

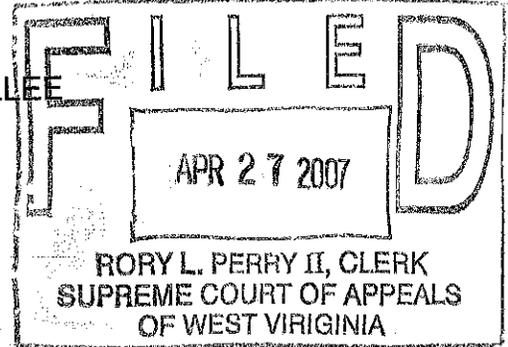
NO. 33298

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, APPELLEE

v.

DANNY L. CECIL, APPELLANT



BRIEF OF APPELLEE

STATE OF WEST VIRGINIA

Submitted by:

A handwritten signature in black ink, appearing to read "Mark A. Sorsaia".

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I.

JURISDICTIONAL STATEMENT

The appellee, State of West Virginia, submits that jurisdiction for the issues raised on appeal are properly before the Court.

II.

PROCEDURAL HISTORY

In November of the year 2005, a Putnam County Grand Jury was presented a case regarding allegations that the appellant had engaged in sexual misconduct relating to two young adolescent females. The Putnam County Grand Jury, after listening to the presentment, returned a four count indictment against the appellant, Danny L. Cecil, alleging in Count No. One (1) of the indictment, that he committed the felony offense of sexual abuse in the first degree in 2002 relating to the victim S.D.. Count No. Two (2) of the indictment alleged that the appellant in 2002 also committed the felony offense of sexual abuse by guardian or custodian relating to the victim S.D.. Count No. Three (3) of the indictment alleged that the appellant in the summer of 2005 committed the felony offense of sexual assault in the second degree relating to the victim K.J.. The fourth and last count of the indictment alleged that in the summer of 2005 the appellant committed the felony offense of sexual abuse by a guardian or custodian relating also to the victim K.J..

On January 31, 2006, a jury was empaneled in the case against the appellant. On February 1, 2006, and continuing through February 3, 2006, the petit jury heard the evidence in the matter. On February 7, 2006, after a lengthy deliberation, the jury returned in open Court a verdict of guilty of the felony offense of sexual abuse in the first degree as contained in Count No. One (1) of the indictment, a verdict of guilty regarding sexual abuse by a guardian or custodian as contained in Count No. Two (2) of the indictment, and a verdict of guilty of sexual abuse by guardian or custodian as contained in Count No. Four (4) of the indictment. The jury then returned a verdict of not guilty relating to the offense of sexual assault in the second degree as contained in Count No. Three (3) of the indictment.

On February 16, 2006, the trial Court heard post-trial motions regarding this case. During the hearing the trial Court addressed several issues raised by the appellant's petition including an allegation of juror misconduct. The trial Court denied the appellant's motions. The appellant was then sentenced by the Circuit Court of Putnam County. The appellant then lodged this appeal before this Honorable Court by filing a petition on August 24, 2006.

III.

STATEMENT OF FACTS

In the summer of 2005 the appellant, Danny L. Cecil, lived with his wife and two children in a residential subdivision located in the Town of Winfield, Putnam County,

West Virginia. Mr. Cecil's daughter had a friend located in the neighborhood who was thirteen year old K.J.. On July 3, 2005, a decision was made between Mr. Cecil's daughter and K.J., that K.J. would spend the night at the Cecil residence. K.J. slept on the second floor that night in the bedroom of the appellant's daughter. During the course of the night his daughter, for some reason, left the room leaving K.J. alone. TT 261. K.J. testified before the Circuit Court of Putnam County that she awoke during the middle of the night when she felt a hand on her "bottom". TT 261. She testified that she was laying on her stomach when she felt the hand placed on her buttocks and, that she was rolled over and saw Danny L. Cecil standing over her bed. TT 261. She testified that Mr. Cecil then placed his hand inside of her shorts, and then inserted his finger into her vaginal area and was at the same time putting his tongue on her lips. She testified that she tried to pretend that she was asleep, while at the same time squirming and attempting to roll over to get away from Mr. Cecil. TT 263. She stated then that Mr. Cecil made a decision to leave the room. She testified that after a period of time she made a decision to get up and go across the hall to be with Danny Cecil's daughter who was sleeping in an adjacent bedroom. She testified that she told Mr. Cecil's daughter what happened. She then testified that Mr. Cecil's daughter then went downstairs and reported the event to Mr. Cecil's wife, and then Mr. Cecil's wife and Danny Cecil then went upstairs and confronted K.J. about her accusations. K.J. testified that during that conversation where she was confronted by Mr. Cecil and his wife, that the appellant, Danny L. Cecil, fell to his knees crying claiming that he would never do anything to hurt her. TT 265. Mr. Cecil's wife then made a decision to call K.J.'s mother.

K.J.'s mother, Pam James, testified that she got a telephone call in the middle of

the night and went to the Cecil residence and picked up her daughter from that residence. Pam James then testified that after learning of the allegation concerning Mr. Cecil's conduct she took her daughter to Women and Childrens Hospital in Charleston where a sexual assault exam was conducted. TT 313.

After the physical examination was conducted, K.J.'s parents decided to take her to Family Services of Kanawha Valley to receive counseling and also reported the matter to the Winfield Police Department which launched a criminal investigation concerning the complaint. TT 315, 316.

After the criminal investigation started regarding the allegations, a young woman who lived in Poca, West Virginia, described as S.D., learned that a complaint was made against Danny L. Cecil by a young girl in Winfield concerning an allegation of sexual misconduct. Having learned of that complaint, S.D. made a decision that it would be necessary for her to come forth to notify authorities that she too had been a victim of Danny L. Cecil when she had spent a night in the Cecil residence in 2002. TT 409. During the trial S.D. testified that she was a seventeen year old. TT 398. She testified that in March of 2002 she was thirteen years old, and at the time her family was very close to Mr. Cecil's family. She testified that she knew Mr. Cecil through church, and was a very close friend with Mr. Cecil's son. She testified that in March of 2002 she spent the night in Mr. Cecil's home located in Winfield, Putnam County, West Virginia. She testified that this sleep over was arranged between her parents and the Cecils. She testified that Mr. and Mrs. Cecil provided a dinner for her and a place to spend the night and directed her to sleep in their guest bedroom upstairs. She testified that during the night hours she was awakened by the appellant with his hand down the shirt of her

pajamas touching her breast by "cupping them". TT 404. She testified that Mr. Cecil then moved his hands down the pants of her pajamas in an attempt to put his fingers in her private area. She testified that she defended herself from Mr. Cecil's advances by holding her legs together, thus preventing him from putting his hands between them. TT 404. She testified he then left the room.

S.D. testified that she told her sister, and disclosed the incident to her trusted uncle soon after it occurred, but she did not tell her mother right away because of her fear that she was going to damage Mr. Cecil's relationship with her father, and that she feared hurting Mr. Cecil's children. She testified that she decided to remain silent, but then she learned of the events of July 2005 when Mr. Cecil had allegedly touched K.J., that she felt guilty for not coming forth earlier, in that if she did, perhaps she may have prevented K.J. from being assaulted. TT 441.

The State of West Virginia called Dr. Bonnie Bailey and nurse, Joanna McKittrick, who testified about the physical examination of K.J., and testified about the medical history that was given to them. The State also called S.D.'s uncle, Scott Lanham, who testified that S.D. did in fact make a disclosure to him in 2002. S.D. testified that she met with the victim K.J. at the Winfield Police Department on one occasion for the purpose of apologizing to K.J. because she felt guilty about her failure to disclose years earlier, in that if she would have disclosed, perhaps K.J. may have been saved from Mr. Cecil's assault.

The defense called a host of witnesses, which included the defendant's wife and both of his children. They also called a Child Protective Service Worker who investigated the Cecil home regarding the safety of the Cecil children. The CPS worker

testified in the defense case that there were no risks identified, and testified that they closed their file. The defense also called Dr. Christa Cooper-Lehki who is a psychiatrist employed at West Virginia University.

IV.

ASSIGNMENTS OF ERROR

The trial Court did not commit reversible error in limiting the testimony of defense expert, Dr. Cooper-Lehki.

1. The standard of review.

The admissibility of testimony by an expert witness is a matter within the sound discretion of the trial Court and the trial Court's decisions, will not be reversed unless it is clearly wrong. Syl. Pt. 6, Helmick v. Potomac Edison Company, 185 W.Va. 269, 406 S.E.2d 700 (W.Va. 1991), State v. McCracken, 218 W.Va. 190, 624 S.E.2d 537, 539 (W.Va. 2005). Evidentiary decisions by trial Courts are entitled to substantial deference. See State v. Riley, 201 W.Va. 108, 500 S.E.2d 524, 530 (W.Va. 1997).

2. Argument.

The appellant is making an argument that the trial Court improperly restricted the testimony of their psychiatrist in violation of Rule 702 of the West Virginia Rules of Evidence. In order to fairly evaluate that argument one must look at the entire record of this case to see how the appellant attempted to use expert testimony to affect the outcome of this case.

The appellant is arguing that the Circuit Court restricted their use of expert testimony in violation of Rule 702, which resists the notion that the purpose of their expert testimony was to not only boost the credibility of Danny L. Cecil, but also to impeach the credibility of the victims in this case, which is prohibited by Rule 608, of the Rules of Evidence. In their petition for appeal, appellant Counsel states, "Mr. Cecil's case is one in which no physical corroboration was presented to support the accusations made against him. The Cecil case therefore is essentially a case of 'she said - he said'."¹ In such cases the outcome can and often does turn on other factors and witnesses which lend credit or discredit one side or the other. They stated that in the trial Mr. Cecil sought to support his defense in part through the presentation of an expert witness, Dr. Christa Cooper-Lehki. After one completely reviews the record of this case, one will find that defense Counsel tried to bolster the credibility of Mr. Cecil through the use of this expert, and also tried to attack the credibility of the victims through the use of this expert.

Appellant counsel called Dr. Christa Cooper-Lehki to testify. She testified before the jury that she was a faculty psychiatrist at West Virginia University and an Assistant Professor of psychology. She testified that Danny L. Cecil was referred to the University for what they called a psychosexual evaluation. TT 613. Dr. Cooper-Lehki testified that Mr. Cecil was subjected to a battery of examinations and tests. She testified that what they measure (the tests) is his sexual interests. TT 621. She also testified that the test is done to measure sexual deviancy. TT 621. The doctor then

¹Mr. Cecil's case was one in which two alleged victims made allegations, not just one.

testified to the jury that in her professional opinion Mr. Cecil's test results showed, "a normal adult male heterosexual profile". She testified that a normal adult male heterosexual will show sexual interest in adult women and adolescent females. TT 622. Based upon the tests results, she testified that they demonstrated that Mr. Cecil has no sexual deviance that may be detectable by these devices. TT 627. Obviously, the purpose of this testimony was to demonstrate to the jury that Mr. Cecil was arguably "normal" and not a "sexual deviant", in that his sexual interests were geared toward adult women and adolescent females. If Mr. Cecil was to have a deviant characteristic, he would have given indicators that he would be interested perhaps in children that had not yet reached puberty. See TT 631-632.

This expert testimony from the doctor concerning Mr. Cecil being a man with normal adult heterosexual interests in adult women and adolescent females, was admissible under Rule 708 arguably only if it was determined that the thirteen year old victim in this case had a physical appearance of a female (with a childlike appearance) that has not yet become an adolescent female with mature female characteristics, as compared to an adolescent that does have "mature female characteristics." Based upon that reasoning the trial Court allowed this testimony, in that it was difficult to predict what the appearance of S.D. would have been in 2002 at the time of the alleged event. TT 467.

During cross-examination of Dr. Cooper-Lehki she discussed Mr. Cecil's responses to the "Hanson Sex Attitude Questionnaire". She testified that in response to a question as to whether or not a person should have sex whenever it is needed, that Mr. Cecil indicated the answer of yes. She testified that in response to the question of

whether or not a woman should oblige a man's sexual needs, she indicated that Mr. Cecil circled a number five on a scale of one to five, which means that he completely agreed with the concept. In response to a question as to whether or not, "everyone is entitled to sex", she testified that Mr. Cecil again circled a number five on a scale of one to five, which indicated that he completely agreed with that concept. In response to a statement that, "sex must be enjoyed by both parties", she testified that Mr. Cecil circled a number one on a scale of one to five, which means that he completely disagreed with the concept that sex should be enjoyed by both parties. In response to a statement, "men need more sex than women do", she indicated that Mr. Cecil again circled number five on a range of one to five and that he completely agreed with the concept. She was then asked in light of the above-stated questions whether it was fair for her to have an opinion as to whether or not his responses would be those of a healthy heterosexual male, she testified that those responses were very accurate and what men in general think about sex. See TT 634-635.

In conclusion, based upon the defense expert, Mr. Cecil indicated in his testing that he believed that a person should have sex whenever they needed it, and that a woman should oblige a man's sexual needs. He believed that everyone was entitled to sex, and he disagreed that sex must be enjoyed by both parties implying that the enjoyment of one is all that is necessary. Based upon the testing, Mr. Cecil indicated that men need sex more than women. Despite these opinions, the defense expert still concluded, and testified to the jury, that in her professional opinion Mr. Cecil had the characteristics of a normal heterosexual man with normal sexual interests.

This testimony was allowed to be given to the jury by the trial Court based upon

the factual possibility that the children in this case at the time that they were allegedly assaulted may have had a physical appearance of a child who had not yet sexually matured, which would be a defense to Mr. Cecil in that he only had a sexual interest in adult women and "adolescent females". The practical effect of this testimony though was an attempt by the defense to have the jury focus upon the idea that Mr. Cecil was sexually normal, and that when he chose to take the witness stand, this evidence would boost his credibility when he denied the allegations made against him.

Appellant's post expert testimony regarding statistics of victim fabrication and reasons therefore, and criticism of the Social Service Worker's techniques regarding the victim's counseling should not have been admissible in this trial and were properly excluded by the trial Court.

The appellant's Counsel started early in the process with the attempt to create expert testimony attacking the credibility of one of the victims in this case. Defense Counsel filed a motion for an independent psychological examination of the alleged victim, K.J., in their pre-trial motions. The defense alleged in that motion that the records of the examination by the social worker agency disclosed a history which casts some doubt as to the "veracity of the charges". They stated that other, "demonstrated behaviors attributed to the State's alleged victims suggested need for evaluation". See defense motion #27 record. At the hearing on pre-trial motions defense Counsel attempted to justify their motion for a psychiatric evaluation or an independent evaluation of one of the alleged victims. After conceding that competency was not the purpose for the evaluation, the Court tried to narrow defense Counsel down as to the

true reasons for the motion. The Court stated,

If competency is not an issue, and you're basing a psychological examination solely on credibility, veracity, can you cite me any cases that our Supreme Court, where our Supreme Court said that victims are subject to psychological evaluations for the purposes of determining their truthfulness, that's basically what you're asking for. TT 53-54. Defense Counsel was not able to provide an argument that justified the psychological evaluation, that did not directly go towards an objective of having a professional develop evidence that would be used to impeach the alleged victim's credibility. See Court's ruling on motion. TT 39.

After failing to gain access to the victim for the purpose of having the victim evaluated by a Dr. Cooper-Lehki, appellant's Counsel then attempted to use discovery materials in order for Dr. Cooper-Lehki to have a basis for forming an opinion concerning credibility issues of the victim, K.J.. The victim, K.J., had sought the services of Family Services of Kanawha Valley for counseling after the sexual assault. The material from Family Services' file regarding K.J., as well as a video tape, were provided to defense Counsel through discovery. The appellant's expert, Dr. Cooper-Lehki, reviewed that material as an attempted basis for her opinion. TT 190. During the in-camera hearing it was pointed out that Family Services' role was to provide counseling to children and not necessarily doing a professional assessment as done by a psychiatrist. TT 200.

In the appellant's petition he stated that an expert would have testified that children are often not truthful regarding allegations of sexual misconduct because they have been subjected to improper techniques of therapy or interrogations which are sometimes referred to as inadvertent indoctrination. TT 489. Even though their expert was critical of how Family Services provided counseling to K.J., there was never a conclusion that the alleged failures on the part of Family Services did cause K.J. to

exaggerate or fabricate allegations towards the appellant.

In conclusion, the trial Court made a ruling that if the State called witnesses from Family Services to testify that K.J. had characteristics similar to that of a sexually abused child, that he would allow defense Counsel to call their expert in rebuttal, implying that the expert could testify about their criticisms regarding Family Services techniques. The appellant is correct, the State of West Virginia elected not to call witnesses from Family Services, so Family Services' testimony regarding K.J.'s characteristics of that of a sexual abused individual were never put into evidence. After the State chose not to call Family Services as a witness, the appellant was then put in a perplexing situation, that they could not use their rebuttal testimony, and was thus placed in the position of debating whether or not they should call Family Services' witnesses to testify. The Court then had concerns regarding the appellant calling their own witnesses for the purpose of their providing rebuttal testimony to their own witness. TT 471 and 472. Again, this complete reading of the transcript indicates the appellant's true reason for calling the expert, not being the criticism of Family Services techniques, but to focus on psychiatric reasons to attack K.J.'s credibility.

**The trial Court did not commit reversible error
by prohibiting the defense expert from testifying that in
accepted studies there is evidence that between five and
thirty-five percent of all accusations of sexual abuse are fabricated.**

Rule 702 of the West Virginia Rules of Evidence states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness

qualified as an expert by knowledge, skill, expertise, training, or education, may testify thereto in the form of an opinion or otherwise.

The first question that needs to be asked regarding the statistics of fabrications is what benefit does a statistical range of five to thirty-five percent have for the jury in determining any fact in issue in the case? If one accepts the five percent, then that indicates that ninety-five percent of all individuals who make allegations that they are a victim of a sex crime is telling the truth. If you take the extreme range of thirty-five percent, then one would conclude that sixty-five percent of all individuals who make an allegation that they have been subjected to sexual abuse are telling the truth. See TT 509. Such a great range of five to thirty-five percent practically provides absolutely no help to the jury in determining any fact in controversy in the case outside of credibility issues which would again be governed by Rule 608 of the Rules of Evidence.

Rule 608 states in pertinent part:

(b) Specific instances of conduct. Specific instances of the conduct of the witness, for purposes of attacking or supporting the witness's credibility, ..., may not be proved by extrinsic evidence. (emphasis added)

Statistical data dealing with such generic percentages of fabrications in sexual assault cases would be extrinsic evidence in an attempt to make an argument that the State could not meet its burden of proving guilt beyond a reasonable doubt if there is a thirty-five percent chance that the victims are not being truthful. The defense expert testified that one of the most common situations dealing with fabrications is a divorce situation and custody disputes. She testified that she did not know of any studies that specifically break it apart, but that would be a red flag with the allegation coming in at that context. She conceded that in divorce situations often times children would be

caught between two competing parents and that allegations of sexual abuse could be used as a weapon. TT 504. Under Rule 702 analysis, how helpful would this statistical information be regarding the percentages of false allegations when you have situations where allegations are made in divorce cases that may play into the statistical analysis. In the present case there were no allegations of divorce or competing interests in a child custody situation.

It is also important to note that the defense expert in this case never personally met or interviewed either of the alleged victims in this case. Nor did the defense expert in this case ever personally interview or obtain first-hand knowledge of the events that took place at Family Services outside of the discovery packet provided to defense Counsel dealing with video tapes, interviews, and other documentation that may have been taken out of context of the reality of what happened during the counseling sessions.

The appellant's expert testified that there is a number of reasons that false reports or false allegations are made by alleged victims of sexual abuse. She testified that it can be for seeking attention, it can be a result of coaching, and it can be for distraction or displacement. She testified that distraction or displacement is that the alleged victim may want to divert attention away from a topic. TT 489. The question that needs to be addressed is under Rule 702, is this testimony helpful to the jury in order to determine any facts in this case or is it designed again as an extrinsic testimony in order to attack credibility. The State argued that an expert's testimony must rest on a reliable foundation and be relevant to the case at hand. The reason why an individual may lie regarding a sexual assault was connected to the statistical

analysis. The appellant expert was able to say in generality why individuals may lie regarding such allegations, but could not in any factual way connect it to this case.

Arguably, the opinions of why people lie is not based so much on expert testimony, but just on common sense, that would be within the scope of persuasive argument that an attorney could make in closing argument. The idea seeking attention is a common argument made by defense Counsel in closing arguments on why a person may not be telling the truth when they are alleging that they are a victim of crime. Coaching is again another common argument that is made concerning credibility that is not given any kind of special status based upon the testimony of an expert, unless the expert could connect the concept of coaching with a specific aspect of the case.

The trial Court made rulings regarding the above-referenced testimony and cited the case of State v. Harman, 165 W.Va. 494, 270 S.E.2d 146 (W.Va. 1980) in which this Court stated that there may be one occasion where psychiatric disability may be admitted for impeachment purposes. Syl. Pt. 5 of that case refers to situations where a child witness has a psychiatric disability, and that psychiatric disability may affect credibility, then it could be, but is limited, and would be admissible if there is a showing that the disorder affects the credibility of the witness. It also has to be shown that the expert had a sufficient opportunity to make a diagnosis of that disorder.

The Court made a finding that the appellant's expert would have the expert qualification to testify in general regarding how things happen in real life, why in general people may have motivations to not be truthful, and some general statistics regarding fabrication relating to allegations of sexual misconduct. The Court did make

a finding that her general and academic opinions regarding reasons for fabrication and fabrication statistics are not in any way factually tied to this case, and therefore found that her testimony in that regard would not assist the trial fact under Rule 702, and would create more confusion to a jury and would be likely to mislead a jury in its evaluation. TT 519. The argument of misleading the jury in its evaluation of credibility could be based upon the concept that by having the opinions given by an expert would give it more weight than it would deserve.

The Judge's ruling regarding limiting the appellant's expert did not prevent defense Counsel from making an argument to the jury in closing regarding these concepts. The defense Counsel stated to the jury in closing arguments:

I submit to you that K.J.'s story has been suspect from the very beginning that it was told. The problems appears to be, and this is based on at least my observation and it's up to you whether or not you agree or disagree, that once a child begins to make such an allegation, that the child becomes enveloped in a system that will in fact not let it turn back. There does not seem to be, at least in this case, an adequate safeguard to protect against accusations that for whatever reason, whether those events are imagined, whether those events are exaggerated, or whether they are a product of a dream, there is no adequate safeguard, at least in this instance, to turn back the accusation and therefore the accusation literally spins out of control to the point that a man who enjoys a good reputation all of his life is defending himself in front of twelve strangers against a horrible accusation and they are horrible. But once it starts, there appears to be no stopping. (emphasis added) TT 931.

Defense Counsel's argument in closing is based upon common sense arguments about why a victim may not be truthful in a sexual assault case. It bolsters the argument that the proposed expert testimony regarding reasons children may not tell the truth such as seeking attention or otherwise are, "common sense" arguments relating to credibility, that should not be bolstered by being a product of an expert's

testimony. If the Court had allowed the defense expert to testify as to the reasons that children lie and the statistics therefore, defense counsel could have argued in closing the same type of argument that would be bolstered as the opinion of an expert, thus, giving it undue weight and confusing the jury as to the appropriate value of the argument.

Defense counsel did not hesitate in closing argument to take an opportunity to exploit their expert's opinion regarding Mr. Cecil's expert diagnosis of being a normal adult heterosexual male. The appellant's counsel in closing argument stated the following:

You have a normal adult heterosexual male who's now accused of going out of the realm of what is acceptable behavior. Now, is that reasonable? Or is it not supportive of a reason to doubt the accusations? TT 942.

Again, it is important to note that the purpose of the expert testimony dealing with the normal adult heterosexual male was to demonstrate to the jury that the defendant did not have a sexual interest in children that have not yet reached the level of puberty. Defense counsel though sought the opportunity of using the expert testimony as a blanket allegation in closing argument that the defendant was "normal" and now being accused of a crime that is out of the realm of acceptable behavior, and then argued that that was a reason to support a finding of reasonable doubt. This is the very reason why Rule 702 and Rule 608 of the Rules Of Evidence come into play. Rule 702 would indicate that the testimony regarding the statistics of fabrication and the reason therefore would not be helpful to the jury, and Rule 608 would prevent said information being used as extrinsic evidence to attack the credibility of the child.

The trial Court in making its decision to limit the appellant's expert testimony

regarding statistics and reasons why children may fabricate, made reference to former Justice Cleckley, now Professor of Evidence Cleckley, in his treatise on evidence, specifically Chapter 6, Article 6, Section 8(a)(3)(a), which states with modern rules of evidence regarding how Rule 608 spells out ways to attack credibility through opinion evidence. Professor Cleckley cites State V. Harman as the only exception where it would be found that a child witness has a psychiatric disability that may affect his or her credibility.

In the case of State v. McIntosh, 207 W.Va. 561, 534 S.E.2d 757 (W.Va. 2000), this Honorable Court addressed the issue of the burden of proof that is needed in an attempt to prove that mental disability is sufficient to affect credibility. The McIntosh case was a case where the defendant was convicted of third degree sexual assault, and the Court held that psychiatric disorders can be shown to impeach a material witness's testimony in a criminal case. There must be a showing that the disorder affected the credibility of the witness and that the expert had a sufficient opportunity to make a diagnosis of the psychiatric disorder. Most importantly the Court stated, "we have also recognized the sensitive nature of the evidence and the potential for abuse" and have "required a showing that the psychiatric disorder affects the credibility and that an expert has had a sufficient opportunity to make the diagnosis of a psychiatric disorder before the evidence can be used to impeach the witness", citing State v. Harman, 165 W.Va. 494, 270 S.E.2d 146 (W.Va. 1980).

In the case of State v. Harman, 165 W.Va. 494, 270 S.E.2d 146 (W.Va. 1980), this Honorable Court, as stated above, is the authority in this State that a psychiatric disability may be introduced which affects the credibility of a material witness if it can be

shown that the disorder affects credibility and the expert has sufficient opportunity to make a diagnosis of the disorder. Harman also distinguishes the difference between a psychiatric disorder and issues dealing with competency. In the present case there was never a suggestion that either of the victims in this case had a psychiatric disability that would affect their credibility.

In the case of State v. Miller, 168 W.Va. 531, 285 S.E.2d 376 (W.Va. 1981), the defendant was convicted in Preston County on first and third degree sexual abuse. In that case this Honorable Court reversed the conviction based upon expert testimony provided by the State. The State called an expert witness, being a psychologist, who had not interviewed any of the parties to the incident, but gave an opinion based on hypothetical questions which covered the facts surrounding the incident. The State had the burden of proving that the alleged acts committed by the defendant were for the purpose of sexual gratification. By using a hypothetical, the expert said that the acts, based on a hypothetical, would be both sexual and stadtistic in content.

This Honorable Court stated in that case that the general theory which permits an expert to give an opinion is that the questions presented are of such a technical nature that persons of ordinary intelligence would not possess the expertise to competently pass judgement thereon. Consequently, it is permissible for experts to assist a jury in these situations. The Court went on to say that, however, when the subjects being inquired into are within the common knowledge of the jury, expert opinion is ordinarily not admissible. This rule is based on the general premise that to permit such testimony invades the providence of the jury which is the ultimate fact finder.

In this case the Court stated the following:

One of the difficult problems which arises from permitting an expert to testify about the intent of the defendant independent of the insanity issue is that criminal intent is an indispensable element of almost every area of our criminal law. As we have previously noted in this case, the term sexual gratification which is a required element of sexual abuse, is a subjective state of mind similar to the criminal intent required in other crimes. To permit experts to give opinion testimony, based on hypothetical questions or based on their examination of a party, on the ultimate issue of criminal intent would, in our view, only serve to unduly confuse and complicate the trial of a criminal case. Each side would have the right to offer opinion testimony on the intent or mental state of a defendant. Moreover, in cases where crime relates to the same manner to the mental state of the victim, this will also be subject to opinion testimony. Because these intent issues are subjective in nature, it can be expected that the experts will disagree. The consequences will be that the subjective area of intent will no longer be tested by the objective actions and circumstances surrounding the conduct of the parties, but will be overlain by varying opinions of experts. (emphasis added)

The Court also stated that the same issue of confusion and complication was cited in the case of State v. Frazier, ___ W.Va. ___, 252 S.E.2d 39 (W.Va. 1979), where the Court concluded that a polygraph test was too subjective to be admissible in a criminal trial. The Court stated that what is involved in the case relating to the expert testimony of the defendant's state of mind, is the introduction of an expert on the subjective mental condition of the defendant, which is a key element of the crime of sexual abuse.

In the present case defense counsel has attempted to introduce expert testimony regarding the subjective analysis as to whether or not the victims would be telling the truth. They would have an expert testify that based upon certain studies and documented reasons for fabrications, connected to counseling techniques at Family Services, that there is a likelihood that one of the victims in this case was not being

truthful, or a stage would be set for defense counsel to make that argument in closing. As the Supreme Court stated in State v. Miller, supra, if that was allowed to happen, it would open a pandora box in which the State and defense would be calling experts regarding the subjective factors to be considered on who is telling the truth and who isn't, which are subjective in nature, and can be expected to create a situation where numerous experts would disagree. As stated in State v. Miller, the issues that the appellant tried to develop through their expert that was precluded by the trial Court such as reasons for not being truthful or for fabrication, would be such issues and matters which the average juror could understand from the facts surrounding the case and based upon their own common sense of human affairs. Such consideration should not be bolstered through the credentials of an expert, or cause the confusing atmosphere of having jurors subjected to conflicting experts on subjective issues before the jury.

Other states have been reluctant to allow expert testimony that vouches or supports the credibility of a witness or would attack or effect the weight of another witness's testimony. In People v. Minoru, 735 P2d 203 (CO. app. 1987) that Court held that where a trial Court permitted a psychiatrist to examine one of the children to give her opinion as to the child's truthfulness on specific occasions, such testimony would invade the providence of the jury regarding the credibility of a witness. In State v. Ritrovato, 85 CT. app. 575, 858 A.2d. 296 (2004), a Connecticut Appellate Court stated that an expert may not testify regarding the credibility of the victim, as that determination is solely within the providence of the jury. In Hams v. State, 598 S.E.2d 459 (GA. 2004), a Georgia Appellate Court stated that a defense expert in a murder prosecution was properly precluded from testifying with respect to an expert's favorable

opinion as to the credibility of a defendant's pre-trial statement, when such testimony would invade the providence of the jury. In the case of Frazier v. State, 269 S.E.2d 568 (GA. Ct. app. 2006), a Georgia Appellate Court stated that the credibility of a witness is a matter for the jury, and a witness's credibility may not be bolstered by the opinion of another witness as to whether the witness is telling the truth. In State v. Humphrey, 36 P3d 844 (Kan. Ct. app. 2001) , a appellate Court stated that an expert may not evaluate the weight or credibility of the evidence because these matters are strictly within the providence of the jury. In State v. Whitmill, 780 S.W.2d 45 (MO. 1989), a Missouri Appellate Court stated that in the prosecution for a first degree sexual assault case, the Court properly excluded a psychologist testimony regarding psychological factors involved in eyewitness identification on grounds that such testimony would invade the providence of a jury.

**The trial Court did not commit reversible
error in denying appellant's motion for directed
verdict on two counts of sexual abuse by custodian.
W.Va. Code, Chapter 61, Article 8D, Section 5.**

1. The standard of review.

Upon a motion to direct a verdict for the defendant, the Court is to view the evidence in a light most favorable to the prosecution. In State of W.Va. V. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (W.Va. 1995), this Honorable Court stated:

the standard review of sufficiency of evidence to support a conviction, which applies both generally and in circumstantial evidence cases,

approaches highly differential, and the appellate court can reverse only if no rational jury could have found the defendant guilty beyond a reasonable doubt; the standard is a strict one, and the defendant must meet a heavy burden to gain reversal because the jury verdict will not be overturned lightly.

The Court went on to say that an appellate review is not a device for appellate courts to replace jury's findings with its own conclusions that appellate courts may not decide the credibility of witnesses. The Court went on to say that a jury verdict should be set aside only when the record contains no evidence, regardless of how it is waived, from which a jury could find guilty on a reasonable doubt.

2. Argument.

The indictment returned by a Putnam County Grand Jury against Mr. Cecil in Count Nos. Two (2) and Four (4), pertain to the felony offense of sexual abuse by guardian or custodian, under West Virginia Code, Chapter 61, Article 8D, Section 5. According to the language in the indictment Mr. Cecil allegedly engaged in sexual contact with individuals under the age of eighteen while they, were "under his care, custody and control". In Count No. Two (2) of the indictment the time frame for the allegation was between February, 2002, and April, 2002. In Count Four (4) of the indictment the time period was between June, 2005, and August, 2005. West Virginia Code, Chapter 61, Article 8D, Section 1, defines a custodian as a person over the age of fourteen years who has or shares actual physical possession or care and custody of a child on a full-time or temporary basis, regardless of whether such person has been granted custody of the child by any contract, agreement or legal proceeding.

In 2005 the West Virginia Legislature amended 61-8D-5 and added an additional category of persons having standing to commit the crime as being described as,

"persons in a position of trust in relation to a child". The jury was also instructed in jury instructions by the Court consistent with the older version of the statute.

While instructing the jury as to the law the Circuit Court stated the following regarding the definition of a custodian:

A custodian means a person over the age of fourteen 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. TT 898, 899.

Therefore, the fact comes into play outside of age limitations is that whether or not Mr. Cecil shared actual physical possession or care and custody of the alleged victims on a temporary basis...therefore, the issue is whether or not when a child would spend the night at a friend's house, whether or not the friend's parents would be custodians according to the statute, i.e. sharing physical possession or care and custody of the guest child on a temporary basis.

When victim K.J. testified in the trial she stated that she spent the night at the defendant's house, particularly on July 2nd. TT 259. She was asked whether or not she spent the night at the defendant's house very often and the her reply was, "yeah". TT 260. K.J.'s mother testified that the defendant and K.J. were close to being best friends and that the defendant's family just lived a couple doors down from her house and that they spent a lot of time together. TT 307. She testified that K.J. spent the night at the defendant's house on July 2nd. TT 208. She further testified that it was a normal event for K.J. to sleep over at the defendant's house. TT 309.

The victim S.D. testified that the defendant's family and her family had a close relationship. TT 400. S.D. testified that she stayed at the defendant's house in March

of 2002. TT 401. She indicated that the decision to stay at the defendant's house was, "it was discussed between our parents". TT 402.

The defendant's daughter, R.C., was called to testify on behalf of the defendant. She stated in response to defense Counsel's questions that she and K.J. would often times spend the night together. That she would spend the night in K.J.'s home and K.J. would spend the night in her home frequently. TT 542, 543.

When the defendant's wife took the stand, pursuant to cross-examination, she testified that the night of the alleged events the defendant, her husband, in response to K.J.'s allegation told her (K.J.) that he loved her and he would never hurt her. TT 741. She also agreed that it's common place in today's world for kids to spend the night at some else's house with their friends. TT 741. The defendant's wife was asked during cross-examination the following question, "If you entrusted your child when they spent the night with another family, would you expect the adults in that home would feel a responsibility to take care of them as if they were their own children?" The defendant's wife's answer to the question was "yes". She also admitted that she would feel a responsibility and that her husband would have a responsibility to take care of children that would be spending the night at their home. TT 742. During cross-examination the defendant's wife stated regarding K.J., "she was under our house, she was in our care, yes." TT 743.

The defendant, Danny L. Cecil, made a decision to take the stand and testify in his own behalf. During cross-examination the defendant admitted that he had a responsibility to supervise children that were in his home. He stated the following: "I believe that when a child is in my home that I am supposed to look after that child. I

believe that if anything happens to that child, I'm to immediately notify their parents." TT 803. He agreed to the following, "it's just like if your child spent the night at another home, you would expect the adults in that home to care for your child, just like you would care for a child in your home." TT 803.

Based upon the above referenced testimony, a jury can fairly conclude beyond a reasonable doubt that the defendant, Danny L. Cecil, shared actual physical possession of both victims in this case, and was responsible for their care and custody on a temporary basis, when those children were visiting his home.

The 2005 amendment to the statute giving the State additional options, was not included in the language of the indictment. Nor was the jury in this case instructed as to the version of the law that was enacted by the West Virginia Legislature in 2005. The State of West Virginia proceeded upon the statute that was in place in 2002 and in 2005 prior to the amendment, and the jury was instructed accordingly, and the defendant was in no way prejudiced by that post legal standard. In fact, it is obvious from the record that the decision was made to proceed that way in order to avoid *ex post facto* issues.

**The Court did not commit reversible error
in denying the appellant's double jeopardy arguments.**

1. Argument.

The appellant claimed that the right against double jeopardy has been violated because the claim of sexual abuse by guardian or custodian is a lesser included offense of general sexual abuse crimes. Appellant's characterization of what the Double Jeopardy Clause of the 5th Amendment protects is not correct as it relates to

this case. The Double Jeopardy Clause of the Fifth Amendment provides that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb." The clause affords three protections to the criminal defendant. The first two protect against a subsequent prosecution for the same offense after acquittal or conviction. See Ohio v. Johnson, 467 U.S. 493, 498 (1984). When subsequent prosecutions are involved it is appropriate to use the "Blockburger" test to examine whether one offense is included in another offense. However, neither of the protections against second prosecutions is involved here. The appellant was charged and convicted in a single prosecution.

Absent a second prosecution, appellant's protection under the Double Jeopardy Clause is limited to multiple punishments for the same offense imposed in a single proceeding. In the multiple punishments context, the interest protected is limited to ensuring that the total punishment did not exceed that authorized by the legislature. United States v. Halper, 490 U.S. 435, 450 (1989); See Ohio v. Johnson, supra; Missouri V. Hunter, 459 U.S. 359, 366, 367 (1983). The purpose is to ensure that sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishments. i.d. at 499.

In the case of State v. Gill, 187 W.Va. 136, 416 S.E.2d 253 (W.Va. 1992), this Honorable Court specifically addressed the issue as to whether or not West Virginia Code, Chapter 61, Article 8D, Section 5, violated the double jeopardy clause of the United States Constitution. In State v. Gill this Honorable Court stated that if the

Legislature made clear an expression of its intention to aggregate sentences for the related crimes, there would be no need to engage in the "Blockburger" test. Syl. Pt. 8. This Honorable Court stated that the statutory offense of sexual abuse involving parents, custodians, and guardians, is a separate and distinct crime from the general statutory sexual offenses for purposes of punishment, and separate offenses of both crimes in a trial involving the same acts would not violate the double jeopardy clause of the Constitution.

Given the parameters of protection in multiple punishments, the test enunciated in State v. Gill properly comports with the Constitution. A claim that double jeopardy has been violated based on multiple punishments imposed after a single trial is resolved by determining the legislative intent as to punishment. Syl. Pt. 7., State v. Gill, 416 S.E.2d 253 (W.Va. 1992). The legislature has clearly and unequivocally declared its intention that sexual abuse involving parent, custodians, or guardians, West Virginia Code, Chapter 61, Article 8D, Section 5, is a separate and distinct crime from general sex offenses for the purpose of punishment. i.d. at Syl. Pt. 9.

When the appellant is arguing his double jeopardy issue, he makes reference to the "same evidence test", or the "same transaction test" as described in State ex rel Dowdy v. Robinson, 257 S.E.2d 167 (1979). He goes on to state that the same evidence tests provides that offenses are the same unless one requires proof of a fact which the other does not. They state in Mr. Cecil's case his prosecution plainly violates the test. For purposes of argument if one would look at the Code sections pertaining to sexual abuse in the first degree, sexual assault in the second degree and sexual abuse by a guardian or custodian, one would find that they all have difference peculiar facts

that must be proven with each to the exclusion of the other two. Sexual abuse by a guardian or custodian under West Virginia Code, Chapter 61, Article 8D, Section 5, requires the State to prove that the offender is in fact a guardian or custodian. Sexual abuse in the first degree under West Virginia Code, Chapter 61, Article 8B, Section 7, would require that the State prove that the sexual contact is the result from "forcible compulsion". Forcible compulsion is not an element necessary to prove sexual abuse by a guardian or custodian. Sexual assault in the second degree under West Virginia Code, Chapter 61, Article 8B, Section 4, requires that the State prove "sexual intercourse or intrusion", a fact that the existence of which is not necessary to prove sexual abuse in the first degree or sexual abuse by a guardian or custodian. Sexual abuse by a guardian or custodian can be proved through sexual contact which does not necessarily require penetration. (See West Virginia Code, Chapter 61, Article 8B, Section 1, defining forcible compulsion, sexual contact, sexual intercourse and/or intrusion.) In State v. Gill, supra, this Honorable Court stated that the, "Blockburger" test cited by the appellant would not apply where the Legislature clearly intended for sexual abuse by guardian or custodian under West Virginia Code, Chapter 61, Article 8D, Section 5, be a separate and distinct defense. The statute plainly indicates that that was a legislative intend. State v. Gill, supra.

The appellant raises an issue alleging that the failure of the jury to convict the appellate regarding sexual assault in the second degree, is an **inconsistent verdict** regarding the conviction of sexual abuse by a guardian or custodian, and should be grounds for a new trial. Defense Counsel cited the case of State of W.Va. V. Hall, 328 S.E.2d 206 (1985) that stated that inconsistent verdicts would not constitute reversible

error. In State v. Hall, this Honorable Court cited United States v. Powell, 469 U.S. 57, 105 S.C. 471 (1984), in which our United States Supreme Court unanimously concluded that an appellant review of a claim of inconsistent verdicts is not generally available. It was stated that each count in an indictment is regarded as if it was a separate indictment.

The verdicts in this case are not inconsistent. As stated above, sexual assault in the second degree requires the State to prove beyond a reasonable doubt that there was sexual intercourse or sexual intrusion. West Virginia Code, Chapter 61, Article 8B, Section 4(1). Sexual intrusion requires penetration. See West Virginia Code, Chapter 61, Article 8B, Section 1. If the jury believes that the appellant had sexual contact with K.J., which would necessitate touching, but the jury did not believe beyond a reasonable doubt that there was intrusion, then the jury could find the appellant guilty of sexual abuse by a guardian or custodian and not guilty of sexual assault in the second degree.

Therefore, appellant's rights with respect to any double jeopardy claim were protected and observed in the prosecution of this case.

**The trial Court did not commit reversible error
in permitting juror Brian Hamm to serve on the petit jury.**

1. The standard of review.

In order to receive a new trial based on the presence of a juror disqualified under West Virginia Code, Chapter 52, Article 1, Section 8, the party challenging the verdict must show that a timely objection was made to the qualification or that ordinary

diligence was exercised to ascertain the disqualification. Proudfoot v. Dan's Marine Service, Inc., 558 S.E.2d 298, 304 (W.Va. 2002).

2. Argument.

Appellant claims that his right to a trial by a jury of twelve was denied when the appellant discovered post trial that Juror Brian Hamm had a residence in Charleston, Kanawha County and another in Putnam County which he declared his permanent residence. According to the appellant, Juror Hamm indicated on the second page of his petit juror qualification questionnaire on December 19, 2005 that he had two residences. See Pet. at 37. Juror Hamm then corresponded with Judge O.C. Spaulding on January 9, 2006, and had a conversation with the Putnam County Circuit Clerk's Office about his residences on January 10, 2006, and its effect on his ability to serve. See Pet. at 38. Juror Hamm was a part of the "jury pool" in the appellant's trial and he was ultimately selected for service.

Although it is not clear from the record, based on Juror Hamm's interactions with Judge O. C. Spaulding and the Putnam County Circuit Clerk, it may be assumed that Juror Hamm was not deemed disqualified from service. The trial court did not err in permitting Juror Hamm to serve on the jury because the appellant cannot show he (the appellant) made a timely objection or exercised ordinary diligence in regard to Juror Hamm's qualifications.

The Court has recognized that when statutory or common law basis for disqualification of a juror exists, a party **must** during voir dire avail himself of the opportunity to ask such disqualifying questions. Otherwise, the party may be deemed

not to have exercised reasonable diligence to ascertain the disqualification. Proudfoot v. Dan's Marine Service, Inc., 558 S.E.2d 304 . (citing State v. Bongalis, 378 S.E.2d 449, 456 (W.Va. 1989)). Further, under the ordinary diligence standard, it is not enough to show that the circuit court failed to ask the questions which likely would have revealed the disqualification. A party must ensure that the trial court examines the jury panel concerning possible disqualification, or the party itself must ask the relevant questions. i.d.

Even assuming arguendo that Juror Hamm was disqualified under West Virginia Code, Chapter 52, Article 1, Section 8, the appellant has failed to show a timely objection or ordinary diligence on his part. First, the materials relied on by the appellant were available to him before trial. There is no indication that appellant was denied access the petit juror qualification questionnaires. Secondly, during voir dire, the Judge nor the appellant asked the jurors whether they were residents of Putnam County or whether they had residences elsewhere. TT 1-81. The appellant had every opportunity to ascertain the qualifications of the jurors in this case. Appellant's lack of diligence and failure to object is a waiver of this issue.

Appellant Counsel claims in his brief that the Circuit Judge's letter dated January 9, 2006, to Mr. Hamm, is an incorrect statement of the law, and that it was a mistake to allow him to serve. Counsel is asking this Court to make a ruling that this juror's status was as a matter of law disqualified the juror, and relieves them of an obligation to exercise ordinary diligence in regard to juror qualifications and asking the appropriate questions in voir dire.

Based upon the record, the Court's letter instructed the potential juror, "your

permanent residence is determined by your intentions...it all depends on where you consider your permanent residence to be." The record also indicates that he called the Clerk's Office and it was documented that he believed Putnam County to be his permanent residence. In fact, the jury questionnaire clearly indicates that he believed his permanent residence was in Putnam County. In today's world individuals have multiple residences, some own country farms, some have vacation homes in the mountains, or at out-of-state locations in warmer climates.

The present state of law is not intended to create a standard in which jury convictions can be challenged by subsequent arguments that individual jurors did not have the domicile in the county in which the trial took place even though they may have had a residence there. That is why the Court's have imposed upon Counsel the obligation to perform ordinary diligence to explore those details. Even though appellant's Counsel has stated in his brief that the juror apparently not only lived in Charleston, but did so with his wife and children. That is not documented in the record and should not be relied upon by this Court as a basis for weighing legal arguments in question. The trial Court and the State never had an opportunity to make a record on the issue in that it has not been raised until the appeal, which is another reason for it not being grounds for reversal.

The trial Court did not commit reversible error in denying appellant's motion for a hearing on alleged juror misconduct.

1. Argument.

Appellant claims error in trial court's decision not to hold an evidentiary hearing

on appellant's allegations of juror misconduct. The trial court was correct in its analysis of Rule 606(b) of the West Virginia Rules of Evidence and the corresponding case law in denying appellant's motion.

Appellant requested an investigation and hearing into three possible allegations of juror misconduct. The first allegation involved the visit to MySpace.com by a juror. The second allegation involved the private communication between a juror and her daughter about MySpace.com. The third allegation involved juror bias because a juror worked for the Department of Health and Human Resources.

During the post trial motions hearing, the trial court heard testimony and took evidence with respect to the allegations of juror misconduct. The impeaching juror, Juror Hamm, did not appear pursuant to a prior order, but the trial court took into consideration the testimony of David Alan Barnette, Juror Hamm's lawyer. Mr. Barnette testified to conversations he had with Juror Hamm and an email submitted to Mr. Barnette by Juror Hamm about the juror misconduct.

After considering the evidence before it, the trial court properly denied appellant's motion for an investigative hearing. A jury verdict may not ordinarily be impeached based on matters that occur during the jury's deliberative process which matters relate to the manner or means the jury uses to arrive at its verdict. Syl. Pt. 1, State v. Scotchel, 285 S.E.2d 545 (W.Va. 1981). Courts do recognize that a jury verdict may be impeached for matters of misconduct extrinsic to the jury's deliberative process. i.d. at Syl. Pt. 2. The extrinsic information, however, must be sufficiently prejudicial to set aside the verdict. State ex rel Trump v. Hott, 421 S.E.2d 500, 504 (W.Va. 1992). The trial court found that the appellant could show no prejudice based on the

allegations and the issue did not warrant a hearing. ORD 4/14/06 at 21.

First, the trial court properly found that a visit to any website was not prejudicial and as such did not warrant a hearing. i.d. at 12. The evidence introduced at trial concerning the website, MySpace.com, was introduced solely for the purpose of attacking the credibility of one of the mothers of a victim, and was not substantive evidence. i.d. at 11. Furthermore, the public access to the website information specifically maintained by the minor victim was restricted or removed prior to trial. i.d. at 11-12.

The MySpace evidence came into the trial through the investigator for Mr. Cecil when he testified that the victim, K.J., had a MySpace account and after the July 2005 incident that she used the MySpace account and communicated with, "older boys". The investigator testified he found numerous postings on the site that connected K.J. to male individuals who, "purported to be older, i.e. sixteen, seventeen, or eighteen". He indicated that it was common for K.J. to make references to older boys on the MySpace account. See TT 605, 606. He testified that K.J.'s MySpace screen name was, "Sweet Cupcake Twenty Ten". Defense Counsel said the MySpace testimony was legitimate impeachment in light of the fact that the victim's mother had testified that K.J. prior to the July, 2005, assault was very outgoing. K.J.'s mother testified that she would become very withdrawn. She testified that she noticed a little bit that she didn't like being around older men, older boys, and you know an uneasy feeling. Just very withdrawn. See TT pg. 316.

Second, the trial court properly found that the communication between the juror and her daughter about MySpace.com would also constitute harmless error. i.d. at 12.

Again, MySpace.com itself was impeachment evidence only, not even related to a victim's testimony, and could not prejudice the appellant in a manner to warrant setting aside the verdict. i.d. at 12.

Although appellant cites Remmer v. United States in support of his proposition that the contact between a juror and her daughter was presumptively prejudicial, Remmer specifically applies to communication with juror during a trial **about the matter pending before the jury**. Remmer v. United States, 347 U.S. 227, 229 (1954). The evidence before the trial court was that the discussion was about "a web site" and not about any matter pending before the jury. Post Trial Tr. at 20-21. The email admitted as Defense Exhibit 1 during the Post Trial Motions hearing indicated that the juror discussed the website with her daughter without discussing the case. Therefore, appellant was required to show prejudice that would warrant further investigation and he failed to do so.

Thirdly, with respect to the juror who worked for the Department of Health and Human Resources, the trial court properly found that the juror was not initially biased and the appellant failed to exercise due diligence during voir dire. This juror was frank with the Court and defense Counsel was aware of her work experience and any contact she had with the prosecuting attorney's office during voir dire. TT 8. The trial court also found that the juror relied on her life experiences as she was instructed to do by the trial court. Post Trial Tr. at 27. The jury was instructed at trial that the evidence should be considered and viewed by the jurors in light of their own observations and experience in the ordinary affairs of life. TT 906. Additionally, the appellant does not challenge the

jury instructions in any way.

Defense Counsel had six (6) jury strikes during the jury selection process, while the State had only two (2). The record indicates that defense Counsel made the choice not to strike its DHHR juror. This could be because defense Counsel called a DHHR witness, who according to their argument supported their theory of the case.

A jury verdict may not ordinarily be impeached based on matters that occur during the jury's deliberative process which matters relate to the manner or means the jury uses to arrive at its verdict. Syl. Pt. 1, State v. Scotchel, 285 S.E.2d 545 (W.Va. 1981). Additionally, Rule 606(b) is clear that a juror may not testify as to the effect of another juror's mind or emotions on the juror's assent or dissent from the verdict. Rule 606(b) of the West Virginia of Evidence.

If the trial Court would have granted the motion and brought the jury in for an interrogation and hearing, it would have established a dangerous precedent. It would encourage attorneys and their investigators to contact jurors after trial, after a term of Court, and question them regarding the "deliberative process", in hopes of digging up issues of potential misconduct. After a trial, jurors may see media accounts or hear other unreliable information which may challenge the judgement they use during the jury deliberation process. This post-trial information could cause them to have second thoughts, and possibly misconstrue subjective conversations and debates that took place in the jury room. The ability to recall jurors after trials, should be closely guarded by the Courts, and only used when solid evidence suggests extrinsic misconduct that is prejudicial to the deliberative process. As such, the appellant's motion for further investigation was properly denied.

**The trial Court did not commit reversible error
in sentencing the appellant as such sentence was not disproportionate.**

1. The standard of review.

The general rule is that if a sentence is within statutory limits and not based on some impermissible factor, it is not subject to appellate review. State v. Hayes, 408 S.E.2d 614 (W.Va. 1991); State v. Rogers, 280 S.E.2d 82 (W.Va. 1981); State ex rel Koton v. Coiner, 187 S.E.2d 209 (W.Va. 1972); State ex rel Boner v. Boles, 137 S.E.2d 418 (W.Va. 1964); State v. Boles, 134 S.E.2d 576 (W.Va. 1964).

2. Argument.

The appellant was convicted of two counts of sexual abuse by a guardian or custodian, which carried a penalty of 10-20 years, each and one count of sexual abuse, which carried a penalty of 1-5 years. The trial court sentenced the appellant to 10-20 years on each count of sexual abuse by a guardian or custodian, to run consecutively, and 1-5 years on the count of sexual abuse to run concurrently.

Appellant claims that this sentence violates the proportionality principle of the West Virginia Constitution. It cannot be said that the trial court abused its discretion in sentencing the appellant. Appellant's claim is misguided. First, the proportionality principle applies to criminal sentences where there is no maximum set by statute or where a life recidivist sentence is imposed. State v. Carper, 342 S.E.2d 277 (W.Va. 1986). Such may be the case if this were a robbery conviction with a penalty of not less than 10 years. Here, however, there is a statutory minimum and maximum on each charge the appellant was convicted of.

Secondly, the general rule is that if a sentence is within statutory limits and not based on some impermissible factor, it is not subject to appellate review. State v. Bennett, 304 S.E.2d 28 (W.Va. 1983). Furthermore, there is nothing wrong with a trial judge imposing the maximum punishment possible under the statute. State v. Hayes, 408 S.E.2d 614 (W.Va. 1991); State v. Rogers, 280 S.E.2d 82 (W.Va. 1981); State ex rel Koton v. Coiner, 187 S.E.2d 209 (W.Va. 1972). State ex rel Boner v. Boles, 137 S.E.2d 418 (1964); State v. Boles, 134 S.E.2d 576 (W.Va. 1964).

In State v. Rogers, the Court refused to review the appellant's sentence of one to five years in the state penitentiary for unlawful wounding. State v. Rogers, supra. The Court noted that in prior cases, review has been limited to sentences which have no maximum limit provided by statute or life recidivist sentences. i.d. The appellant's sentence was clearly within statutory guidelines and there was no evidence that the sentence was based on an impermissible factor. i.d. Here, the trial court did not sentence the appellant to anything above what was statutorily permitted according the code and there is no evidence that an impermissible factor was considered in sentencing.

Thirdly, West Virginia Code, Chapter 61, Article 11, Section 21, provides that sentences imposed simultaneously shall run consecutively. However, the trial judge may, in his or her discretion, order the sentences to run concurrently. Keith V. Leverette, 254 S.E.2d 700 (W.Va. 1979). In this case, the trial court gave the appellant a benefit by exercising his discretion and ordering concurrent sentencing on the sexual abuse count.

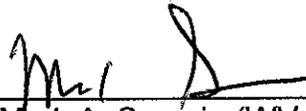
Therefore, appellant's rights with respect sentencing were protected and observed in the prosecution of this case.

1. Conclusion.

For the reasons set forth in this response or for any other just and lawful reason known by this Honorable Court, the State of West Virginia PRAYS that the judgment of the Circuit Court of Putnam County be affirmed by this Honorable Court.

Respectfully submitted,
STATE OF WEST VIRGINIA

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DANNY L. CECIL,
Appellant,

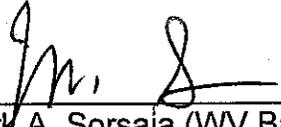
v.

Docket No. 33298

STATE OF WEST VIRGINIA,
Appellee.

CERTIFICATE OF SERVICE

I, Mark A. Sorsaia, Prosecuting Attorney, do hereby certify that I have on this 27th day of April, 2007, served the within Brief Of Appellee by mailing a true copy thereof by regular United States Mail to his Attorneys, James Cagle and Mark McMillian at 1018 Kanawha Blvd. E., Suite 1200, Charleston, WV, in an envelope properly stamped and addressed.



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