

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA,
Plaintiff below, Appellee

vs.) No. 35540 (Morgan County 07-F-20)

TEX B. SIMMONS,
Defendant below, Appellant

FILED
February 11
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA, 2011

MEMORANDUM DECISION

Following a jury trial, Tex B. Simmons (hereinafter “Mr. Simmons”), appellant herein and defendant below, was convicted of one count of first degree sexual assault and one count of sexual abuse by a custodian. By order entered on September 29, 2009, the Circuit Court of Morgan County sentenced Mr. Simmons to two consecutive sentences: twenty-five to one hundred years on the sexual assault conviction and ten to twenty years on the conviction of sexual abuse by a custodian.¹ After a careful review of the briefs submitted by the parties, the record submitted for appeal, the oral arguments presented to this Court, and the applicable case law, we determine that the circuit court committed no prejudicial error. This Court further finds that this case presents no new or significant questions of law. Therefore, this case will be disposed of through a memorandum decision as contemplated under Rule 21 of the Revised Rules of Appellate Procedure.

The facts underlying this appeal are brief. Mr. Simmons was charged with sexual assault in the first degree and sexual abuse by a custodian. The victim was four-year-old, A.M.,² whose mother, Sharlene Simmons, was married to Mr. Simmons. While

¹On appeal, Mr. Simmons set forth various assignments of error. One issue was accepted for review: whether the circuit court erred in allowing the introduction of the child’s statements through the testimony of her mother, Nurse Leahy, and Officer Link.

²Because of the sensitive nature of the facts alleged in this case, we follow our normal practice and refer to the child by her initials rather than by her full name. *See, e.g., In re Cesar L.*, 221 W. Va. 249, 252 n.1, 654 S.E.2d 373, 376 n.1 (2007); *In re Randy H.*, 220 W. Va. 122, 125 n.1, 640 S.E.2d 185, 188 n.1 (2006); *In re Clifford K.*, 217 W. Va. 625, 630 n.1, 619 S.E.2d 138, 143 n.1 (2005); *State ex rel. West Virginia Dep’t of Human Servs. v.*

Sharlene worked, Mr. Simmons provided childcare to her three children. On April 6, 2006, Sharlene was working late and her three children were left in the care of Mr. Simmons. As was her normal practice, A.M. fell asleep on the couch in the living room and was still there in the early hours of April 7, 2006, when her mother returned from work.

The two older children left for school at 7:30 a.m., then A.M. approached her mother and told her that, during the night, “Tex put his pee pee in my mouth and peed and kept it there until I swallowed.” Sharlene called her pastor for advice on how she should react, who then called social services and received the recommendation that A.M. should be taken to a medical facility. Sharlene took A.M. to Winchester Medical Center, where she was examined and evaluated by Nurse Cynthia Leahy. Nurse Leahy is a forensic nurse and collected information including A.M.’s medical history, medications, previous surgeries, and other pertinent health-related issues. During the examination, A.M. told Nurse Leahy that

I was asleep on the couch. Something came out it and went down my throat. It had a yucky taste. I was still asleep while he was doing that. I remember it. I still have a yucky taste from it. I cried this morning because I still had the taste.

Samples were also collected from A.M.’s mouth using lip swabs, oral rinse, and floss. The oral samples, along with a blood sample, were sealed in an evidence kit and provided to Officer Tony Link.

Officer Link investigated the allegations, including taking possession of the evidence collected at the hospital, as well as taking possession of a pillow that A.M. had used on the night in question. Officer Link, along with a caseworker, also interviewed A.M. While they admit the interview was difficult, Officer Link testified that he was told by A.M. that she had a “yucky taste in her mouth that went down her throat” and that “Tex had put that taste in her mouth.”³ The West Virginia State police tested the forensic evidence and found that the swabs from around A.M.’s mouth contained traces of seminal fluid. However, no Y chromosomes were present; therefore, DNA testing was inconclusive in identifying the male who deposited the seminal fluid.

Cheryl M., 177 W. Va. 688, 689 n.1, 356 S.E.2d 181, 182 n.1 (1987).

³Officer Link also testified that Mr. Simmons alluded to his wife’s altered mental condition, and implied that she might have collected the semen from him during the night and provided it to A.M. to drink. The evidence reveals that Sharlene was injured in a car accident years prior to this event and that she had difficulty with both short-term and long-term memory, in addition to other mental deficits caused by the accident.

The trial was held November 18 and 19, 2008. The victim was now seven years old. She was called to the stand by the prosecution and was questioned on direct and cross examination, as well as redirect and re-cross examination. During questioning, the child declared that she could not recall the events in question. The trial court found A.M. to be an unavailable witness pursuant to West Virginia Rule of Evidence 804(a)(3). The lower court allowed testimony by the child's mother, Nurse Leahy, and Officer Link regarding statements the child had made to them at the time of the incident. The jury found Tex Simmons guilty of one count of sexual assault in the first degree pursuant to W. Va. Code § 61-8B-3 (2006) (Repl. Vol. 2010) and of one count of sexual assault by a custodian pursuant to W. Va. Code § 61-8D-5(a) (2005) (Repl. Vol. 2005). Mr. Simmons filed this appeal asserting several assignments of error. However, this Court accepted review of only one issue: whether the circuit court erred in allowing the child victim's statements to be introduced into evidence through the testimony of her mother, Nurse Leahy, and Officer Link after the child testified that she did not remember the incident.

On appeal to this Court, Mr. Simmons argues that the circuit court erred in allowing the child victim's statements to be introduced into evidence through the testimony of her mother, Nurse Leahy, and Officer Link⁴ after the child testified that she did not remember the incident. Mr. Simmons contends that the child's inability to remember the incident does not fulfill the requirements of an "unavailable" witness such that it would meet the exceptions to the general rule against the admissibility of hearsay statements.

Upon review, regardless of whether the lower court's determination that the child was "unavailable" was correct, we determine that the complained-of testimony was

⁴While Mr. Simmons's assignment of error sets forth his disagreement with the admission into evidence of the testimony of the victim's mother, Nurse Leahy, and Officer Link, a review of both his brief and his reply brief shows a failure to address the issue of Officer Link's testimony. Therefore, this issue is deemed waived. *See In re Edward B.*, 210 W. Va. 621, 625 n.2, 558 S.E.2d 620, 624 n.2 (2001) ("Because the errors, as assigned in the Appellant's petition for appeal, were neither assigned nor argued in the Appellant's brief they are hereby waived."); *Britner v. Medical Sec. Card, Inc.*, 200 W. Va. 352, 354 n.5, 489 S.E.2d 734, 736 n.5 (1997) ("The defendants' petition for appeal cited as error the circuit court's application of the five year statute of limitations to this case. However, the defendants did not address that issue in their brief and therefore have abandoned that assignment of error."); Syl. pt. 6, *Addair v. Bryant*, 168 W. Va. 306, 284 S.E.2d 374 (1981) ("Assignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived.").

properly admitted.⁵ Mr. Simmons relies on *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), for his argument that the child victim's statements were improperly admitted through her mother and the examining nurse as he argues that he had no opportunity to confront the statements at issue because the child was declared to be unavailable.

We disagree with Mr. Simmons's application of *Crawford*. The *Crawford* decision concerns "admission of a testimonial statement by a witness who does not appear at trial, unless the witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness." Syl. pt. 6, *in part*, *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006) (applying *Crawford* to Confrontation Clause issues). In this case, the child victim, the child's mother, and the examining nurse were available to testify. In fact, the child victim was examined on direct examination, cross examination, redirect examination, and re-cross examination before she was declared to be "unavailable." Moreover, Mr. Simmons was in possession of the psychological report concerning the child victim's lack of memory, as well as the police report and medical report, both of which contained information regarding the child's statements to her mother⁶ and to Nurse Leahy.⁷

⁵We previously have held, "[t]his Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment." Syl. pt. 3, *Barnett v. Wolfolk*, 149 W. Va. 246, 140 S.E.2d 466 (1965). *See also* *Murphy v. Smallridge*, 196 W. Va. 35, 36-37, 468 S.E.2d 167, 168-69 (1996) ("An appellate court is not limited to the legal grounds relied upon by the circuit court, but it may affirm or reverse a decision on any independently sufficient ground that has adequate support."); *Longwell v. Hodge*, 171 W. Va. 45, 47, 297 S.E.2d 820, 822 (1982) ("We agree with the Circuit Court, and affirm its decision, although for different reasons than those expressed by the lower court.").

⁶The mother's testimony describes what her daughter told her, which was the explanation as to why she called her pastor and took A.M. to the hospital. The child's statement was the impetus for the mother's actions. While Mr. Simmons makes an allegation that the mother's brain injury from a previous car accident makes her testimony inadmissible, we find this assertion to be meritless. The mother's deficits were fully explored during both direct and cross examination. Therefore, the weight to be afforded the mother's testimony became an issue of credibility for the jury.

⁷Moreover, the child's statements to Nurse Leahy are admissible because they were made for medical purposes. *See* Syl. pt. 6, *State v. Payne*, 225 W. Va. 602, 694 S.E.2d 935 (2010) ("When a child sexual abuse or assault victim is examined by a forensic nurse trained

All of these materials were in Mr. Simmons's possession prior to trial and allowed his counsel to properly prepare to confront the statements contained therein, especially in light of the fact that the witnesses appeared at trial and testified. Therefore, we find no violation of *Crawford* or the Confrontation Clause in this case. Accordingly, we find that it was proper to allow the prior statements of the child victim to be introduced into evidence through the testimony of the child's mother and the examining forensic nurse.

For the foregoing reasons, we find no error in the circuit court's decisions to admit the testimony. Therefore, the convictions and resulting sentences are affirmed.

Affirmed.

ISSUED: February 11, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Thomas E. McHugh

in sexual assault examination, the nurse's testimony regarding statements made by the child during the examination is admissible at trial under the medical diagnosis or treatment exception to the hearsay rule, *West Virginia Rule of Evidence* 803(4), if the declarant's motive for making the statement was consistent with the purposes of promoting treatment and the content of the statement was reasonably relied upon by the nurse for treatment. In determining whether the statement was made for purposes of promoting treatment, such testimony is admissible if the evidence was gathered for a dual medical and forensic purpose, but it is inadmissible if the evidence was gathered strictly for investigative or forensic purposes."'). The four-year-old's statements to the nurse examining her at a medical facility were clearly for the purpose of treatment and were relied upon by Nurse Leahy to determine what medical tests were needed to treat and protect the child.