time petitioner’s counsel heard of such scoring. The circuit court overruled this objection and Dr. Phillips was permitted to continue her testimony on this subject. After two days of trial, the jury found petitioner guilty of all twenty-four counts of first degree sexual assault. At sentencing, the circuit court ordered petitioner to pay a fine of \$5,000 and to serve twenty-five to one hundred years in prison, followed by fifty years of supervised release. Petitioner appeals.

¹ Because the victim in this matter was petitioner’s stepdaughter and a minor at the time of the offenses, we follow our traditional practice in cases involving sensitive facts and use only petitioner’s last initial. See *State v. Edward Charles L.*, 183 W.Va. 641, 645 n.1, 398 S.E.2d 123, 127 n.1 (1990).

We review this case under the following standard:

“‘The admissibility of testimony by an expert witness is a matter within the sound discretion of the trial court, and the trial court's decision will not be reversed unless it is clearly wrong.’ Syllabus Point 6, *Helmick v. Potomac Edison Co.*, 185 W.Va. 269, 406 S.E.2d 700 (1991), *cert. denied*, 502 U.S. 908, 112 S.Ct. 301, 116 L.Ed.2d 244 (1991).” Syllabus point 1, *West Virginia Division of Highways v. Butler*, 205 W.Va. 146, 516 S.E.2d 769 (1999).

Syl. Pt. 5, *State v. Leep*, 212 W.Va. 57, 569 S.E.2d 133 (2002).

Petitioner argues that the circuit court abused its discretion in allowing surprise evidence that should have been disclosed by the State in discovery where such evidence materially prejudiced the defense. He argues that Dr. Phillips first testified that her physical examination of the victim was “normal” and that based upon a range of classifying child sexual abuse authored by a Dr. Joyce Adams, the likelihood that the victim was sexually abused was “probable,” out of a range of “none,” “possible,” “probable,” or “definitive.” Petitioner argues that explaining this classification system constituted surprise evidence, was prejudicial to his case, and that his convictions should be reversed.

In response, the State contends that it is undisputed that petitioner was given a copy of Dr. Phillips’s report sufficiently in advance of trial and that he did not request a copy of her anticipated trial testimony. Moreover, Dr. Phillips’s testimony was not prejudicial to petitioner. The factors of the classification scale were not odd or unusual criteria and it did not use complicated scientific methodology. Rather, Dr. Phillips’s testimony was actually a recitation of what other witnesses had testified concerning the child’s abuse. The State further argues that even if any error occurred, it was harmless error under Syllabus Point 2 of *State v. Atkins*, 163 W.Va. 502, 261 S.E.2d 55 (1979). Not only did the victim testify of petitioner’s sexual assaults against her, but several other witnesses who worked with the victim testified of this abuse. For instance, the forensic interviewer testified that throughout her interviews of the victim, the victim remained consistent in her descriptions of the abuse.

We find no error or abuse of discretion by the circuit court in permitting Dr. Phillips to testify about the particular range she considered in determining child sexual abuse. A review of the record supports petitioner’s convictions, and we find no error to warrant overturning them.

For the foregoing reasons, we affirm petitioner’s convictions and sentencing.

Affirmed.

ISSUED: November 19, 2012

CONCURRED IN BY:

Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum