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NO. 33314

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

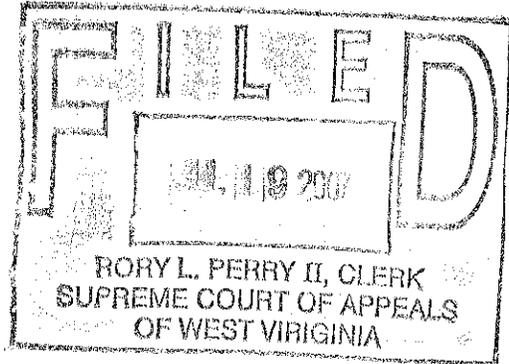
STATE OF WEST VIRGINIA,

*Appellee,*

v.

DAVID FARRIS,

*Appellant.*



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BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

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DARRELL V. McGRAW, JR.  
ATTORNEY GENERAL

R. CHRISTOPHER SMITH  
ASSISTANT ATTORNEY GENERAL  
State Bar ID No. 7269  
State Capitol, Room E-26  
Charleston, West Virginia 25305  
(304) 558-2021

*Counsel for Appellee*

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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 David Farris (hereinafter "Appellant") from the May 30, 2006 order of the Circuit Court of Mingo County (Thornsbury, J.), which sentenced him to a term 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(a) (Count I); a term of not less than fifteen years nor more than thirty-five years in the State Penitentiary, upon his conviction by a jury of one count of first degree sexual assault, in violation of West Virginia Code § 61-8B-3 (Count II); a term 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(a) (Count III) and a

term of not less than fifteen years nor more than thirty-five years in the State Penitentiary, upon his conviction by a jury of one count of first degree sexual assault, in violation of West Virginia Code § 61-8B-3 (Count IV). According to the sentencing order, Appellant is to serve the sentence for Count II first; with the sentence for Count I running concurrently with that of Count II. Appellant is then to serve the sentence for Count IV; to be served consecutively with that for Counts I and II. The sentence for Count III is to run concurrently with Count IV. On appeal, Appellant claims that the circuit court committed error on various evidentiary grounds and denied Appellant a fair trial.

## II.

### STATEMENT OF FACTS

This case arises out of crimes of sexual abuse committed against two minor children, Autumn B. and Shannon B., by Appellant while he and his wife were babysitting them one evening in September 2004. (R. at 1-2; Tr. 9, 23.) During the summer of 2004, Appellant and his wife babysat Autumn B. and Shannon B. while their mother, Joyce Spradlin and her husband worked late on evenings. Appellant and his wife babysat Autumn B. and Shannon B. primarily on weekends. (Tr. 17-18.) On November 1, 2004, Autumn B. and Shannon B. related the incidents of sexual assault against them by Appellant. (Tr. 16.) When these events of sexual abuse occurred, Shannon B. was eight and Autumn B. was nine years of age. (*Id.* at 31.) When the girls revealed the events to their mother, Ms. Spradlin and her family were living in Kentucky, and she reported the matter on November 2, 2004 to Chief Roby Pope, Jr., of the Williamson Police Department in Mingo County, West Virginia.<sup>1</sup> (*Id.* at 4, 19.) At this time, Ms. Spradlin filed a complaint against Appellant. (*Id.*

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<sup>1</sup>Initially, Ms. Spradlin reported the matter the day that her daughters related the incidents to her on November 1, 2004, to the Kentucky State Police, but they advised her that she had to notify law enforcement in West Virginia where the offenses occurred. (Tr. 19.)

at 5.) Chief Pope reported the matter to Child Protective Services (CPS) in Williamson on November 8, 2004. (*Id.*)

On November 16, 2004, Mingo County CPS worker, Nettie Goan, conducted interviews with the two girls regarding the sexual assault allegations. (*Id.*) Ms. Goan testified at trial that during the interviews, she discovered that Appellant sexually assaulted or abused the two girls. (*Id.* at 72.) Autumn B. and Shannon B. also related to Ms. Goan that they had snorted green pills, smoked marijuana out of a bong and drank Bud Light on the night in question. (*Id.* at 80-81.) The CPS worker also discovered that the girls watched pornographic movies at Appellant's apartment that evening. (*Id.* at 80.) Based on her interviews, Ms. Goan found both girls to be credible. (*Id.* at 74, 81 and 83.)

Mingo County Child Protective Services referred Autumn and Shannon to Dr. Joan Phillips, a pediatrician and co-director of the Child Advocacy Center at Women and Children's Hospital in Charleston, West Virginia, and on December 14, 2004, an examination was conducted on both girls. (*Id.* at 124, 127.) In an interview with a pediatric resident, Shannon B. revealed that there had been sexual contact with someone named David. (*Id.* at 128.) Upon physical examination, Dr. Phillips discovered that Shannon B. had an abnormal vaginal exam showing portions of the hymen missing. This was indicative of a strong possibility of a penetration injury, and it was concluded with a reasonable degree of medical probability that she suffered from abuse. (*Id.* at 130-32.)

When Dr. Phillips conducted an examination of Autumn B., it was discovered that her vaginal area was normal. (*Id.* at 135.) Although she had no signs of tear to the hymen and had a normal vaginal exam, Dr. Phillips stated that it did not mean that no sexual abuse occurred. (*Id.*) In fact, Dr. Phillips testified that only about five percent of children who suffer from sexual abuse

show signs of vaginal penetration. (*Id.*) At the conclusion of her testimony, Dr. Phillips stated that there were no signs in either of the girls demeanor that would cause her to doubt that they were victims of sexual abuse. (*Id.* at 135-36.)

Robin Browsoski, a forensic interviewer at the Child Advocacy Center in Pikeville, Kentucky, conducted an interview with the victims on March 22, 2005. (*Id.* at 91.) Ms. Browsoski testified that the girls revealed to her that the perpetrators of the sexual abuse against them were David and Tina Farris. (*Id.* at 92.) Just as with Ms. Goan and Dr. Phillips, Ms. Browsoski stated that she found the girls to be credible. (*Id.* at 94.)

Dr. Dorothy Holihan, the Victims Services Therapist for Pike County, Kentucky, treated the girls through counseling on two separate occasions, beginning June 13, 2005. (*Id.* at 108.) Dr. Holihan discovered that Shannon B. had problems of bed-wetting that coincided with the incident of sexual abuse. (*Id.* at 109.) The therapist stated that the girls suffered from feelings of hurt and fear. (*Id.*) Both girls had reoccurring nightmares. Dr. Holihan discovered that Autumn B. was acting out, engaging in behavioral problems, picking at her sister, failing to listen to her mother, threatening to hurt herself and mentioning that she wanted to die. (*Id.*) Both girls experienced a drop in their grades at school. The therapist testified that all of this behavior was common in children who have been victims of sexual abuse. (*Id.*) Dr. Holihan testified that both girls feared that they and their mother were in danger. (*Id.* at 111.) Based on their sexual knowledge, Dr. Holihan stated that she had no doubt that the girls were victims of sexual abuse. (*Id.* at 117.) As with the other professionals who treated the girls, Dr. Holihan testified that she found them credible and that their demeanors were consistent with children who were victims of sexual abuse. (*Id.* at 112.)

Both Autumn B. and Shannon B. testified at trial. According to Shannon B., while she and her sister were at Appellant's apartment, he made them take off their clothes. (*Id.* at 66.) Autumn B. testified that Appellant licked each girl's vagina and stuck his penis inside of it. (*Id.* at 38-39.) Both girls stated that Appellant had sex with them, and they both witnessed him sexually abusing the other sister. (*Id.* at 38-43, 56-57.) According to both victims, Appellant made them drink beer and vodka and orange juice, smoke marijuana out of a bong, smoke cigarettes and snort crushed pills through a straw. (*Id.* at 46-47, 62-63.) Additionally, Autumn B. testified that marijuana smoke from a bong was blown in her face. (*Id.* at 47.) While the acts of sexual abuse were occurring, Appellant's wife, Tina, was present in the same room. (*Id.* at 41, 64.) Both girls stated that Appellant and Tina made them watch pornographic movies on the night in question. (*Id.* at 41-42, 64-65.) Regarding Appellant having intercourse with them, both Autumn B. and Shannon B. said that it was painful and made them feel bad. (*Id.* at 39-41, 59.)

On February 1, 2006, a jury convicted Appellant on two counts of sexual abuse by a custodian and two counts of first degree sexual assault. (R. at 16-19.)

### III.

#### RESPONSES TO ASSIGNMENTS OF ERROR

Appellant's assignments of error are quoted below, followed by the State's responses:

- A. THE NEWLY-DISCOVERED EVIDENCE OF DR. BROWSOSKI'S REPORT OF THE INTERVIEW WITH BARBARA R. REQUIRES A NEW TRIAL.

**State's Response:**

The report of Robin Brownsoski from the interview of Barbara R. could have been secured with due diligence by Appellant before the verdict was handed down. Therefore, it was not newly-discovered evidence, and a new trial is not warranted.

- B. THE FAILURE OF THE PROSECUTOR TO DISCLOSE DR. BROWSOSKI'S REPORT VIOLATED *BRADY V. MARYLAND* AND CONSTITUTES REVERSIBLE ERROR.

**State's Response:**

The Brownsoski report based on the interview of Barbara R. could not reasonably be taken to put the entire case in such a different light as to undermine the confidence in the verdict.

- C. THE CIRCUIT COURT'S FAILURE TO HOLD AN EVIDENTIARY HEARING ON APPELLANT'S MOTION FOR NEW TRIAL WAS AN ABUSE OF DISCRETION.

**State's Response:**

The trial court properly used its discretion in denying Appellant an evidentiary hearing on his motion for a new trial. Thus, the court's decision should not be reversed.

- D. THE ADMISSION OF THE TESTIMONY OF CHIEF ROBY POPE IMPROPERLY VOUCHING FOR THE VICTIMS' CREDIBILITY CONSTITUTES PLAIN ERROR.

**State's Response:**

Chief Pope's testimony did not constitute plain error because it did not affect the fundamental fairness of the trial. His stating that he found the victims credible during interviews was presented for purposes of explaining his investigation of Appellant rather than for bolstering.

#### IV.

#### ARGUMENT

**A. ROBIN BROWSOSKI'S REPORT OF HER INTERVIEW WITH BARBARA R. DOES NOT REQUIRE A NEW TRIAL BECAUSE IT DOES NOT CONSTITUTE NEWLY-DISCOVERED EVIDENCE IN THAT DUE DILIGENCE ON THE PART OF APPELLANT WOULD HAVE SECURED THE REPORT BEFORE THE VERDICT.**

Appellant contends that a report by Robin Browsoski from an interview of Barbara R. was discovered after the verdict was handed down and would provide exculpatory evidence requiring a new trial. However, in applying the standards set by this Court, in determining what is to be newly-discovered evidence warranting a new trial, all of the elements are not met with respect to this report. In particular, there is no doubt that due diligence on the part of Appellant would have secured this evidence before the verdict. Alternatively, it is dubious that this report would have produced an opposite result in the case, but rather would have been useful merely for impeachment purposes.

**1. Standard of Review.**

“‘A new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his affidavit that plaintiff was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side.’ Syllabus, *State v. Frazier*, 162 W.Va. [9]35, 253 S.E.2d 534 (1979), quoting, Syl. pt. 1, *Halstead v. Horton*, 38 W.Va. 727, 18 S.E. 953 (1894).” Syl. Pt. 1, *State v. King*, 173 W.Va. 164, 313 S.E.2d 440 (1984).

Syl. Pt. 2, *State ex. rel. Kahle v. Risovich*, 205 W. Va. 317, 518 S.E.2d 74 (1999); Syl. Pt. 1, *State v. O'Donnell*, 189 W. Va. 628, 433 S.E.2d 566 (1993).

2. **The Report of Robin Browsoski from the Interview of Barbara R. Could Have Been Secured with Due Diligence by Appellant Before the Verdict Was Handed Down. Therefore, It Was Not Newly-Discovered Evidence, and a New Trial Is Not Warranted.**

Appellant asserts that a report drafted by Robin Browsoski based upon her interview with another minor, Barbara R., was not known to him and would have provided exculpatory evidence for his defense. Specifically, Appellant states that this report would have shown that the victims' mother coerced Barbara R. into saying that he sexually abused her children and that Shannon B. stuck a toothbrush inside her vagina, which caused the injury rather than any abuse on his part. However, this report does not meet all of the elements of the standard set forth in *Risovich, supra*, and *O'Donnell, supra*, to be characterized as newly-discovered evidence. In particular, due diligence would have secured this report by Appellant before the guilty verdict was handed down. Thus, Appellant fails to meet the second element of the standard set forth in these cases.

As these cases held, "It [the evidence] must appear from facts stated in his affidavit that plaintiff was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict." *Risovich, supra; O'Donnell, supra*. Clearly, this report from Ms. Browsoski from an interview with Barbara R. could have been secured by due diligence from Appellant. This was the second of two trials involving these crimes, the first ending in a mistrial. In both cases, Ms. Browsoski was a witness. As the trial court found and stated in its order denying Appellant's motion for a new trial, the information was obviously known to him before the original trial because he planned on calling Barbara R. as a witness.<sup>2</sup> (R. at 208.) Additionally as stated in the order, Appellant's counsel referred to the forensic interview of Barbara

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<sup>2</sup>Barbara R. was found incompetent to testify in the first trial on January 4, 2006. (R. at 490.)

R. during the cross-examination of Ms. Browsoski in the State's case-in-chief in the first trial. (*Id.* at 208, 417, 422.)

It is true that Appellant was represented by different counsel in the first trial, and he alleges that his counsel in the second trial did not have knowledge of the report or its contents. However, Appellant could have mentioned this interview to his new counsel, and the latter could have inquired about the existence of any report based on the interview and obtained the same. Appellant's counsel could have read the transcript of the first trial and determined that the forensic interviewer conducted an interview of Barbara R. in the trial. (*Id.* at 422.) As noted in the order, these interviews by Ms. Browsoski were conducted through an agency of the Commonwealth of Kentucky, and even the prosecutor had no knowledge of an interview and report of Barbara R. at the initial trial. (*Id.* at 208, 417.) Yet, Appellant had knowledge of this interview of Barbara R. by January 4, 2006, when the forensic interviewer from Kentucky testified at this first trial. Appellant made no attempt to subpoena or otherwise secure the report from Kentucky or take any action to conduct any additional discovery on the matter. (*Id.* at 208.) In light of this, Appellant could indeed have obtained this report of Barbara R. Accordingly, it cannot be characterized as newly-discovered evidence, and he is not entitled to a new trial on this basis.

Assuming, *arguendo*, that this report could not have been secured by Appellant with due diligence, he is not entitled to a new trial because he fails the fourth and fifth elements in the standard established in *Risovich, supra*, and *O'Donnell, supra*. Both cases held that the evidence must be such that would produce an opposite result in the second trial on the merits. It seems highly unlikely that this report would produce an opposite result. In determining whether evidence would produce an opposite result in another trial on the merits, this Court held that it is to examine it in

light of the entire record. *State v. Stewart*, 161 W. Va. 127, 137, 239 S.E.2d 777, 783 (1977) (citing C. Wright & F. Elliot, 2 *Federal Practice and Procedure* at 557 (1969)). This one report stated that the victims' mother threatened the interviewee if she did not answer in accordance with what the former wanted and that Shannon B. stuck a toothbrush in her vagina. However, there was overwhelming evidence presented at trial through both the victims and the physicians and counselors who treated the girls that Appellant had sexually abused them. This Court has held, "[A] conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible, the credibility is a question for the jury." *State v. Beck*, 167 W. Va. 830, 843, 286 S.E.2d 234, 243 (1981). Clearly, the testimony of the two victims was sufficient to convict Appellant in this case. It was not inherently incredible, and the jury found it to be true. Additionally, numerous experts in the area of child sexual abuse found them credible and testified to the same.

Appellant states that the report of Barbara R. in which she says that Shannon B. "stuck a toothbrush up inside her" was evidence that this is what caused injury to her rather than any act by Appellant. However, again even assuming Barbara R.'s statement is accurate, that does not take anything away from the fact that Appellant committed sexual offenses against these girls. Taking the report of Barbara R. as credible evidence, there is no reason that a fact-finder could not conclude that both injuries occurred. As Dr. Phillips testified, only a very small amount of sexual abuse and assault victims who are minors show physical evidence of the incident when medically examined. Thus, even if this injury was caused by a toothbrush, there is nothing to say that a medically undetectable sexual offense took place by Appellant against Shannon B. Accordingly, the testimony given by both Shannon B. and Autumn B. was sufficient for a jury to convict Appellant. Therefore,

when examining the entire record, this report cannot be characterized as newly-discovered evidence warranting a new trial.

Again, assuming *arguendo*, that the statements made by Barbara R. are true, this evidence seems to be merely for the purpose of impeaching or discrediting witnesses for the State's case-in-chief. This is particularly true regarding Barbara R.'s stating that the victims' mother told her that she would be taken away from her mother if she did not "go along with the story." Thus, this evidence fails the fifth element of the standard established in *Risovich, supra*, and *O'Donnell, supra*, and is not newly-discovered evidence that would require the granting of a new trial.

**B. THE BROWSOSKI REPORT NOT BEING DISCLOSED TO APPELLANT DID NOT CONSTITUTE A VIOLATION OF *BRADY v. MARYLAND*,<sup>3</sup> AND WAS NOT A DUE PROCESS VIOLATION.**

Appellant contends that the failure of the State to disclose the report by Robin Browsoski based on her interview of Barbara R. was a violation of *Brady* and warrants a new trial. This argument fails, however, because the favorable evidence could not reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. Therefore, this Court should not reverse the trial court decision.

**1. The Standard of Review.**

Regarding the suppression of evidence by the State, the United States Supreme Court held in *Brady*, "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 86, 83 S. Ct. at 1197. The

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<sup>3</sup>373 U.S. 84, 83 S. Ct. 1194 (1963).

United States Supreme Court later held in *Youngblood v. West Virginia*, \_\_\_ U.S. \_\_\_, 126 S. Ct. 2188, 2190 (2006), the following:

A *Brady* violation occurs when the government fails to disclose evidence materially favorable to the accused. See 373 U.S., at 87, 83 S.Ct. 1194. This Court has held that the *Brady* duty extends to impeachment evidence as well as exculpatory evidence, *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), and *Brady* suppression occurs when the government fails to turn over even evidence that is “known only to police investigators and not to the prosecutor,” *Kyles*, 514 U.S., at 438, 115 S.Ct. 1555. See *id.*, at 437, 115 S.Ct. 1555 (“[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police”). “Such evidence is material ‘if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,’” *Strickler v. Greene*, 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (quoting *Bagley*, *supra*, at 682, 105 S.Ct. 3375 (opinion of Blackmun, J.)), although a “showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant’s acquittal,” *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555. The reversal of a conviction is required upon a “showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Id.*, at 435, 115 S.Ct. 1555.

2. **The Browsoski Report Based on the Interview of Barbara R. Could Not Reasonably Be Taken to Put the Entire Case in Such a Different Light as to Undermine the Confidence in the Verdict.**

According to Appellant, the failure of the prosecution to disclose this report based on the interview of Barbara R. amounted to a violation of Appellant’s due process rights as established in *Brady*, *supra*. It is worth noting, as the trial court concluded, that the State did not have access to this report conducted by an agent of the Commonwealth of Kentucky. (R. at 209.) However, even putting that fact aside, this does not amount to a *Brady* violation. As the United States Supreme Court held in *Youngblood*, *supra*, “The reversal of a conviction is required upon a showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” When comparing this report to all of the evidence presented

in the State's case-in-chief, it is not possible that it would put the case in such a different light so as to undermine the confidence in the jury's verdict. Both victims gave detailed testimony regarding the offenses. Their mother testified regarding her children telling her about Appellant committing the sexual offenses against them. Each expert who treated the victims stated that they found them credible. In particular, with respect to the girls' credibility, Nettie Goan testified, "In my opinion, they are both credible. They give too many details." (Tr. 74.) Comparing this vast testimony with one report by another young girl that the victims' mother allegedly threatened her if she did not "go along with the story" and that Shannon B. allegedly stuck a toothbrush inside her, it seems very unlikely, at best, that the evidence would put the whole case in such a light as to undermine the confidence in the verdict.

It is true that impeachment evidence carries a *Brady* duty as was held in *Youngblood, supra*. The alleged threat to Barbara R. by the victims' mother would clearly be identified as impeachment evidence, and it could be argued that her statement that Shannon B. stuck a toothbrush inside her could be defined as the same; although Appellant characterizes the latter statement as another explanation of Shannon B.'s injuries. However, when looking at the case as a whole, there is no possibility that had the report been disclosed, the result of the proceedings would have been different or the whole case would have been put in such a different light that the confidence in the verdict would have been undermined as *Youngblood, supra*, dictates. In fact, as stated previously, even if both statements in the report are taken as true, it really does nothing to exculpate Appellant. Therefore, Appellant's due process rights were not violated, and he is not entitled to a new trial.

**C. THERE WAS NO ABUSE OF DISCRETION IN THE TRIAL COURT'S DECISION NOT TO HOLD AN EVIDENTIARY HEARING ON APPELLANT'S MOTION FOR A NEW TRIAL.**

Appellant states that the trial court's failure to hold an evidentiary hearing on his motion for a new trial was an abuse of discretion. Appellant is correct that evidentiary rulings are reviewed on an abuse of discretion standard; yet trial courts are given broad discretion in such matters, and no abuse occurred. As noted previously, the trial court determined that Appellant did not utilize due diligence in obtaining the Browsoski report on the Barbara R. interview and made its decision to deny the evidentiary hearing on that basis. Thus, no abuse of discretion took place on this matter.

**1. Standard of Review.**

“A trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard.” Syl. Pt. 4, *State v. Rodoussakis*, 204 W. Va. 58, 511 S.E.2d 469 (1998).” Syllabus point 1, *State v. Martisko*, 211 W. Va. 387, 566 S.E.2d 274 (2002).

Syl. Pt. 3, *State v. Brooks*, 214 W. Va. 562, 591 S.E.2d 120 (2003). *See also* Syl. Pt. 1, *State v. Phelps*, 197 W. Va. 713, 478 S.E.2d 563 (1996) (“Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion.” Syl. Pt. 2, *State v. Peyatt*, 173 W. Va. 317, 315 S.E.2d 574 (1983).”).

Regarding the decision on whether or not to conduct an evidentiary hearing on a motion for a new trial, this Court held, “Just as the circuit court has broad discretion in resolving a new trial matter, so, too, does it enjoy discretion on whether to hold an evidentiary hearing on this motion.” *See n.1, State ex. rel. Daniel v. Legursky*, 195 W. Va. 314, 318, 465 S.E.2d 416, 420 (1995).

2. **The Trial Court Properly Used Its Discretion in Denying Appellant an Evidentiary Hearing on His Motion for a New Trial. Thus, the Trial Court's Decision Should Not Be Reversed.**

As Appellant recognizes, trial courts have discretion on the decision as to whether to conduct an evidentiary hearing on a motion for a new trial. As stated above, decisions on these matters are reviewed on an abuse of discretion standard. Appellant is incorrect in his assertion that the trial court engaged in an abuse of discretion in denying him an evidentiary hearing on his motion for a new trial.

On March 20, 2006, a hearing was conducted on Appellant's motion for a new trial where arguments were made by both parties. (R. at 201, 493-610.) Appellant specifically states that he intended to call Dr. Timothy Saar as a witness in the evidentiary hearing. (See Appellant's Brief at 20.) Dr. Saar was to testify regarding the credibility of statements made by Autumn B. and Shannon B., as well as the competency of Barbara R. (R. at 206.) It was found that Dr. Saar changed his opinion regarding Barbara R., and deemed her competent to testify. (*Id.* at 207.) As previously mentioned in its order denying Appellant a new trial, the court found that Appellant knew about the Browsoski report based on the interview with Barbara R. before the verdict. (*Id.* at 207.) Additionally, the court found that the evidence would not have changed the result of the trial on the merits. (*Id.* at 212.) Therefore, the evidence was not newly-discovered warranting a new trial. Further, the trial court found aspects of Barbara R.'s testimony to be hearsay and other portions that fell under a hearsay exception to be irrelevant. (*Id.*) In light of this, the court filed an order denying Appellant a new trial on April 21, 2006. (*Id.* at 212-13.)

Due to the broad authority given trial courts in making decisions on evidentiary matters, there was no abuse of discretion in light of the nature of the Browsoski report based on her interview with

Barbara R., the expert testimony of Dr. Saar regarding this girl and the nature of her statements.

Accordingly, Appellant is not entitled to a new trial based on this ground.

**D. THE ADMISSION OF THE TESTIMONY OF CHIEF OF POLICE ROBY POPE, JR., THAT HE FOUND THE VICTIMS TO BE CREDIBLE WHEN INTERVIEWED BY ROBIN BROWSOSKI DID NOT CONSTITUTE PLAIN ERROR BECAUSE IT WAS INTENDED FOR BACKGROUND PURPOSES REGARDING HIS INVESTIGATION RATHER THAN FOR BOLSTERING.**

Appellant asserts that the admission of the testimony of Chief of Police Roby Pope, Jr., where he stated that he found Autumn B. and Shannon B. credible when he observed the interview conducted by Robin Browsoski amounted to plain error in that it was used for bolstering the victims' respective testimony in violation of West Virginia Rule of Evidence 608(a). However, this matter does not warrant review under the plain error doctrine because it does not amount to an obvious error affecting the fundamental fairness of the trial. The testimony of Chief Pope regarding the victims' credibility was presented to provide background and show why he pursued an investigation of Appellant.

**1. Standard of Review.**

"To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

Syl. Pt. 1, *State v. Wood*, 194 W. Va. 525, 460 S.E.2d 771 (1995).

**2. The Admission of Chief Pope's Testimony Did Not Constitute Plain Error Because It Did Not Affect the Fundamental Fairness of the Trial. His Stating That He Found the Witnesses Credible During This Interview Was Presented for Purposes of Explaining His Investigation of Appellant Rather Than for Bolstering.**

Appellant contends that the admission of the testimony from Chief of Police Roby Pope, Jr., concerning the credibility of Autumn B. and Shannon B. amounted to plain error. West Virginia

Rule of Evidence 608(a) limits the evidence of truthfulness of character to only after the witness's character for truthfulness has been attacked. Additionally, this Court held in *Wood, supra*,

“Expert psychological testimony is permissible in cases involving incidents of child sexual abuse and an expert may state an opinion as to whether the child comports with the psychological and behavioral profile of a child sexual abuse victim, and may offer an opinion based on objective findings that the child has been sexually abused. Such an expert may not give an opinion as to whether he personally believes the child, nor an opinion as to whether the sexual assault was committed by the defendant, as these would improperly and prejudicially invade the province of the jury.” Syl. pt. 7, *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990).

Syl. Pt. 3, *Wood*. That was the case with the expert testimony based on forensic interviews from Ms. Goan, Ms. Browsoski, Dr. Holihan and Dr. Phillips.

While it is true that Chief Pope does not qualify as an expert as the other above-mentioned witnesses do, his testimony that spoke to the victims' credibility was presented for the purposes of background and the reasoning for investigating Appellant. The testimony of Chief Pope concerning this matter was the following:

Q: While the girls were participating in their interview with Robin Browsoski, did you have an opportunity to observe their demeanor?

A: Yes. I did.

Q: Based upon your experience in this area— First, let me ask you— Can you describe their demeanor?

A: Uh— The first child, Autumn, actually was very open with Ms. Browsoski, from what I saw and open with her on what she was saying and she was— the things she was saying I felt was credible. I don't think any young child could make it up.

Q: Were you able to determine when the abuse would have occurred?

A: Yes. In the initial interview with Joyce Spradlin, she had told me that she had these people babysitting for her children and that the last time they babysitted [sic] with the two girls was in September of 2004. She give me [sic] an approximate date of September 12, 2004.

Q: Was there anything significant about the date that you can recall?

A: On September 12th?

Q: Or any other day in September?

A: That—I know that was the defendant's birth date [sic] was in September of 2004.

Q: And how old was the defendant, David Farris, at the time these events occurred?

A: I'm not sure of the exact age.

Q: Was he over the age of eighteen?

A: Yes, he is.

Q: You're sure of that?

A: Oh, positive.

Q: And how old were the victims at the time this occurred?

A: Uh— Autumn was nine years old, and Shannon was eight years old.

(Tr. 9-10.) This line of questioning—including the question regarding the victims' credibility was meant to establish background and Chief Pope's reasoning for conducting an investigation of Appellant.

Similar background-type questioning occurred with Chief Pope that reflected on his investigation regarding his observation of the victims' interviews with the CPS worker, Nettie Goan.

The questioning on this subject went as follows:

Q: So you watched it [Goan interviews] on a video monitor?

A: Yes, I did.

Q: And in that way were you able to obtain a statement from the girls to be used as part of your investigation?

A: Yes, I did. Ms. Goan also provided me a copy of the taped interview.

Q: At that time, who did the girls disclose had abused them?

A: David Farris.

Q: And where did the abuse allegedly occur?

A: It occurred at his apartment.

\*\*\*

Q: What steps did you take after this interview of the girls was completed?

A: Okay, I then, after this interview, I met with Michael Sparks, the Prosecuting Attorney of this county, on November 24, in 2004. At that time, I obtained a search warrant for the residence of David and Tina Farris, at Apartment 10, Victoria Courts. I also obtained arrest warrants and arrested them on November 24th and searched their apartment.

(*Id.* at 6-7.)

When examined as a whole, Chief Pope's testimony regarding his observations of the victims' interviews was merely an historical account as to how he learned of the offenses, and, in turn, what steps he took in response—including his testifying that he found the girls to be credible. A similar issue arose in *Wood, supra*, where a victim's teacher testified that he found her credible with respect to allegations of sexual assault, which led him to pursue the matter further. The testimony in this case went as follows:

Q: [This excerpt of testimony occurs after Mr. Pace has testified that he did not report Betty A.'s allegations until he determined whether or not they were true] [by the State] You indicated that you had come to the conclusion that [Betty A.] was not making this up; is that correct?

A: [by Mr. Pace] That's correct.

Q: Why do you say that?

A: Well, for one thing, after I had established a relationship with [Betty A.], I found out that when she was lying, if I pursued my questioning, she would always tell me the truth.

Q: Now, wait a minute. So, you're saying that [Betty A.] has lied to you?

A: In terms that she may deny that she had done something, and when I questioned her about that, she would often say, 'Oh, no, Mr. Pace, that wasn't me, I didn't do that, I didn't do that,' and when I pursued the matter, she would always own up to it.

Q: Always?

A: Well, to my knowledge, yes.

\*\*\*

Q: So, in your opinion, based on your work with [Betty A.], she's basically a truthful person?

A: Oh, yes. Now, qualifying that, if she could get out of trouble, she would.

\*\*\*

Q: Did you investigate [Betty A.'s allegations of sexual assault], to your satisfaction, to determine whether or not she was, in fact, telling you the truth?

A: Yes, I did because--in fact, we had--you know, I explained the severity of making an accusation like that. . . . [S]he at that time convinced me that she was telling the truth.

*Id.* at 530-31, 776-77. This Court found that although this testimony may have violated West Virginia Rule of Evidence 608, it was not given to define the victim's character for truthfulness, which is the paramount concern of the rule. But rather, it was given as historical information. Thus the Court held that although it recognized that the admission of the testimony violated West Virginia Rule of Evidence 608(a), it also recognized that it did not seriously affect the fundamental fairness, integrity or public reputation of the judicial proceedings, given the context of the testimony (historical account and determination of what actions should be taken). *Id.* at 533-34, 779-80.

Just as was the situation in *Wood, supra*, Chief Pope's testimony, including that regarding his belief that the victims were credible, was not bolstering. Rather, the testimony was intended to establish the historical background and reasoning behind the police officer's investigation and arrest of Appellant. This can be distinguished from repeated, detailed questioning of the forensic and medical experts regarding the credibility of Autumn B. and Shannon B. during the trial. Therefore, no plain error occurred with respect to the admission of Chief Pope's testimony due to its not affecting the fairness, integrity or public reputation of the judicial proceedings, and Appellant is not entitled to a new trial.

V.

**CONCLUSION**

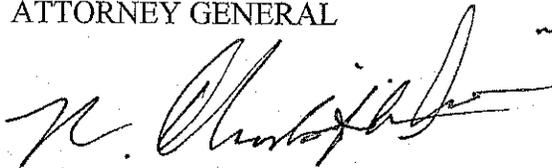
For the foregoing reasons, the judgment of the Circuit Court of Mingo County should be affirmed by this Honorable Court.

Respectfully submitted,

State of West Virginia,  
*Appellee,*

By counsel

DARRELL V. McGRAW, JR.  
ATTORNEY GENERAL



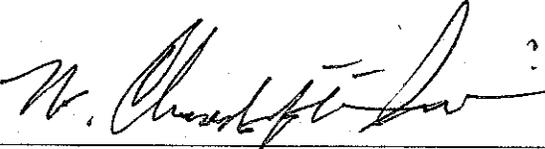
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R. CHRISTOPHER SMITH  
ASSISTANT ATTORNEY GENERAL  
State Bar ID No. 7269  
State Capitol, Room E-26  
Charleston, West Virginia 25305  
(304) 558-2021

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 19<sup>th</sup> day of July, 2007, addressed as follows:

M. Timothy Koontz, Esq.  
186 East Second Avenue  
P.O. Box 2180  
Williamson, West Virginia 25661

  
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R. CHRISTOPHER SMITH