
NO. 33300

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

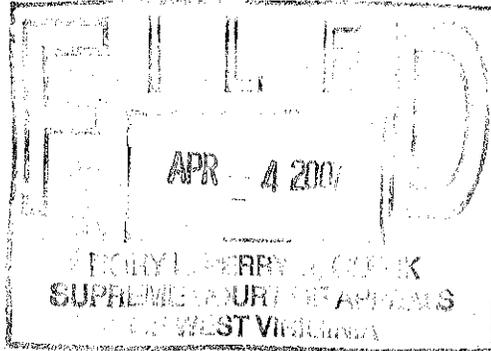
STATE OF WEST VIRGINIA,

Appellee,

v.

KENNETH RAY COLLINS,

Appellant.



BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

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BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

I.

**KIND OF PROCEEDING AND
NATURE OF THE RULING BELOW**

This is an appeal by Kenneth Ray Collins (hereinafter "Appellant") from the December 30, 2005, order of the Circuit Court of Mingo County (Thornsbury, J.), denying his motion for reconsideration. Appellant moved for reconsideration of a sentence of not less than ten years nor more than twenty years in the State Penitentiary, upon his conviction by a jury of one count of sexual abuse by a parent, guardian or custodian, in violation of West Virginia Code § 61-8D-5 and a term of ninety days in the State Penitentiary, upon his conviction by a jury of one count of sexual abuse in the third degree, in violation of West Virginia Code § 61-8B-9 to be served concurrently. On appeal, Appellant claims that the circuit court committed error by not directing a verdict of acquittal on the charge of sexual abuse by a custodian at the close of the State's case-in-chief and by its submitting to the jury any instructions on that charge.

II.

STATEMENT OF FACTS

In August 2002, Samantha Hope Owens (hereinafter "the victim"), a minor, was reported missing in Mingo County by her mother, Ms. Tina Pennington. (Tr. vol. I, 125, Jan. 10, 2005.) Corporal Mark Muncy of the West Virginia State Police conducted the investigation. Eventually, Samantha Owens came home.¹ (*Id.* at 127.) During the course of these events, Ms. Pennington told Corporal Muncy that Samantha had made allegations of past sexual assaults against her. (*Id.* at 128.) Corporal Muncy advised Ms. Pennington to take her child to Child Protective Services and report the matter to Ms. Rhonda Pack. (*Id.*) Ms. Pack later informed Corporal Muncy that Appellant was the suspect in these allegations of sexual assault. (*Id.* at 129.) A videotaped statement of the victim by Child Protective Services was provided to Corporal Muncy regarding these allegations. (*Id.* at 146.)

Samantha Owens testified at trial that she knew Appellant as she was growing up and that he dated her aunt. (*Id.* at 214-15.) She stated that around August 2000, she was living at Appellant's parents' house in Taylorville because her mother had no place to live. (*Id.* at 215.) Although Appellant did not live there, he came over to his parents' house quite frequently. On numerous occasions, Appellant and Samantha would go riding on his four-wheeler. (*Id.* at 216.) On one of these trips, Appellant took the victim up some hills near his parents' house. Appellant stopped the four-wheeler and asked Samantha Owens to give him oral sex. (*Id.* at 217.) Samantha Owens was eleven years of age at this time. (*Id.* at 221.) Samantha testified that Appellant told her that he

¹The Federal Bureau of Investigations (FBI) was contacted in this matter, but it was determined that the victim's mother made a false report. Samantha Owens was with some other people and did not return home on time. (Tr. vol. I, 125-26, Jan. 10, 2005.)

would not take her home until she performed oral sex on him. (*Id.*) Samantha stated that she was scared at this time. Appellant pulled down his pants, and Samantha put his penis in her mouth until he ejaculated. (*Id.* at 218-20.) Samantha testified that after this happened, she was crying to go home. (*Id.* at 220.) According to the victim, she was under his supervision at the time. (*Id.* at 221.)

Approximately a year later when Samantha Owens was twelve years old, she spent the night with Appellant and his wife Melissa. During this occasion, Samantha testified that Appellant sexually assaulted her again. She stated that she was going to take a bath. When she went in Melissa's room to get a shirt to wear after her bath, Appellant came in the room, pushed her on the bed, put his hand over her mouth and put the shirt over her face. (*Id.* at 224.) Appellant then proceeded to put his penis in the victim's vagina and forced sexual intercourse on her. (*Id.* at 225.) Samantha tried to kick and force Appellant off of her but to no avail. (*Id.*) She stated that she was very scared at the time this occurred. Samantha tried to scream but could not do so. She said that she was crying at the time of the forced sex and immediately thereafter. (*Id.* at 226.) She testified that Appellant was the only adult in the house at the time and was supervising her. (*Id.* at 227.) After this second sexual incident occurred, Samantha stated that Appellant told her not to tell anyone about the incident in a very angry voice. (*Id.* at 228.)

Corporal Muncy asked Appellant to come in for questioning on the matter, and on August 6, 2002, the latter complied. (*Id.* at 138.) When Appellant arrived at the State Police office, Corporal Muncy told him that he was not under arrest, could leave at any time, and read him his *Miranda* rights. (*Id.* at 133-34.) Corporal Muncy then wrote a statement based on what Appellant said to him. Once Corporal Muncy read the statement back to Appellant, the latter signed it with Sergeant J.J.

Lester witnessing the same.² (*Id.* at 141, 206.) Sergeant Lester then signed the statement indicating that he witnessed Appellant signing it in his presence. (*Id.*)

In this statement, Appellant stated that he took Samantha four-wheel riding about two years earlier. He said that during this ride, Samantha kept feeling his penis. According to Appellant, he stopped the vehicle and told Samantha to quit touching him or they would go home. (*Id.* at 138.) Appellant said that she then jerked his pants down and took his penis in her hands and started playing with it. (*Id.* at 139.) He then stated that she put his penis in her mouth, placed her tongue around it and then took it out, saying, "this is nasty." (*Id.*) Appellant then said that he pulled his pants back up and took Samantha back to his father's house.

Appellant then stated that a year later Samantha was staying at him and his girlfriend's³ house when she hollered for him to come into a room where she was. When he did so, he stated that Samantha started kissing him and "grabbing him by the penis." (*Id.*) According to Appellant's statement, he then pushed Samantha down on the bed where she proceeded to take her shirt off and started jumping on the bed until Melissa came into the room. Appellant said that once Melissa came in, Samantha ran into the bathroom. (*Id.*)

Based on the videotape provided by Child Protective Services and Appellant's statement, Corporal Muncy obtained a warrant for Appellant's arrest and Trooper Milum served him with it. (*Id.* at 143.)

²Corporal Muncy wrote Appellant's statement down for him because, other than his name, Appellant could not read or write English. (Tr. vol. I, 131-32, 128, Jan. 10, 2005.)

³In her testimony at trial, Samantha Owens referred to Melissa Baker as Appellant's wife when this alleged incident occurred.

At trial, Appellant actually denied everything written in the statement that he signed at the State Police headquarters on August 6, 2005, and stated that he did not commit any of the offenses charged against him. (Tr. vol. II, 37-42, Jan. 12, 2005.) Despite his denying these offenses, the jury handed down a verdict of guilty of sexual abuse by a parent, guardian or custodian and third degree sexual abuse.⁴ (*Id.* at 166-56.)

III.

RESPONSE TO ASSIGNMENTS OF ERROR

Appellant's assignment of error is quoted below, followed by the State's response:

The trial court erred when it failed to direct a verdict of acquittal on the charge of sexual abuse by a custodian at the close of the State's case-in-chief, and erred in submitting to the jury any instructions on that charge.

State's Response:

The trial court did not err in denying Appellant's motion for a directed verdict of acquittal on the charge of sexual abuse by a custodian at the close of the State's case-in-chief nor when it submitted instructions on the charge because the relationship of Appellant with the victim was sufficient for a jury to deem it as one of a custodian for purposes of West Virginia Code § 61-8D-5 prior to its amendment by the State Legislature in 2005.

⁴Appellant was found not guilty of sexual abuse by a custodian regarding the alleged incident in 2001 at his house and contained in Count IV of the indictment. (Tr. vol. II, 156, Jan. 12, 2005.) The State will discuss this alleged incident as well due to Appellant's discussion of his version of the incident in his Brief as well as to show that he had a custodial relationship with the victim.

IV.

ARGUMENT

APPELLANT HAD A SUFFICIENT CUSTODIAL RELATIONSHIP WITH THE VICTIM IN ORDER TO BE DEEMED A CUSTODIAN OF HER FOR PURPOSES OF SEXUAL ABUSE BY A CUSTODIAN UNDER WEST VIRGINIA CODE § 61-8D-5 BEFORE IT WAS AMENDED BY THE STATE LEGISLATURE IN 2005. THEREFORE, THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR DIRECTED VERDICT OF ACQUITTAL AND ITS INSTRUCTING THE JURY ON SUCH CHARGE.

Appellant contends that his relationship with Samantha Owens did not constitute one that would be deemed custodial in nature in order for a jury to convict him of sexual abuse by a parent, guardian or custodian in violation of West Virginia Code § 61-8D-5 as the statute read when the alleged offenses occurred. However, although the West Virginia State Legislature did amend this statute in 2005 to expand those covered under it to include the words "or other person in a position of trust in relation to" with respect to a child, the statutory language before this amendment was sufficient to characterize his relationship with the victim as a custodian in order for the jury to convict him of this charge. Thus, the trial court did not err in its denial of his motion for a directed verdict of acquittal. Likewise, the trial court did not err in submitting the instructions to the jury regarding this offense.

1. **The Standard of Review.**

Before the statute was amended in 2005, West Virginia Code § 61-8D-5 stated, in pertinent part,

(a) In addition to any other offenses set forth in this code, the Legislature hereby declares a separate and distinct offense under this subsection, as follows: If any parent, guardian or custodian of 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 or custodian shall be guilty of a felony and, upon conviction thereof, shall be imprisoned in the penitentiary not less than ten nor more than twenty years, or fined not less than five hundred nor more than five thousand dollars and imprisoned in the penitentiary not less than ten years nor more than twenty years.

Additionally, West Virginia Code § 61-8D-1(4) defines a custodian for purposes of § 61-8D-5 as follows:

“Custodian” means 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. “Custodian” shall also include, but not be limited to, the spouse of a parent, guardian or custodian, or a person cohabiting with a parent, guardian or custodian in the relationship of husband and wife, where such spouse or other person shares actual physical possession or care and custody of a child with the parent, guardian or custodian.

2. **The Relationship Appellant Had with Samantha Owens Was That of a Custodian as Provided under West Virginia Code § 61-8D-5 Prior to the State Legislature’s Amending the Statute; and Thus, a Jury Could Indeed Find Him Guilty of the Offense of Sexual Assault by a Custodian.**

Appellant contends that his relationship with Samantha Owens did not constitute that of a custodian in order to be convicted of sexual abuse by a parent, guardian or custodian in accordance with West Virginia Code § 61-8D-5 prior to its amendment in 2005. Appellant characterizes this relationship in which he was convicted of this crime as merely “someone taking an alleged victim on a four-wheeler ride” and represents the other alleged incident of sexual assault in which he was ultimately found not guilty by the jury as “allegations of sexual contact at his home” in an attempt to show that he was not a custodian when these offenses occurred. This fails to accurately represent his custodial relationship with the victim, however.

During the trial, the instructions given to the jury regarding sexual abuse by a custodian and the definition of custodian were as follows:

Sexual abuse by a custodian is committed when any parent, guardian or custodian of a child under his or her care, custody or control, engages in, or attempts to engage in, 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 suffered no apparent physical injury or mental or emotional injury as a result of such conduct.

Definition of Custodian. "Custodian" means any 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.* at 77-78, 85, 111-12, and 119-20.)⁵

It is clear from these definitions in the jury instructions that it was in conformity with the statutory language of West Virginia Code § 61-8D-5 prior to its being amended in 2005 and with that of § 61-8D-1(4). Additionally, these definitions contained in the instructions were adequate for the jurors to convict Appellant of the offenses charged based on the facts of the case.

Appellant was undoubtedly a custodian to Samantha Hope Owens in this case when the offenses occurred, albeit on a temporary basis. The statutory language of § 61-8D-5 states that one who engages in sexual contact or attempts to engage in sexual contact while a child is in one's care, custody or control is in violation of the statute. When Appellant took the victim on the four-wheeler rides in the hills near his parents' house, he indeed had care, custody and control of her on a temporary basis. Samantha testified that Appellant took her on these rides on numerous occasions

⁵These definitions were given as instructions to the jury for both Count II of the indictment, concerning the alleged offense of August 2000, and Count IV of the indictment, concerning the alleged offense occurring between July and September 2001. It is worth noting that during the discussion of these instructions with the judge and the parties as well as the reading of them to the jurors, at no time did Appellant's counsel object to the definitions which he now asserts amounted to error. (Tr. vol. II, 77-124, Jan. 12, 2005.)

and that she was under his supervision. (Tr. vol. I, 216, 221, Jan. 10, 2005.) The fact that Appellant said to Samantha Owens that they would not leave the area of the hills and go home before she performed oral sex on him establishes that he had control over her. (*Id.* at 221.) Further, Appellant's being alone with Samantha Owens at his home when his girlfriend was away where the second alleged offense occurred establishes that he had temporary care, custody and control over this child in conformity with the statute. Likewise, these two events show that Appellant was a custodian under the statutory definition of West Virginia Code § 61-8D-1(4) in that he was more than fourteen years of age and had temporary control and possession of the victim when these acts of sexual abuse occurred. The jury instructions complied with this statutory language, and the judge's giving them to the jurors was proper.

The language of the 2005 amendment to West Virginia Code § 61-8D-5 which expanded the statute was not necessary to convict Appellant of sexual abuse by a custodian against Samantha Owens, and the jury did not rely on such expansive language. In *State v. Potter*, 197 W. Va. 734, 478 S.E.2d 742 (1996), a trial court convicted a defendant of sexual abuse by a custodian and this Court upheld the conviction where sexual contact occurred against a child by a pastor who befriended the victim, taking him places and having him spend the night in his apartment. The sexual contact took place on these occasions where the victim spent the night with the pastor and was sufficient with respect to custody, control and care to convict the latter of the offense. Similarly, in *State v. Stephens*, 206 W. Va. 420, 525 S.E.2d 301 (1999), the definition of "custodian" was upheld for purposes of West Virginia Code § 61-8D-5 prior to its 2005 amendment where the offense took place by a babysitter while left in charge of three small children for a half-hour time period. In that case, the Court held, "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 under this statute is a question for the jury.” Syl. Pt. 1, *State v. Stephens*. Accordingly, an adult taking a child on four-wheeler rides and being the sole adult at home while the victim is spending the night at his house—and in both instances where the victim considers the adult’s role as supervising her—are sufficient positions of custody, possession and control to be deemed a custodian for a conviction under West Virginia Code § 61-8D-5. As *Stephens, supra*, establishes, this is a matter for the jury to decide, and in the present case the jurors deemed Appellant a custodian and convicted him of sexual abuse by a custodian without relying on the expansive language of the 2005 amendment based on the evidence presented.

As was brought forth at trial, Appellant forced Samantha Owens to give him oral sex while on a four-wheeler ride while she was under his care, custody and control. Yet, even if one were to believe Appellant’s version of events in his police statement regarding the August 2000 four-wheeler ride where the victim “pulled his pants down and stuck his penis in her mouth,” he could still easily be convicted of sexual abuse by a custodian in going along with the act since the statute states that one is in violation where sexual contact occurs even if “the child may have consented to such conduct.”

In light of the fact that Appellant sexually abused Samantha Owens while she was in his care, custody and control when these offenses occurred—albeit brief time periods—a jury could indeed convict him of sexual abuse by a custodian in violation of West Virginia Code § 61-8D-5. Appellant asserts that this conviction was based on the more expansive language of the 2005 amended statute, yet he gives no evidence to support this. Thus, the trial court did not err when it denied Appellant’s motion for a directed verdict of acquittal at the end of the State’s case-in-chief and when it gave the instructions to the jury.

V.

CONCLUSION

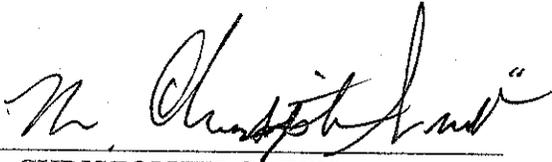
For the foregoing reasons, the judgment of the Circuit Court of Mingo County should be affirmed by this Honorable Court.

Respectfully submitted,

State of West Virginia,
Appellee,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

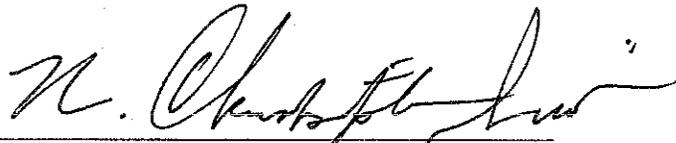
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CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of Appellee, State of West Virginia* was mailed to counsel for the Appellant by depositing it in the United States mail, first-class postage prepaid, on this 4th day of April, 2007, addressed as follows:

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