No. 35472 - *State of West Virginia v. Donald Lee Longerbeam*

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Workman, Justice, dissenting:

The Appellant was the victim's fifty-five-year-old uncle who, along with his wife, was called to the home where their three underage nieces were alone. When the adults arrived, they entered the victim's home without knocking. The Appellant's wife asked the children to come downstairs and the children complied with her directive. Moreover, the sixteen-year-old sister who the majority characterizes as being "in charge" of the victim was actually sleeping at the time the Appellant arrived and, therefore, was not actively watching her sisters.

The Appellant was convicted of one count of sexual abuse by a parent, guardian, custodian, or person in a position of trust to a child in violation of West Virginia Code § 61-8D-5(a) (2005). The majority concludes that the circuit court erred by denying the Appellant's post-trial motion for a judgment of acquittal based upon the Appellant's argument that he does not meet the definition of any of the specified classes of individuals in West Virginia Code § 61-8D-5(a). I dissent because the question of whether a criminal defendant meets the statutory definitions of either a custodian or a person of trust has consistently been held to be a question of fact for the jury to decide.

West Virginia Code § 61-8D-5(a) provides, in pertinent part:

> *If any* parent, guardian or *custodian of or other person in a position of trust in relation to a child under his or her care, custody or control*, shall engage in or attempt to engage in sexual exploitation of, or in sexual intercourse, sexual intrusion or sexual contact with, a child under his or her care, custody or control, notwithstanding the fact that the child may have willingly participated in such conduct or the fact that the child may have consented to such conduct or the fact that the child may have suffered no apparent physical injury or mental or emotional injury as a result of such conduct, then such parent, guardian, custodian or person in a position of trust shall be guilty of a felony . . . .

Id. (emphasis added). A custodian is further defined in West Virginia Code § 61-8D-1(5) (2005) as "a person over the age of fourteen years who has or shares actual physical possession or care and custody of a child on a full-time or temporary basis, regardless of whether such person has been granted custody of the child by any contract, agreement or legal proceeding." *Id*. Further, a "person in a position of trust in relation to a child"

> refers to any person who is acting in the place of a parent and charged with any of a parent's rights, duties or responsibilities concerning a child or someone responsible for the general supervision of a child's welfare, or any person who by virtue of their occupation or position is charged with any duty or responsibility for the health, education, welfare, or supervision of the child.

Id.

Very recently, in *State v. Edmonds*, ___ W. Va. ___, ___S.E.2d ___, 2010 WL 4272851 (W. Va. filed October 28, 2010), a decision not even mentioned in the majority opinion, this Court was confronted with the precise question presented in the instant case.

In *Edmonds*, the defendant claimed that the State presented insufficient evidence at trial to establish that he was a "person in a position of trust"[1] to the sixteen-year-old victim in the case and that the victim was under his "care, custody or control" at the time of the alleged offense. *Id*. at ___, ___ S.E.2d at ___, 2010 WL 4727851 at *1.

The Court first examined whether the evidence was sufficient for a jury to find that the defendant was a "person in a position of trust." In upholding the jury's verdict on this issue, the Court noted that it has repeatedly found that whether a person falls within one of the four classes of individuals set forth in the provisions of West Virginia Code § 61-8D-5 is a question of fact for the jury. *See* Syl. Pt. 1, *State v. Stephens*, 206 W. Va. 420, 525 S.E.2d 301 (1999)(holding that "[a] babysitter may be a custodian under the provisions of *W. Va. Code*, § 61-8D-5[1998], and whether a babysitter [is] in fact a custodian is a question for the jury"); *see also State v. Collins*, 221 W. Va. 229, 232-34, 654 S.E.2d 115, 118-20 (2007)(determining that whether an adult who took an eleven-year-old girl four-wheeling on multiple occasions with the implicit permission of the child's mother was a temporary custodian under the provisions of West Virginia Code § 61-8D-5 (2005) was a question for the jury); *State v. Cecil*, 221 W. Va. 495, 502, 655 S.E.2d 517, 524 (2007)(finding that there was sufficient evidence to support jury's determination that the defendant was a "custodian"

[1]The circuit court also instructed the jury on the statutory definition of custodian. *Edmonds*, ___ W. Va. at ___, ___ S.E.2d at ___, 2010 WL 4272851 at *3.

of minor victims so as to uphold conviction of defendant for sexual abuse by a custodian where the defendant was the father of victim's friend).

In the instant case, however, the majority usurps the jury's role. First, the majority concludes that because the sixteen-year-old sister of the victim was "babysitting" the victim at the time of the incident, the Appellant could not be the custodian. To reach such a conclusion, the majority rejects the State's evidence that the Appellant and his wife, the victim's aunt, were called to the victim's home on the day of the incident for help in catching a hamster that had gotten loose.

The majority, likewise, rejects the jury's determination that the Appellant was a person in a position of trust in relation to a child. Again, the majority hinges its determination on its conclusion that the victim's sister was "the individual who was charged with and retained that supervisory responsibility." Once again, in reaching its conclusion, the majority rejects the State's evidence that the Appellant was the victim's uncle by marriage. The Appellant's wife also testified that the victim and her sisters had spent the night at their aunt and uncle's home on several occasions and there was evidence that the Appellant had supervised the victim on several prior occasions.

Regarding the majority's conclusion that the Appellant was not a person in a position of trust in relation to the victim, the majority does not reconcile its decision with that reached by the Court in *Edmonds*. By way of analogy, there were others (even adults) "in charge" of the victim at the school she attended on some of the occasions that the defendant in the *Edmonds* case molested her. Yet this Court made clear that the issue of whether the defendant in that case occupied a "position of trust" under the statute was a jury issue**.** In *Edmonds*, the same issue was before the Court concerning whether the jury had been presented with sufficient evidence to find that defendant was "a person in a position of trust" as the phrase is defined in the statute. W. Va. Code § 61-8D-1(12). Significantly, the Court focused upon the following:

> The jury heard testimony from multiple witnesses that the defendant maintained a consistent presence at the school and church. The defendant performed maintenance around the school/church building on multiple occasions. Angel testified that the defendant assisted her with her school work. . . . There was also testimony that the defendant played an active role in the church. He led the church in prayer and was twice listed as an "Associate Youth Pastor" in the church bulletin.

Edmonds, ___ W. Va. at ___, ___ S.E.2d at ___, 2010 WL 4272851 at *5. All of the foregoing evidence which this Court found sufficient to sustain the jury's verdict of conviction in *Edmonds* involved "prior" instances of supervision between the defendant and victim. Yet, in the instant case, when similar type evidence was introduced by the State to prove that the Appellant was a person of trust, it is rebuked by the majority. Specifically, the majority states that

> the only evidence that the State relies upon as proof that Appellant occupied the temporally relevant status of a "person in position of trust" with regard to

> the victim on the date in question is *prior* instances of supervision of . . . [the victim] that took place at the residence of Appellant and his wife. While those previous instances could be relied upon to establish that there were occasions when Appellant was responsible for the "general supervision" of the victim's "welfare," those instances do not establish that he was acting in that capacity – as a "person in a position of trust" – on the date in question.

(footnote omitted).

Additionally, the majority reaches the conclusion in a summary fashion that the victim in the instant case was not under the "care, custody or control" of the Appellant at the time she was subject to the alleged abuse, thus substituting the majority's own judgment for the factual findings of a properly instructed jury. *See* W. Va. Code § 61-8D-5(a). The Court's decision in *Edmonds*, however, provides guidance as follows, which again, was not utilized by the majority:

> The terms care, custody and control are not statutorily defined. Absent a statutory definition of these terms, we will necessarily defer to the "common, ordinary, and accepted meanings of the terms in the connection in which they are used." *In re Clifford K.*, 217 W. Va. 625, 640, 619 S.E.2d 138, 153 (2005). The word "care" is defined as "[s]erious attention; heed." Black's Law Dictionary 240 (9th ed. 2009). "Custody" is defined as "[t]he care and control of a thing or person for inspection, preservation, or security." *Id*. at 441. "Control" means "[t]o exercise power or influence over." *Id*. at 378.

Edmonds, ___ W. Va. at ___, ____ S.E.2d at ___, 2010 WL 4272851 at *6.

The Court, in *Edmonds*, then focused on the encounters between the defendant and victim. The Court found that the defendant exercised control over the victim by instructing her on where to lie down, where to sit and not to tell anyone. *Id.* In the instant

case, the State offered evidence that the victim was scared and froze most of the time. Thus, there was evidence for the jury to conclude that the Appellant's exercise of power and influence over the victim caused such fear in her that she could not avoid or get away from the abuse inflicted upon her by her uncle.

While the majority correctly sets forth the standard of review applicable to sufficiency of the evidence, they do not set forth another part of the equation in their review. In syllabus point three of *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

> A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt.

The majority ignores the Appellant's heavy burden and sets aside the jury verdict where the State did present evidence from which the jury properly convicted the Appellant of the crime charged. *Id*.

In so doing, the majority has taken a statute, West Virginia Code § 61-8D-5, that in 2005 was expanded by the Legislature to include an even broader group of individuals and, at least in this case, rendered the statute meaningless by construing the statute in

restrictive manner and in substituting its judgment of the facts for that of the jury. As the Court has previously held,

> "A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute." Syllabus Point 3, *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 530 S.E.2d 676 (1999). It is presumed that each word in a statute has a definite meaning and purpose. *State ex rel. Johnson v. Robinson*, 162 W. Va. 579, 582, 251 S.E.2d 505, 508 (1979). "It is always presumed that the legislature will not enact a meaningless or useless statute." Syllabus Point 3, *United Steelworkers of America, AFL-CIO, CLC v. Tri-State Greyhound Park*, 178 W. Va. 729, 364 S.E.2d 257 (1987) (citing Syllabus Point 4, *State ex rel. Hardesty v. Aracoma-Chief Logan No. 4523, V.F.W.*, 147 W. Va. 645, 129 S.E.2d 921 (1963)). Courts should favor the plain and obvious meaning of a statute as opposed to a narrow or strained construction. *Thompson v. Chesapeake & O. Ry. Co.*, 76 F. Supp. 304, 307-308 (S.D. W. Va.1948).

T. Weston, Inc. v. Mineral County, 219 W. Va. 564, 568, 638 S.E.2d 167, 171 (2006). The majority has construed this statute in such a narrow manner that the victim's uncle who sexually assaulted his twelve-year-old niece does not, *as a matter of law*, fall within the statutory purview of "a parent, guardian, custodian, or person in a position of trust to a child," notwithstanding ample evidence to support the jury's factual conclusion that he was a custodian and "person in a position of trust" to his niece. W. Va. Code § 61-8D-5(a). This construction by the majority violates the most basic tenets of statutory construction.

The majority's decision that, as a matter of law, the Appellant does not fall within one of the four statutory classes of individuals effectively renders the well-established role of the jury in this decision as meaningless. For the foregoing reasons, I respectfully dissent.