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NO. 33324

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

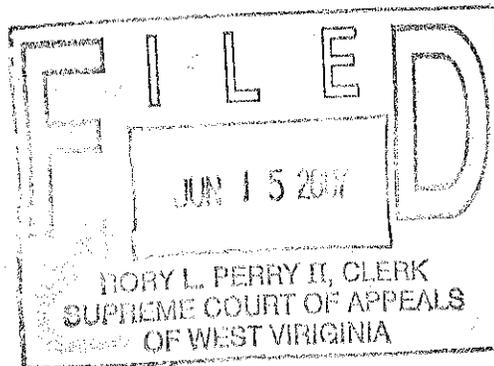
STATE OF WEST VIRGINIA,

*Appellee,*

v.

JONATHON FREEMONT RAY,

*Appellant.*



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BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

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BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

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I.

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

Jonathon Freemont Ray, Defendant below (hereafter "Appellant"), was convicted of five counts of first degree sexual assault, three counts of first degree sexual abuse, and five counts of incest following a jury trial in Case No. 04-F-40. Concurrently, as two indictments were joined for trial, Appellant was also convicted of two counts of sexual abuse by a parent, guardian or custodian in Case No. 04-F-71. The trial was held in the Circuit Court of Preston County, West Virginia, the Honorable Lawrance S. Miller, Jr., presiding. By order of the circuit court dated May 26, 2006, the Appellant was re-sentenced to consecutive terms of not less than fifteen nor more than thirty-five years for each of the five counts of first degree sexual assault, and terms of not less than one nor more than five years for each of the three counts of first degree sexual abuse. The Appellant was

also sentenced to a term of ten to twenty years for the count of sexual abuse by a parent, guardian or custodian, and terms of five to fifteen years for each of the counts of incest; however, these sentences were ordered concurrent to the sentences for sexual assault and abuse. It is from this judgment that Appellant appeals.

This appeal is predicated upon the circuit court's refusal to grant Appellant's motion for judgment of acquittal on the counts of incest. His assignment of error is twofold: First, that the conviction of incest cannot stand due to the lack of a consanguineous relationship between the Appellant and the victims; and second, that the principles of double jeopardy preclude the Appellant's convictions for both incest and first degree sexual assault.

## II.

### STATEMENT OF FACTS

The Appellant is the biological brother of George Ray, III, who, at all relevant times, was duly and legally married to Crystal Ray. Crystal Ray is the biological mother of two of the victims herein (hereinafter "the victims"). The third victim was unrelated by consanguinity or affinity to the Appellant and is not subject to this appeal, and evidence regarding a fourth victim was not adduced at trial thus resulting in an acquittal thereon. The Appellant was accused of committing acts of sexual intercourse with the victims, his nephews by affinity through marriage.

In or around December 2003, Trooper First Class C.W. DeBerry of the West Virginia State Police, Kingwood Detachment, received a referral for a sexual assault/abuse matter from the West Virginia Department of Health and Human Resources with the Appellant as the accused. (Tr.

390-91.)<sup>1</sup> Trooper DeBerry proceeded to the victims' elementary school in Reedsville, West Virginia, to conduct an interview with the children. (Tr. 391.) He had been informed that the Appellant was involved in a similar matter in Monongalia County, West Virginia, and had provided a statement wherein he implicated himself in the Preston County charges. ( *Id.*) DeBerry then proceeded to the residence of Crystal and George Ray, III, to inform them of the pending investigation and recommend that the children should be evaluated at the hospital. (Tr. 392.) After a complete investigation, Trooper DeBerry submitted the matter to the Preston County Prosecuting Attorney for submission to the grand jury.

Following the investigation and presentation to the grand jury, the Appellant was indicted by the June 2004 Term of the Grand Jury in Case No. 04-F-40 on sixteen felony counts; namely, first degree sexual assault (Counts 1 through 7); first degree sexual abuse (Counts 8 and 9); and incest (Counts 10 through 16).

Subsequent thereto, the October 2004 Term of the Grand Jury returned a second indictment against the Appellant, styled 04-F-71, alleging three counts of first degree sexual assault, three counts of sexual abuse by a parent, guardian or custodian, and one count of first degree sexual abuse.

On November 8, 2004, then-prosecuting attorney Ronald R. Brown filed a motion requesting the dismissal of Case No. 04-F-40. However, before the matter was heard by the trial court, Melvin C. Snyder, III, successor to Ronald R. Brown as prosecuting attorney, caused the withdrawal of motion to dismiss Case No. 04-F-40 and instead moved to consolidate the indictments by dismissing

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<sup>1</sup>References to the record will appear herein as "R. \_\_\_." References to pages in the transcript of the trial will appear as "Tr. \_\_\_."

Counts 1, 2, 3 and 7 of Case No. 04-F-71 and Count 5 of Case No. 04-F-40. The indictments were ordered consolidated for trial.

A unitary trial encompassing both joined indictments was held in this matter on March 29 and 30, 2005, wherein the Appellant was convicted of Counts 1, 2, 3, 4, 6, 8, 9, 10, 11, 12, 13, 14 and 15 of Case No. 04-F-40, and Counts 4 and 5 of Case No. 04-F-71. The convictions at issue in this appeal are Counts 11, 12, 13, 14 and 15 of Case No. 04-F-40, all convictions for the offense of incest pursuant to West Virginia Code § 61-8-12.

Trial counsel, upon the close of the government's case-in-chief, moved for a judgment of acquittal on the incest counts, asserting that a conviction requires proof of a consanguineous relationship. (Tr. 444-45.) This motion was denied by the trial court, and the convictions followed.

### III.

#### **RESPONSE TO ASSIGNMENT OF ERROR**

The Appellant contends that the "Court erred by failing to dismiss the charges of incest concerning George Ray, III's stepchildren." (Appellant's Brief at 8.) However, the statutory construction of West Virginia Code § 61-8-12 has no requirement of consanguinity; thus, this assignment of error must fail.

IV.

ARGUMENT

A. **WEST VIRGINIA CODE § 61-8-12, A STATUTORY OFFENSE, DOES NOT REQUIRE A SHOWING OF CONSANGUINITY TO THE VICTIM AS AN ESSENTIAL ELEMENT.**

The Appellant's first assignment of error is that the trial court erred in denying his motion for a judgment of acquittal at the conclusion of the State's evidence on the charge of incest. He contends that the State's evidence was insufficient to establish the element of consanguinity.

1. **The Genesis of the Crime of Incest; Related Laws.**

In West Virginia jurisprudence, the crime of incest under West Virginia Code § 61-8-12 did not exist at common law. Rather, "[i]ncest is a statutory crime . . . . Therefore, whatever elements are necessary to constitute the offense of incest are prescribed wholly by the particular statute." *United States ex rel. Preece v. Coiner*, 150 F. Supp. 511 (D.C. W. Va. 1957). Thus, the question becomes what elements are necessary to support a conviction.

West Virginia Code § 61-8-12 [1994] states that a "person is guilty of incest when such person engages in sexual intercourse or sexual intrusion with his or her . . . nephew[.]" It further states that, for purposes of the section:

- (11) "'Nephew' means the *son* of a person's brother or sister;" and
- (15) "'Son' means a person's natural son, adoptive son or the *son of a person's husband or wife*["

(Emphasis added.)

The statute proscribes sexual intercourse or intrusion between persons related by blood *or* marriage. There is no distinction between consanguinity and affinity, and thus a blood relationship

between the parties is not an element of the offense. It is well settled that “the only material elements of the offense are (1) sexual intercourse, (2) between persons of the prohibited relationship.” *Preece*, 150 F. Supp. at 513.<sup>2</sup>

In determining whether the Legislature intended to include an element of consanguinity for the offense of incest, the Court must review other statutes relating to the same subject:

“Statutes relating to the same subject, regardless of the time of their enactment and whether the later statute refers to the former statute, are to be read and construed together and considered as a single statute the parts of which had been enacted at the same time.” Point 1 Syllabus, *Delardas v. Morgantown Water Commission*, 148 W.Va. 776, 137 S.E.2d 426.

Syl. Pt. 5, *State v. Flinn*, 158 W. Va. 111, 208 S.E.2d 538 (1974).

“Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *pari materia* to assure recognition and implementation of the legislative intent.” Syl. Pt. 5, in part, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W.Va. 14, 217 S.E.2d 907 (1975).

Syl. Pt. 10, *The West Virginia University Board of Governors, et al. v. The West Virginia Higher Education Policy Commission*, No. 33208 (W. Va. May 24, 2007).

Thus, this Court should consider West Virginia Code § 48-2-302(c) [2001] relating to prohibitions against marriage between related persons, wherein the Code again fails to draw a legal distinction between relations by consanguinity and relations by affinity through marriage:

The prohibitions described in subsection (a) of this section are applicable to persons related by affinity, where the relationship is founded on a marriage, and the prohibition continues in force even though the marriage is terminated by death or

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<sup>2</sup>Similarly, the crime of incest is not age specific: “[W. Va. Code § 61-8-12] makes neither the age of the parties nor their particular mental state material elements of the offense.” *Preece*, 150 F. Supp. at 512.

divorce, unless the divorce was ordered for a cause which made the marriage, originally, unlawful or void.

Similarly, West Virginia Code § 48-3-103(a)(2) [2001] instructs that a marriage “prohibited by law on account of consanguinity *or affinity*” is voidable. (Emphasis added.)

It is axiomatic that, under West Virginia law, evidence of the marriage of a person to a stepchild’s mother is sufficient to support a conviction for incest of the stepchild. *E.g.*, *Coleman v. Painter*, 215 W. Va. 592, 600 S.E.2d 304 (2004); *State v. Ayers*, 179 W. Va. 365, 369 S.E.2d 22 (1988); *State v. Moubray*, 139 W. Va. 535, 81 S.E.2d 117 (1954).

In order for a statute to pass constitutional muster, the prohibitions contained therein must be reasonably evident. “A criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication.” Syl. Pt. 1, *State v. Flinn, supra*.

**2. Statutory Construction, Interpretation.**

It is well-settled that an unambiguous statute shall not be disturbed by the Court. “A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.” Syl. Pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951).

**3. Sufficiency of Evidence.**

In creating the statutory offense of incest, the Legislature created three classes of victims, namely blood relatives, adoptive relatives, and relatives by marriage. West Virginia Code § 61-8-12 contains a general definition section. The definition of “son” includes the aforementioned three classes, and the definition of “nephew” includes the term “son.”

There is no provision isolating the definitions from each other, and ultimately the crime requires proof of sexual intercourse or intrusion with a prohibited person defined in the section. Throughout the definitions, the same three classes of persons are referenced in interlocking terms, with no preference given to blood relatives.

There has been no dispute as to the proof of the first element of sexual intercourse or intrusion, thus the case turns on the second element of the prohibited class.

The Appellant is the biological brother of George Ray, III, who is the stepfather of the victims in question. Had George Ray, III, engaged in the same acts as the Appellant, he would be guilty of incest. The victims, by statutory definition are his "sons" since they are the children of his wife. The Appellant seems to argue that, even though a stepfather is guilty of incest by engaging in sexual intercourse or intrusion with a stepchild, the stepfather's brother somehow escapes liability for the same acts.

In reviewing the definition of "nephew," the only requirement of the statute is that a "nephew" be the "son of a person's brother or sister." Determining who is a person's nephew thus depends upon the statutory definition of "son" -- which includes stepsons. Therefore, as it has already been established that the victims are the "sons" of George Ray, III, by statutory definition they are the "nephews" of the Appellant.

The construction of this statute is simple, and the definitions are concise. The legislative intent is evident through this precision, but also by comparison to West Virginia Code § 48-2-302 which is another statute designed to protect the family structure. There is no lesser penalty for sexual intercourse or intrusion with a proscribed family member by affinity, just as there is no distinction

between consanguinity or affinity in the prohibition of marriage to a relative. The Legislature intended the same penalties based upon family structure, not blood relations.

4. **The Statute Is Not Unconstitutionally Vague.**

The Appellant claims that the “statute is ambiguous when applied to a step-child.” (Appellant’s Brief at 11.) In justifying this broad claim, the Appellant asserts that the trial court had to read two “provisions” *in pari materia* to determine that sexual intercourse with a step-nephew was proscribed by the statute.

The term “*in pari materia*” in this case is a misnomer, in that its use contemplates the comparison of similar cases or like matters. (*Webster’s Third New International Dictionary*, 1167 (1971); “On the same subject or matter: in a similar case.”)

In this case, there is no comparison of like matters. All of the definitions are contained in one Code section, and all could easily be referenced by a person of normal intelligence. The Appellant cites the trial court’s ruling, which, contrary to Appellant’s position, illuminates the clarity of the Code:

The court in reading the definition of niece and nephew and uncle finds that the definition of niece and nephew use the word son and daughter as part of the definition and the word son and daughter are also defined and they include the adoptive son or daughter or son or daughter of the person’s wife. If I didn’t have these definitions of son and daughter, then I would probably grant your motion; but if I strictly construe the statute, and I read the definition of niece and nephew, and it does use the word daughter and it does use the word son in Subsections (a)(10) and (11). Then if I look at the definition of son and daughter that the legislature made, it includes the son or daughter of the person’s wife and so I am not stretching this or giving meaning other than the definitions that the legislature provided here.

(Tr. 452.)

The trial court engaged in the analysis of a reasonable person, i.e., to apply the internal definitions consistently within the statutory construct. It is only the mental gymnastics undertaken by the Appellant that create confusion over the elements of the offense, and any reasonable person perusing this section would be aware of the prohibition against sexual intercourse with a step-child of one's brother. Inasmuch as the statute is clear and unambiguous, it should be strictly applied.

**B. THE APPELLANT MAY BE PROSECUTED FOR INCEST AND SEXUAL ASSAULT ARISING FROM THE SAME ACT WITHOUT VIOLATION OF THE DOUBLE JEOPARDY PROTECTION AGAINST MULTIPLE PUNISHMENT.**

The Appellant has alleged that the double jeopardy clause of the West Virginia Constitution, Article III, Section 5, prohibits his prosecution for allegations of incest and sexual assault that arose from a single act. This issue has been squarely addressed by this Court.

In *State v. Peyatt*, 173 W. Va. 317, 315 S.E.2d 574 (1983), the defendant was convicted of incest, first degree sexual assault and third degree sexual assault, all arising out of single acts. The Court, interpreting the *Blockburger*<sup>3</sup> test, held that in West Virginia “[w]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.” Syl. Pt. 1, *Peyatt* (quoting Syl. Pt. 8, *State v. Zaccagnini*, 172 W. Va. 491, 308 S.E.2d 131 (1983)).

Applying this rule, the Court held that “separate convictions for sexual assaults and incest, although they arise from the same act, do not constitute the same offense for purposes of the double jeopardy clauses.” *Peyatt*, 173 W. Va. at 321, 315 S.E.2d at 578.

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<sup>3</sup>*Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

The Appellant asserts that “[e]ach count of incest was mirrored by a separate count of First Degree Sexual Assault against the same alleged victim.” (Appellant’s Brief at 14.) It is by some circuitous logic that the Appellant then claims that this duplication of charges gives rise to multiple convictions and punishment for the same act. *Peyatt* makes it evident that this argument must fail. The offenses of sexual assault and incest are different offenses, and a single act giving rise to both charges passes muster under a double jeopardy analysis.

V.

**CONCLUSION**

WHEREFORE, for the foregoing reasons, the decision of the Circuit Court of Preston County should be affirmed by this Honorable Court.

*Respectfully submitted,*

STATE OF WEST VIRGINIA,  
*Appellee,*

By counsel,

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**CERTIFICATE OF SERVICE**

I, William R. Valentino, Assistant Attorney General for the State of West Virginia and counsel for Appellee, do hereby certify that on the foregoing "Brief of Appellee, State of West Virginia" was served upon counsel for Appellant by depositing it in the United States mail, with first-class postage prepaid, on this 15<sup>th</sup> day of June, 2007, addressed as follows:

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