

No. 33298

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

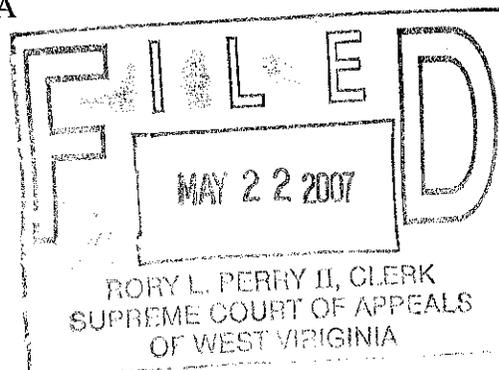
STATE OF WEST VIRGINIA,

Appellee,

v.

DANNY L. CECIL,

Appellant.



REPLY BRIEF

Submitted by:

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**I. The State's Argument Is Too Narrow to Properly
Address The Error Involving The Trial Court's
Restrictions Of The Defense Expert's Testimony**

In its brief the State argues that there was no reversible error committed when the defense expert was prohibited from testifying about the studies which indicate that 5-35 percent of sex abuse accusations are fabricated, Brief of Appellee p. 16 (hereinafter BOA p. ____). The State argues that under Rule 608 of the Rules of Evidence such testimony would constitute inadmissible extrinsic evidence attacking credibility, BOA p. 17. The essential flaw in the State's argument is that the trial court prohibited much more than references to the results of the studies of fabricated accusations of sex abuse. As presented in the Appellant's Brief, the court below prohibited Dr. Cooper-Lehki from testifying about matters which would have tied to specific items of evidence in this case and would have helped to explain why these accusers in particular may be either making up or imagining these events. The State's failure to address such matters has the effect of mistakenly characterizing the argument.

The trial court's decisions which limited Dr. Cooper-Lehki's testimony is found at TT 213-218 and TT 518-519. Because of these rulings Dr. Cooper-Lehki could not relate the common reasons for fabrication to the known facts *e.g.* KJ's attention seeking MySpace entry in which she tells the viewer to "remember my face because I'm gonna be famous someday," Avowal Exhibit, TT 606. Nor could the expert address the effects of the interview technique which was employed by Family Services when that witness was withdrawn by the State. The very purpose of expert witness' opinion testimony is to assist the trier of fact to understand the evidence or to determine a fact in issue, Rule 702 Rules of Evidence. The ruling below improperly denied Mr. Cecil that opportunity. The implications of this error reach well beyond the statistics about fabrication. In its argument, the State neglects any reference to undisputable

facts which were not allowed before the jury, focusing instead on the nonsequitur that “in the present case there were no allegations of divorce or competing interests in a child custody situation,” BOA p. 18.¹

The State also argues that Dr. Cooper-Lehki never met with these victims and that she lacked first-hand knowledge about the events which took place at Family Services, BOA p. 18. What the State does not mention is that the defense made a motion for Dr. Cooper-Lehki to interview these accusers which the State opposed and the trial court denied, TT 174 and Transcript of Proceedings held on 1/13/06 pp. 48-62. On the contrary, courts have often allowed mental examinations of complainants in sexual offense prosecutions, see Annota. Necessity or Permissibility of Mental Examination to Determine Competency or Credibility of Complainant in Sexual Offense Prosecution, 45 ALR 4th 310. The annotation lists cases in which such motions were granted. For the most part, the motions which were granted occurred in cases where the allegations lacked corroboration such as this case. As a result the argument which is advanced by the State is not only misleading, it reflects a fundamental unfairness in the proceedings below. Moreover, the trial court below referred to the same absence of an interview as justification for not permitting certain of the expert’s testimony, TT 174 and Transcript 1/13/06 p. 62.

**The State Misstates the Issue Presented When
It Argues That The Rejected Expert Testimony Was Opinion
Evidence About Whether A Witness Is Telling The Truth**

The State argues that the issue presented is one in which the defense sought to offer Dr. Cooper-Lehki to testify with respect to whether a witness is telling the truth, BOA pp. 25-26. In

¹The father of KJ has recently filed a civil action in the Circuit Court of Putnam County seeking damages from both Mr. and Mrs. Cecil. The father claims that KJ has suffered emotional harm. Dr. Cooper-Lehki could have addressed influences of existing emotional conditions, if any, and the desire for money as reasons why such claims are fabricated. Each would appear factually appropriate.

this regard, the State offers several cases from other jurisdictions. A review of those decisions reveals that they stand for a different proposition altogether than the issue raised herein. In the case of People v. Higa, 735 P.2d 203 (Col. App. 1987), cited by the State as People v. Minoru, BOA p. 25, the Court held that neither a lay nor an expert witness may give an opinion with respect to whether a witness is telling the truth on a specific occasion, 735 P.2d at 205. On the other hand, Colorado allows expert testimony as to whether children generally have the sophistication to lie about a sexual assault, People v. Ashley, 687 P.2d 473 (Colo. Appl. 1984) which is not entirely foreign to the instant issue.

In State v. Ritovato, 858 A.2d 296 (Conn. App. 2004), BOA p. 25, the court held that “it is a well settled evidentiary precept that an expert may not testify regarding the credibility of the victim, as that determination is solely within the province of the jury,” 858 A.2d 309.

Likewise the Georgia cases which the State cites, BOA pp. 25-26, stand for the proposition that one witness, whether an expert or not, cannot testify about another witness’ truthfulness in a specific instance. But that is not what the proffered testimony of Dr. Cooper-Lehki was about. No one other than the State in its brief suggests that the testimony from Dr. Cooper-Lehki was intended to be that these accusers were not telling the truth. Rather, the prohibited testimony was intended to establish that there are studies concerning when such accusations of sex abuse are false and identifying the circumstances and reasons why that occurs. If the jury believed that such circumstances or reasons existed in this trial then of course they should view the accusations with caution which would have been the point had the testimony been allowed. The State in fact called as a witness a pediatrician who referred to the “gold standard” as being the assumption that a child’s disclosure of sexual abuse means that it is

“true and unimagined,” TT 353-354. The testimony of Dr. Cooper-Lehki would have properly addressed that feature of the State’s case.

The State also relies on the decision of State v. Humphrey, 36 P.3d 844 (Kn. App. 2001) for the proposition that an expert witness may not evaluate weight or credibility of the evidence. Of course not, and that is not what Mr. Cecil argues. However, in Humphrey the prosecution offered, and the appeals court allowed, testimony from a nurse to the effect that the victim’s injuries were consistent with the history of a sexual assault provided by the accuser. Humphrey follows the Virginia case of Velasquez v. Com., 543 S.E.2d 631 (2001) in which a nurse was permitted to testify that the victim’s injuries were inconsistent with consensual sex, but consistent with nonconsensual sex, 543 S.E.2d at 636. These cases actually support Mr. Cecil’s argument in that they are based upon the underlying rationale of Rule 702 that the witness’ specialized training aids the jury when interpreting technical facts in issue. The problem in the case *sub judice* is that due to the court’s ruling the jury was unable to hear either all of the facts in issue or to receive the benefit of the expert’s “interpretation” of those facts.

**The State and the Circuit Court’s Reliance
on State v. Harman is Misplaced**

Consistent with the Circuit Court’s ruling below the State now argues that the decision in State v. Harman, 270 S.E.2d 146 (1980) and its progeny preclude such testimony as was proffered through Dr. Cooper-Lehki, BOA pp. 22-25. In Harman, this Court held that:

Evidence of psychiatric disability may be introduced when it affects the credibility of a material witness’ testimony in a criminal case. Before such psychiatric disorder can be shown to impeach a witness’ testimony, there must be a showing that the disorder affects the credibility of the witness and that the expert has had a sufficient opportunity to make the diagnosis of psychiatric disorder, Harmon syl. pt. 5.

In State v. Mitter, 285 S.E.2d 376 (1981), incorrectly identified as “Miller” in the State’s brief, the prosecution offered a psychologist who testified in response to a hypothetical question. The conviction for sexual abuse in the first degree was reversed because the psychologist’s testimony was contrary to the general rule that experts may not offer opinions about a persons’ subjective intent, 285 S.E.2d at 379-380. The case of State v. Frazier, 252 S.E.2d 39 (1979), also cited by the State, BOA p. 24, precludes the introduction of polygraph test results as trial evidence. The polygraph is deemed unreliable and nonscientific as a matter of law in this State.

It is submitted that none of the aforementioned West Virginia authority addresses the issue which is before this Court. Moreover, such case law as the State relies upon most certainly does not demonstrate why the Circuit Court was correct when it limited the testimony of Dr. Christina Cooper-Lehki. In fact, these cases do not appear to be on point. For example, since Dr. Cooper-Lehki was not permitted even an interview with, much less the right to test Mr. Cecil’s accusers she was not offered as a witness about their psychiatric disorders. Harman therefore appears inapplicable. Further, Dr. Cooper-Lehki was not offered to testify as to anyone’s subjective intent, thus Mitter seems inapplicable.

**The State Appears To Misunderstand Mr. Cecil’s
Entitlement To A Judgment Of Acquittal On Counts
2 & 4 Which Charge Sexual Abuse By A Guardian Or Custodian**

Mr. Cecil’s contention that he was entitled to be acquitted of the two charges of sexual abuse by a guardian or custodian, West Virginia Code, §61-8D-5, is premised upon these grounds: first, the statute itself was not applicable to the fact situation in this case; second, the requisite elements were not established as a matter of law, thus Mr. Cecil’s motion presented under Rule 29 of our Rules of Criminal Procedure at the close of the State’s case in chief should

have been granted. The State never addresses these contentions in its brief, BOA pp. 26-30. In fact, the State fails anywhere to acknowledge that under Rule 29 the test is whether they have met their burden of proof during their case in chief. In this case, they clearly had not.

In its argument the State relies upon the testimony of Mr. Cecil's daughter, Mrs. Cecil and Mr. Cecil himself, BOA pp. 29-30. *These witnesses testified after the Rule 29 motion was made.* The test of sufficiency of the evidence under Rule 29 however is based on the state of the evidence when the motion is made. It should be remembered that the court below reserved its ruling as it certainly may under Rule 29(b), TT 462. That rule states in part that:

“If the court reserves decision, it must *decide the motion on the basis of the evidence at the time the ruling is reserved.*” (Emphasis added).

The State neglects entirely the foregoing point of law.

The State relies upon the deferential standard of review expressed in State v. Guthrie, 461 S.E.2d 163 (1995), BOA pp. 26-27, suggesting that this point of argument is foreclosed by the inability of Mr. Cecil to meet his heavy burden of demonstrating that no rational jury could have reached such a verdict. On the contrary, Rule 29 decisions are for the trial court to make whose decisions are subject to a *de novo* review, see Guthrie, 461 S.E.2d at 173 fn. 5. In any event, the decisions as to these two counts should never have reached the jury in the first place.

The State likewise fails to address the argument that §61-8D-5 does not apply to these facts. Mr. Cecil should never have been prosecuted for such violations. Mr. Cecil was simply not a custodian as required by our law, at least as custodian was defined for the dates in issue. He did not share physical possession, or care and custody of these two accusers in the manner that was required to fit under West Virginia Code, §61-8D-1.

In the final analysis, it is abundantly clear that the State's theory of criminal liability was based on the *ex post facto* application of §61-8D-5 using the "position of trust" argument, all the while denying this fact in court, BOA p. 30. What follows is the only question asked on the subject during the State's case in chief:

"Q: Were the Cecil's responsible for you that evening?

A: Yes." TT 403.

The legislature in 2005 passed the "position of trust" modification which became effective after the relevant times involved in this case. That change, as made to §61-8D-1 includes person of trust and defines that person as someone responsible for the general supervision of a child. Thus, while the State persists in its argument that their evidence supports conviction for violations of §61-8D-5 the record supports both reversal and entry of judgments of acquittal as to these two counts.

Under State Ex Rel Dowdy v. Robinson
Double Jeopardy Is Violated When One Is
Prosecuted For Two Crimes Growing
Out Of The Same Transaction

The State mentions the decision in State ex rel. Dowdy v. Robinson, 257 S.E.2d 167 (1979), BOA p. 32, but fails to acknowledge its significance. In that decision this Court held:

In West Virginia the term "same offence" [sic] as used in the double jeopardy provision of *W.Va.Const.*, art. 3, §5 shall be defined by either the "same evidence test" which provides that offenses are the same unless one offense requires proof of a fact which the other does not, or the "same transaction test" which provides that offenses are the same if they grow out of a single criminal act, occurrence, episode or transaction; therefore *whichever test affords the defendant the greater protection must be applied.*" Syl. Pt. 1. (Emphasis added).

Without a doubt, under the same transaction test the convictions, prosecutions and punishments of multiple counts involving the two accusers in this case cannot stand an attack for violating W.Va. Const., art. 3 §5, see discussion describing the test, 257 S.E.2d at 170. Dowdy v. Robinson appears to remain good law in West Virginia.

The State also cites the decision of State v. Gill, 416 S.E.2d 253 (1992), BOA 32, in which this Court applied the Blockburger test in rejecting a double jeopardy challenge to multiple convictions and punishments for violations of §61-8D-5 and §61-8B-1, see Blockburger v. U.S., 284 U.S. 299 (1932). It is submitted that it is difficult if not impossible to reconcile the opinions in Dowdy and Gill.

What is perhaps more difficult is to reconcile is the idea that the legislature can legislate violations of the constitution. That is precisely the situation when one applies Blockburger or Gill so as to justify a prosecution, conviction and punishment of two separate criminal statutes growing out of a single act. Consequently, the undersigned urges this Court to reaffirm Dowdy v. Robinson and to find that double jeopardy has been contravened in this case based on the same transaction rule.

The Appellant Was Improperly Denied An Evidentiary Hearing Into Juror Misconduct

The State has trivialized the possibility of misconduct by jurors in this case, BOA pp. 37-41. In their brief, p. 41, the State asserts that the requested hearing, if granted, “would have established a dangerous precedent.” On the contrary, the motion made by Mr. Cecil was absolutely in conformity with the law, see e.g. State ex rel. Trump v. Hott, 421 S.E.2d 500 (1992). Such hearings have been held without establishing “a dangerous precedent.” *The fact is*

that the questions about juror misconduct originated not with defense counsel, but from a juror.

The reason more is not known about the full extent of any outside influence, investigation or communication is that the Circuit Court refused to permit a meaningful hearing into the questions which were raised about extrinsic matters considered by sitting jurors.

The State makes a number of references to MySpace in its brief BOA pp. 38-39, however the actual information as printed from KJ's MySpace site was not allowed into evidence, Defendant's Avowal Exhibit 1. It therefore appears logical that the juror(s) who made her/their investigation purposely exposed themselves to extrinsic material. Moreover, the female juror who was involved related that she had spoken to her daughter about it – a daughter who went to school and played ball with a member of victim SD's family and attended a school where SD's father taught.²

The characterization by the Circuit Court and the State that any communication between the juror and her daughter would be "harmless error," BOA p. 39, is rendered nonsensical by virtue of the fact that no hearing was conducted. How the actual discussion which took place between mother and daughter about MySpace can be so cavalierly rejected without ever hearing from the participants or finding out how the subject came up or what questions were asked of the daughter makes little sense considering the gravity of the charges and the consequences of conviction.

The State further argues that the presumption of prejudice does not apply in this situation because the reported communication was not about the *matter pending*, BOA p. 40, citing

²This same juror disclosed that fact after the trial began, but said that she would not be influenced by it, indicating that her knowledge or contact was remote.

Remmer v. U.S., 347 U.S. 227, 229 (1954). That argument strains credulity. The outside communication occurred only because the mother/juror was then sitting in the Cecil case. That would also be true of the other jurors as well as it appears from the Hamm e-mail that at least one other juror might have been involved in a similar outside investigation. Historically, the U.S. Supreme Court has been consistent in finding the presumption of prejudice in cases of outside communications involving jurors, Parker v. Gladden, 385 U.S. 363 (1966); Turner v. Louisiana, 379 U.S. 466 (1965); Mattox v. U.S., 146 U.S. 140 (1892). The undeniable fact is that evidence has been presented which indicates that perhaps several jurors in this case defied the trial court's instructions. As a consequence, Mr. Cecil was entitled at least to have an evidentiary hearing into the matters raised at which time the parties may address their respective burdens of proof.

**The Jury Foreperson Did Not Meet The Statutory
Qualifications To Serve On This Jury**

The State argues that Mr. Cecil cannot complain that jury foreperson Brian Hamm was disqualified under West Virginia Code, §52-1-8 because counsel did not exercise ordinary diligence to ascertain the existence of this disqualification, BOA p. 35. If this court finds that this is the case then the undersigned submits that counsel's own error alone should cause reversal of Mr. Cecil's convictions since counsel's performance would be subpar. Moreover, under a reasonable extension to this Court's decision in Proudfoot v. Dan's Marine Service, Inc., 558 S.E.2d 298 (2002), it appears that reversal may indeed be appropriate.

First, the matter of ordinary diligence should be addressed. It is known that §52-1-8(b)(1) requires that the juror be a resident of the county. The information supplied by the Circuit Clerk to counsel consisted of two items: one, a seven (7) page list of the names and addresses of 112 jurors and two, another 29 pages labeled "summoned juror profile." In the first document Mr.

Hamm is listed at the address of 306 E. Maplewood Estates, Scott Depot, West Virginia 25560. Nothing about his address is contained in the profile. Counsel and Mr. Cecil would of course recognize this address as being in Putnam County.

Months later after the term of court had expired and after the Judge had disallowed the defense motion to interview jurors counsel followed up with Mr. Hamm's attorney David Barnette who indicated that Mr. Hamm was willing to speak to counsel. Responding to a phone call, Mr. Hamm left a phone message with a Charleston call back number which turned out to be the Hamm residence. It was then that counsel was told by Mr. Hamm that he and Judge Spaulding had communicated about whether he was a Putnam County resident after Mr. Hamm had questioned that status when he received the questionnaire from the Circuit Clerk. Counsel then sought out and located both that correspondence and the questionnaire as filed in the Clerk's office. Without a doubt, Mr. Hamm, who lived with his family on Loudon Heights Road in Charleston, at the time he served as a Putnam County juror did not meet the statutory requirements of §52-1-8(b)(1).

If ordinary diligence is determined to require that counsel go behind the materials which are submitted by the Clerk to counsel before trial and view such materials as correspondence and/or entries upon juror questionnaires, then counsel indeed failed to meet that obligation. The same would be true when counsel does not inquire about residence during voir dire. If that failure reflects less than ordinary diligence then it is also less than what should be necessary to fulfill the duty of providing effective assistance by counsel. While the undersigned counsel obviously takes no pleasure in this assumption it must necessarily and logically follow. Counsel is certainly willing to acknowledge the failure and thereby "throw himself on the sword."

Under Proudfoot, *supra*, a civil judgment was reversed because a juror was statutorily disqualified as a convicted felon, §52-1-8(b)(6). In reaching that decision, this Court referred to the long line of cases which refused to overturn jury verdicts when jurors were found to be disqualified after the verdicts were returned. This Court in Proudfoot found that the complaining party was not required to show that he suffered a wrong or injustice in that circumstance, which overrules prior case law on the subject. Proudfoot does however direct that under our statutes, namely West Virginia Code, §§56-6-16 and 56-6-15, parties face the “raise it or waive it” rule and the fact that the trial court does not inquire into a disqualification provides no excuse.³ The party must either ensure that the court so examines the panel or do it himself.

This body of law, if properly interpreted by the State, requires that the diligence of counsel be examined on appeal. In that regard, counsel has surely fallen short. However this issue can also be examined another way. Eleven (11) qualified jurors convicted Dan Cecil for crimes for which he has received a lengthy prison sentence. Proceeding beyond the statutory analysis there must be an analysis under the constitution which would require a jury of 12. Considered in that context, either the failure of counsel’s actions entitles Mr. Cecil to have his convictions reversed in that such failure adversely impacts Mr. Cecil’s constitutional rights or Proudfoot should be extended to more closely guard the rights of parties accused of crimes. It only seems logical to provide greater protections where liberty interests are at stake than when property matters are only involved.

³The trial transcript reveals that the Circuit Court did not inquire into the statutory qualifications, see TT 1-31-06 pp. 1-84. Voir dire questions of counsel were submitted before trial by Circuit Court direction and Trial Court Rule.

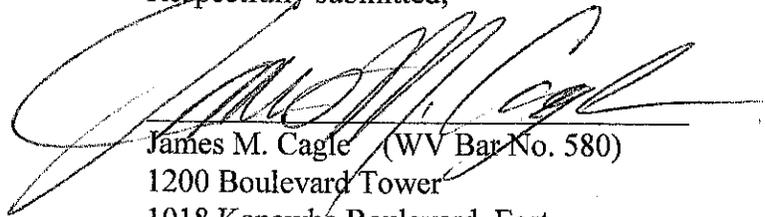
**The State's Argument Concerning The Disproportionality
Of The Sentence Fails To Address The Proper Test**

As is set forth in the Brief of Appellant West Virginia jurisprudence applies both a subjective and an objective test when considering challenges that a sentence is disproportional, see pp. 27-28. By contrast the State in its brief, BOA pp. 42-43, asserts that the only question is whether or not the sentence is within statutory limits. Consequently, the State has failed to properly respond to this issue. In the end it is obvious why the State accuses defendants of violations under §61-8D-5 even though the relationship between accused and accuser does not fall within the statutory definition. Such an accusation substantially ups the ante as it threatens sentences which by their length appear far out of line with the facts. Such is the instant case.

Conclusion

For the foregoing reasons Mr. Cecil's conviction as to Count One should be reversed and the case remanded. As to Counts Two and Four (Sexual Abuse By A Guardian Or Custodian) Mr. Cecil's convictions should be set aside and judgment of acquittal entered in his favor.

Respectfully submitted,



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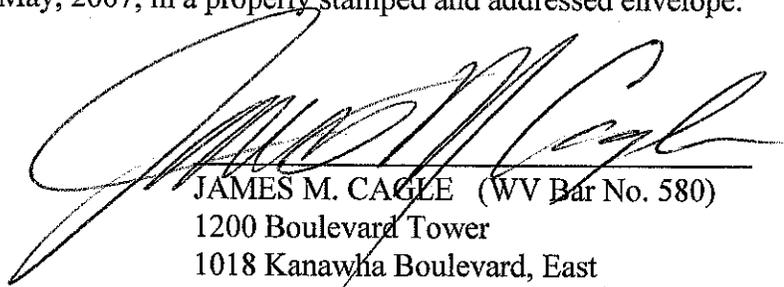
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CERTIFICATE OF SERVICE

I, James M. Cagle, hereby certify that I have served a true and exact copy of the foregoing Reply Brief on the State of West Virginia by forwarding said copy to Mark Sorsaia, Prosecuting Attorney, Putnam County Judicial Building, 3389 Winfield Road, Winfield, West Virginia 25213, on this the 21st day of May, 2007, in a properly stamped and addressed envelope.



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