

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

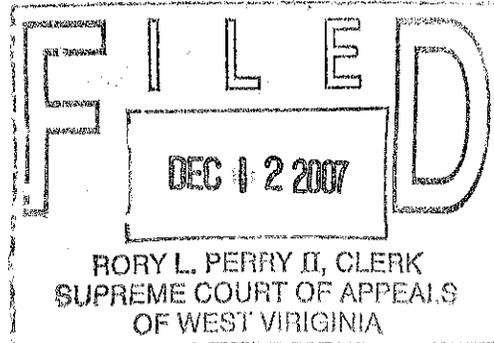
STATE OF WEST VIRGINIA,

v.

**Supreme Court No. 33660
Circuit Court No. 06-F-320
(Kanawha)**

JOHN LOWERY,

Petitioner.



APPELLANT'S BRIEF

Crystal L. Walden
Assistant Public Defender
W.Va. Bar No. 8954
Office of the Public Defender
Kanawha County
Charleston, WV 25330
(304) 558-2323

Counsel for Petitioner

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PROCEEDINGS AND RULINGS BELOW

John Lowery's right to a fair trial was violated numerous times during his one day jury trial, in Kanawha County Circuit Court. Mr. Lowery was tried on three counts of sexual assault in the third degree and three counts of sexual abuse in the third degree. During pretrial motions argued the day of trial, the court ruled, over counsel's objection, the State could call Reverend Ely, Mr. Lowery's minister, as a witness against him. *Trial Transcript (Tr.) 17* The court allowed the State to elicit testimony from Reverend Ely that he had counseled Mr. Lowery in regards to staying away from A.D.¹, on two separate occasions, but saw them together after each occasion. *Tr. 147-149* This testimony violated the clergy-communicant privilege found within W.Va Code § 57-3-9(2001)(2005 Repl. Vol.).

Additionally, during the testimony of A.D., her father stood up, pointed at Mr. Lowery and yelled "you bastard, you bastard." *Tr. 116* A.D. was the State's only witness as to the substance of the charges Mr. Lowery faced. Her father's outburst was emotionally charged, prejudicial, and likely conjured feelings of sympathy towards her from the jury. *Tr. 116-117* Counsel made a motion for a mistrial, but the trial court denied the motion. *Tr. 117* The trial court based its ruling on the fact that it had instructed the jury to disregard the outburst and the court did not find the outburst to be prejudicial to Mr. Lowery.² *Id.*

To secure a conviction under W.Va. Code § 61-8B-5(a)(2)(2000) (2005 Repl. Vol.)(sexual assault in the third degree), of three of the six charges Mr. Lowery faced, the State

¹ The prosecutrix in this case was a juvenile, therefore, counsel will use her initials throughout this petition to protect her identity.

² A.D. was the State's third witness. The outburst was prejudicial and very inflammatory. In all the State called eight witnesses at trial, but A.D. was the only witness that offered substantive testimony regarding the charges Mr. Lowery faced. The trial court had the perfect opportunity to ensure Mr. Lowery's constitutional right to a fair trial, free from prejudice, was protected by declaring a mistrial very early on in the State's case, causing little inconvenience to the State.

was required to prove Mr. Lowery was four years older than A.D. This required the State to prove Mr. Lowery was nineteen years and five months old. The State failed to show Mr. Lowery's age and the other evidence introduced by the State did not prove beyond a reasonable doubt that Mr. Lowery was at least nineteen years old. *Tr. 252* The remaining evidence produced by the State could describe an eighteen year old, as defense counsel argued, and that was not enough to secure a conviction in Mr. Lowery's case. *Id.; Sentencing Hearing Tr. 7*

The jury found Mr. Lowery guilty of two counts of sexual assault in the third degree and two counts of sexual abuse in the third degree. Mr. Lowery was sentenced to one to five years in prison on each count of sexual assault, to be served consecutively. He received a ninety day sentence on each count of sexual abuse with those sentences to run concurrently. *Sentencing Hearing Tr. 19*

STATEMENT OF FACTS

Reverend Ely is the pastor of the New Covenant Missionary Baptist Church. *Tr. 147* John Lowery was a member of Reverend Ely's church and had been receiving martial counseling from Reverend Ely for sometime prior to charges being filed against him. *Tr. 15* Reverend Ely was the fourth witness called against Mr. Lowery at trial. The trial court allowed the State to call Reverend Ely over Mr. Lowery's objection. *Tr. 17* During his testimony, Reverend Ely testified to the substance of Mr. Lowery's counseling in direct violation of W.V. Code § 57-3-9 (2001)(2005 Repl. Vol.). *Tr. 147-149*

In a pretrial motion, defense counsel argued that allowing the State to call Reverend Ely as a witness against Mr. Lowery, a member of the Reverend's church, would be a violation of Mr. Lowery's clergy-communicant privilege found in West Virginia Code § 57-3-9 (2001)(2005

Repl. Vol.) *Tr. 14-15* The State argued that West Virginia did not have a clergy-communicant privilege. Counsel presented the State with a copy of the statute, the State then argued that the statute did not apply because “this is not a church court, or anything like that, unless I am misreading the statute.” *Tr. 16* The court initially ruled in counsel’s favor holding that it was going to exclude Reverend Ely’s testimony. *Tr. 16*

Based on the court’s ruling, the State asked if it would be allowed to call Reverend Ely for impeachment purposes if necessary. This prompted an additional discussion regarding Reverend Ely and the State’s ability to call him as a witness. During this discussion, the trial court effectively reversed itself and ruled that it would allow Reverend Ely to testify as to what he counseled Mr. Lowery about as long as he did not testify to any communication or confession that Mr. Lowery made during the counseling sessions. This ruling was far different from the court’s original ruling made only moments before and it was in direct violation of the protections found within W.Va. Code § 57-3-9(2001)(2005 Repl. Vol.). *Tr. 17*

Reverend Ely was called as a witness by the State and testified he counseled Mr. Lowery about staying away from A.D. on more than one occasion. *Tr. 147-149* Counsel objected to Reverend Ely’s testimony on the grounds of relevance and privilege, but his objections were overruled. *Tr. 148, 149* During Reverend Ely’s testimony the State was able to establish that Reverend Ely counseled Mr. Lowery about staying away from A.D., that he saw them together after the first counseling session, therefore he counseled Mr. Lowery a second time only to see them together a third time. *Tr. 147-149* On cross examination, Reverend Ely testified that he was speaking to Mr. Lowery in several capacities during these counseling sessions. Ely stated that he was speaking to Mr. Lowery as a friend, as supervisor, and as a minister. *Tr. 151, 154* In addition to being a clear violation of W.Va. Code § 57-3-9(2001)(2005 Repl. Vol.), Reverend

Ely's testimony was presented in a way that allowed the jury to make prejudicial inferences regarding Mr. Lowery. Reverend Ely's testimony allowed jurors to believe that Mr. Lowery acknowledged his relationship with A.D. and was seeking counseling from Reverend Ely regarding this relationship.

During A.D.'s testimony her father stood up, pointed at John Lowery, and yelled "you bastard, you bastard" before being escorted out of the courtroom. A.D. was the State's only witness that testified to the substance of the sexual assault and sexual abuse charges for which John Lowery was being tried. *Tr. 116* The remaining witnesses called by the State were only able to link Mr. Lowery and A.D. in public places, church, and by phone records. The court instructed the jury to disregard the outburst of A.D.'s father. *Id.*

Counsel moved for a mistrial arguing, "I don't think there's any way the jury can disregard what just happened, or the emotion of what just happened." *Tr. 116-17* Counsel further argued the outburst was going to "...prejudice them [jury] towards the State's case, give them sympathy towards the State's case. I think that they are more likely to convict the Defendant for unfair reasons outside of what is happening at trial." *Tr. 117* The court denied counsel's motion stating, "I don't see any undue prejudice to the Defendant. A man stood up and made his comments, I think on two occasions, maybe three. He was immediately escorted from the courtroom." *Tr. 117*

Defense counsel made a motion for judgment of acquittal, while the jury was deliberating, based on the State's failure to establish Mr. Lowery's age during trial. In support of this motion counsel explained W.Va. Code § 61-8B-5(a)(2) (2000)(2005 Repl. Vol.) requires the State to prove Mr. Lowery was four years older than A.D., therefore, the State was required to prove Mr. Lowery was nineteen years and five months old. *Tr. 252; Sentencing Hearing Tr. 6-8*

Counsel explained that nothing the State produced at trial proved Mr. Lowery was at least nineteen beyond a reasonable doubt. *Tr. 252, Sentencing Hearing Tr. 6-7.*

The State argued that although it did not introduce Mr. Lowery's age, it did introduce sufficient evidence at trial to allow the jury to make a finding that Mr. Lowery was four years older than A.D. *Tr. 252, Sentencing Hearing Tr. 9* However, the only evidence the State produced that even remotely addressed Mr. Lowery's age was that he was a married man with two babies. *Sentencing Hearing Tr. 7* Defense counsel disagreed with the State's argument, pointing out an eighteen year old could not be convicted in Mr. Lowery's case, and being married and the father of two babies was not enough to establish that Mr. Lowery was at least nineteen years and five months old. *Tr. 252; Sentencing Hearing Tr. 7*

The court withheld its ruling and explained if the jury returned with a guilty verdict, it would allow each side to brief the issue for further consideration. Shortly after this discussion, the jury returned with a guilty verdict. *Tr. 252* Counsel renewed his motion for judgment of acquittal based on the State's failure to prove Mr. Lowery was four years older than A.D. at the sentencing hearing. *Sentencing Hearing Tr. 6*

At this hearing, the State conceded that it failed to prove Mr. Lowery's age during trial and that was the State's fault. However, it argued the jury was the fact finder and the jury had determined Mr. Lowery was more than four years older than A.D.³ *Sentencing Hearing Tr. 9* Finally, the State argued that Reverend Ely testified he had counseled Mr. Lowery to stay away from A.D. due to their age difference.⁴ *Sentencing Hearing Tr. 9* The court denied counsel's

³ While it is true the jury is the finder of fact during a trial, the jury must be provided sufficient information to make a proper finding and that did not happen in this case.

⁴ This is not true as nowhere within Reverend Ely's testimony did the Reverend state that the reason he counseled Mr. Lowery to stay away from A.D. was due to their age difference. *Tr. 146-155*

motion, declared that Mr. Lowery looks to be in his thirties, and noted that the pre-sentence report reflected he was in fact thirty-five.⁵ The court also ruled there was sufficient evidence in the record to support the jury finding Mr. Lowery was more than four years older than A.D., however, the court failed to point to the specific evidence to which it was referring. *Sentencing Hearing Tr. 10*

Counsel also renewed his motion for a mistrial based on the outburst of A.D.'s father as a motion for judgment of acquittal at Mr. Lowery's sentencing hearing. Counsel represented that A.D.'s father, while pointing at the defendant, yelled "you bastard" three times before being escorted out of the courtroom. *Sentencing Hearing Tr. 3-4* The Court disagreed with counsel and said that it only recalled the father saying "you bastard" once.⁶ *Sentencing Hearing Tr. 4* The record reflects that A.D.'s father stated, "you bastard" two times before being escorted out of the courtroom. *Tr. 116* The court denied counsel's motion for a judgment of acquittal stating, "[t]hat would be an absurdity in this case. The effect of that was so benign and so non-effectual. It was obviously a father who stood up and said what he said. I just don't think it had any effect – I can't imagine that that would affect any reasonable person in their determination of the facts of the case. So, your motion is denied." *Sentencing Hearing Tr. 6*

⁵ Unlike the court, the jury did not have access to the presentence report to help determine Mr. Lowery's age.

⁶ As stated above, at trial the court acknowledged that A.D.'s father yelled "you bastard" at Mr. Lowery at least two times, possibly three, when the incident occurred during trial. *Tr. 117*

ASSIGNMENTS OF ERROR

- I. The Trial Court Violated West Virginia Code § 57-3-9 (2001)(2005 Repl. Vol.), Providing For A Clergy Communicant Privilege, When It Allowed The State To Call Reverend Ely As A Witness Against Mr. Lowery.
- II. Mr. Lowery Was Denied His Constitutional Right To A Fair Trial When The Trial Court Denied His Motion For Mistrial Based On The Emotionally Charged, Highly Prejudicial Outburst By A.D.'S Father That Occurred During A Critical Point In Her Testimony.
- III. Mr. Lowery's Conviction For Sexual Assault In The Third Degree, W. Va. Code §61-8b-5(A)(2) (2000)(2005 Repl. Vol.), Is Not Supported By Sufficient Evidence As The State Failed To Prove He Was At Least Four Years Older Than A.D., An Essential Element Of This Offense.

DISCUSSION OF LAW

I. The Trial Court Violated West Virginia Code § 57-3-9 (2001)(2005 Repl. Vol.), Providing For A Clergy Communicant Privilege, When It Allowed The State To Call Reverend Ely As A Witness Against Mr. Lowery.

Standard of Review: To the extent that the trial court's admission of evidence is based on an interpretation of a statute this Court's standard of review is plenary. *State v. Omechinski*, 196 W.Va. 41,45, 468 S.E2d 173,177 (1996).

The trial court's ruling allowing the State to call Reverend Ely to testify he counseled Mr. Lowery about A.D. was a violation of W.Va. Code § 57-3-9(2001)(2005 Repl. Vol.). The trial court's ruling defeated the sole purpose of W.Va. Code § 57-3-9(2001)(2005 Repl. Vol.), in protecting the need of individuals to be able to freely discuss and disclose their actions to a spiritual counselor without fear of reprisal. It was established at trial that Reverend Ely was counseling Mr. Lowery, a member of his church, in his capacity as minister. *Tr. 147-149* The counseling relationship began when Mr. Lowery sought marriage counseling from Reverend Ely. *Tr. 15* The Reverend also counseled Mr. Lowery regarding his relationship with A.D. on several occasions. *Tr. 147-149*

W.Va. Code § 57-3-9 states:

No priest, nun, rabbi, duly accredited Christian Science practitioner or member of the clergy authorized to celebrate the rites of marriage in this state pursuant to the provisions of article two, chapter forty-eight of this code shall be compelled to testify in any criminal or grand jury proceedings or in any domestic relations action in any court of this state:

(1) With respect to any confession or communication, made to such person, in his or her professional capacity in the course of discipline enjoined by the church or other religious body to which he or she belongs, without the consent of the person making such confession or communication; or (2) With respect to any communication made to such person, in his or her professional capacity, by either spouse, in connection with any effort to reconcile estranged spouses, without the consent of the spouse making the communication. This subsection is in addition to the protection and privilege afforded pursuant to section three hundred one, article one, chapter forty-eight of this code.

This court established a four part test to determine if a communication will be considered privileged in *State v. Potter*, 197 W.Va. 734, 755, 478 S.E2d 742, ??? (1996). In order to be privileged: “(1) a communication must be made to a clergyman; (2) the communication may be in the form of a confidential confession or a communication; (3) the confession or communication must be made in his professional capacity; and (4) the communication must have been made in the course of discipline enjoined by the rules of practice of the clergyman’s denomination.”⁷ *Id.*

Mr. Lowery’s communications fell within the privilege. Reverend Ely was Mr. Lowery’s pastor. Reverend Ely, acting in his capacity as pastor of the church, was providing Mr. Lowery, a member of the church, with marital counseling. The conversations that Reverend Ely testified to concerned confidential marital concerns that one would discuss with a marital counselor. Finally, part of Reverend Ely’s duties in the Baptist faith is to provide counseling to its members.⁸

The trial court initially ruled that it was not going to permit Reverend Ely’s testimony based on W.Va. Code §57-3-9(2001)(2005 Repl. Vol.); however, it changed it’s initial ruling.

⁷ A few states have reduced the four part test to a two part test: (1) the communicant must be seeking counsel and advice from the clergy; and (2) the information entrusted must have been made in the form of a confidential communication. North Carolina is one of these states. The Statute creating the clergy communicant privilege in North Carolina reads almost identical to our statute but the case law requires that only two requirements be met in order to be a privileged communication. See *N.C.G.S.A. §8-53.2, State v. Andrews*, 507 S.E.2d 305, 131 N.C. App. 370, (1998). Texas is another state that has reduced the requirements. See *Texas Rule of Evidence 505, Nicholson v. Wittig* 832 S.W.2d 681(1992).

⁸ The Covenant and Code of Ethics for Ministerial Leaders of American Baptist Churches addresses the role of a pastor in regard to counseling as follows: “I will hold in confidence and treat as confidential any information provided to me with the expectation of privacy. I will not disclose such information in private or public except when, in my practice of ministry, I am convinced that the sanctity of confidentiality is outweighed by my well-founded belief that life-threatening or substantial harm will be caused.”

<http://www.ministerscouncil.com/WhoWeAre/EnglishEthics.aspx> (last visited Dec. 11, 2007).

Tr. 16 The court ruled that Reverend Ely could testify as to what he counseled Mr. Lowery about but the Reverend could not disclose any confession or communication made by Mr. Lowery during the counseling. *Tr. 17* The court's ruling allowed the State to admit the following testimony:

Prosecutor: Reverend Ely, I'm going to direct your attention to the beginning of February of 2006, and ask, without telling us anything that was communicated to you by the Defendant to you, did you have an opportunity to counsel the Defendant concerning some allegations that had been made concerning him and Ms. A.D.?

Reverend Ely: Yes

....

Prosecutor: Reverend Ely, I am going to direct your attention to the next day. Did you have an opportunity to once again counsel the Defendant concerning staying away from Ms. A.D.?

Counsel: Your Honor, I object to relevance and to possible privilege.

Prosecutor: Judge, I am not going to inquire as to what the response of the Defendant may have been, only to what he—

The Court: The objection is overruled.

....

Prosecutor: Did you tell him to stay away from the Defendant—A.D.?

Reverend Ely: Yes

Prosecutor: Now, I am going to direct your attention to – that was on a Tuesday, February 28th?

Reverend Ely: Yes.

Prosecutor: Ok, now I am going to direct your attention to Friday, March 3, and ask you if you had an opportunity to see the Defendant and A.D. again?

Reverend Ely: Yes.

Tr. 147-149

As demonstrated above, the court's ruling allowed the State to defeat the sole purpose of the clergy-communicant privilege found in W.Va. Code §57-3-9 (2001)(2005 Repl. Vol.). Although the court limited Reverend Ely's testimony to the subject of the counseling, the testimony still invaded Mr. Lowery's privilege and in fact created a situation which allowed jurors to infer Mr. Lowery had admitted to a relationship or wrongdoing and sought out counseling from Reverend Ely, when the opposite was true. Mr. Lowery denied any wrongdoing

every time he was approached and counseled by Reverend Ely regarding his relationship with A.D. Tr. 153-154

If this Court were to accept the trial court's interpretation of W.Va. Code §57-3-9 (2001)(2005 Repl. Vol.), it would render the clergy-communicant privilege meaningless. The trial court's ruling allowed the State to present the very evidence the statute was created to protect. The court's limitation on Reverend Ely's testimony did nothing more than allow the State to present the improper evidence in a way that invited the jury to make prejudicial inferences about Mr. Lowery. In *Potter*, this Court, in an opinion by Justice Cleckley, recognized the need for the clergy-communicant privilege found within W.Va. Code §57-3-9(2001)(2005 Repl. Vol.): "[w]e believe this statutory privilege must receive a construction consistent with it's policy to carry out a long-standing public policy to encourage uninhibited communication between persons standing in a relation of confidence and trust such as...confessor and clergyman." *State v. Potter*, 197 W.Va. at 747, 478 S.E2d at 755 (internal citations omitted) This Court found support for this privilege in *Mullen v. United States*, 263 F.2d 275, 280 (D.C.Cir 1958):

Sound policy-reason and experience-concedes to religious liberty a rule of evidence that a clergyman shall not disclose on a trial the secrets of a penitent's confidential confession to him, at least absent the penitent's consent. Knowledge so acquired in the performance of a spiritual function as indicated in this case is not transformed into evidence to be given to the whole world... The benefit of preserving these confidences inviolate overbalances the possible benefit of permitting litigation to prosper at the expense of the tranquility of the home, the integrity of the professional relationship, and the spiritual rehabilitation of the penitent. The rules of evidence have always been concerned not only with truth but with the manner of its ascertainment.

Additionally, as noted by this Court in n.22 of *Potter*, the fact that a communication is not incriminatory is not relevant. (citation omitted) *Potter*, 197 W.Va. at 747, 478 S.E.2d at 755.

In *Potter*, this Court held that the testimony of the minister did not violate the defendant's

clergy-communicant privilege, because the defendant gave the minister permission to use their discussion as he saw fit to help educate others. *Id. at 745, S.E.2d at 753* Therefore, he had waived any privilege he had under W.Va. Code § 57-3-9(2001)(2005 Repl. Vol.). *Id. at 747-48, S.E.2d at 755* Mr. Lowery did not waive his privilege guaranteed by W.Va. §57-3-9(2001)(2005 Repl. Vol.).

The testimony Reverend Ely provided concerned confidential counseling of Mr. Lowery, who was a church member, by Reverend Ely, as his minister and falls within the realm of protected communications.⁹ Therefore, according to the provisions of W.Va. Code § 57-3-9 (2001)(2005 Repl. Vol.), Reverend Ely should not have been permitted to testify to anything concerning the counseling he provided to Mr. Lowery. Moreover, as demonstrated above, Reverend Ely provided very prejudicial testimony that arguably corroborated A.D.'s allegations against Mr. Lowery. Based on the evidence produced at trial, Reverend Ely's testimony very likely influenced the jury verdict in Mr. Lowery's case.

II. Mr. Lowery Was Denied His Constitutional Right To A Fair Trial When The Trial Court Denied His Motion For Mistrial Based On The Emotionally Charged, Highly Prejudicial Outburst By A.D.'S Father That Occurred During A Critical Point In Her Testimony.

Standard of Review: *In State v. Williams, 172 W.Va. 295,304, 305 S.E.2d 251, 261 (1983)*, this Court held that "[t]he decision to declare a mistrial, discharge the jury and order a new trial in a criminal case is a matter within the sound discretion of the trial court." (citation omitted)

The constitutional right to a fair trial that is guaranteed to every criminal defendant by the Sixth and Fourteenth Amendments, United States (U.S.) Constitution, and Article III, §§ 10, 14,

⁹ During Reverend Ely's direct examination at trial both Reverend Ely and the prosecutor referred to the communications which occurred between Reverend Ely and Mr. Lowery as counseling. *Tr. 147-149*

West Virginia (W.Va.) Constitution, encompasses the right to a trial free from prejudice. Criminal defendants are also guaranteed the right to a jury trial by a fair and impartial jury. Mr. Lowery was denied these basic protections during his jury trial when the trial court refused to declare a mistrial after a highly prejudicial outburst occurred. During A.D.'s testimony, the State's only substantive witness against Mr. Lowery, her father stood up, pointed at Mr. Lowery, and yelled "you bastard" at least two times, possibly three.

A.D.'s father began yelling at Mr. Lowery immediately after A.D. gave testimony critical to the state's case, impressing on the jury his belief of her testimony and thereby bolstering it. After this emotional outburst by A.D.'s father, jurors watched continued commotion as her angry father was being escorted from the courtroom by the bailiff. A.D. was only the third witness, of a total of eight witnesses, called on behalf of the state. Counsel immediately approached the bench and moved for a mistrial.

In support of his motion, counsel stated, "I don't think there's any way the jury can disregard what just happened, or the emotion of what just happened." *Tr. 116-17* Counsel further argued the outburst was going to "...prejudice them [jury] towards the State's case, give them sympathy towards the State's case. I think that they are more likely to convict the Defendant for unfair reasons outside of what is happening at trial." *Tr. 117* The court denied counsel's motion stating, "I don't see any undue prejudice to the Defendant. A man stood up and made his comments, I think on two occasions, maybe three. He was immediately escorted from the courtroom." *Tr. 117*

The trial court failed to poll the jury after the outburst occurred; therefore there is no way to know the true effect the outburst had on the jury. The court had the perfect opportunity to ensure that Mr. Lowery's right to a fair trial was still in tact after the outburst, by polling the

jury. However, the court ruled on counsel's motion blindly, substituting its own opinion for that of the jurors. In a similar context, this Court held if there is a serious question of possible prejudice due to publicity disseminated during a trial, the trial court may on its own motion or shall upon the motion of a party poll the jurors about their exposure to the material. *State v. Moss*, 180 W.Va. 363,367, 376 S.E.2d 569,573 (1988).

In *Moss*, this Court held that it was an abuse of discretion for the trial court to refuse to poll the jurors even though corrective measures such as a corrective instruction may have justified not declaring a mistrial.¹⁰ *Id.* A similar policy concerning courtroom outbursts should be in place. Unlike publicity, there is no question as to whether or not jurors are exposed to a courtroom outburst. Additionally, as in Mr. Lowery's case, an outburst is generally emotional, inflammatory, and therefore by its very nature highly prejudicial to a defendant. The only question left for the trial court to determine when polling the jury is whether the outburst was so prejudicial to the defendant to warrant a mistrial or if a cautionary instruction will suffice.

In *State v. Stewart*, 278 S.C. 296,303, 295 S.E.2d 627,630 (1982), the court reversed a conviction, holding that it was error for the trial judge to deny counsel's motion for a mistrial without first exploring the improper spectator conduct by polling the jury to determine whether prejudice resulted. The court held that the trial court's reliance on its admonishments to the spectators and its cautionary instruction to the jury was insufficient to ensure the defendant received a fair trial as it is the trial court's obligation to ensure the integrity of its courtroom. *Id.*

In *State v. Taylor*, 97 P.2d 927,932, 55 Ariz. 29,41 (1940), a conviction was reversed due to spectator applause during the State's closing argument, despite the fact the jury was instructed

¹⁰ Counsel made a motion for a mistrial but did not request that the trial court poll the jurors. However, counsel requested the most serious remedy available, therefore any remedy in between was within the trial court's discretion, such as polling the jury.

to disregard the applause. The court held that the spectators' demonstration was in effect telling the jurors that a portion of the community believed the defendant was guilty and should be convicted. *Id.* In reaching its decision, the court explained that great care is taken to ensure that every defendant is guaranteed a fair and impartial trial. In order to reach this end, numerous safeguards are put into place to ensure that jurors are not influenced by outside sources of information such as numerous sources of media. These safeguards ensure that only relevant evidence is used by jurors to decide a case. A courtroom display is a source of outside information that should not be allowed to circumvent these safeguards intended to protect a defendant's right to a fair trial and a cautionary instruction will not be enough to remove the error in all situations. *Id.*

In *State v. Franklin*, 174 W.Va. 469, 327 S.E.2d 449 (1985), this Court reversed a conviction based on the presence of ten to thirty spectators in the courtroom who belonged to a group which supported stiffer penalties for drunk drivers. These spectators identified themselves by wearing badges in the courtroom and were present throughout the trial. This Court held that the intention of the spectators was to influence the jury, therefore the conviction had to be reversed. *State v. Franklin*, 174 W.Va. at 475, 327 S.E.2d at 455. See also *State v. Gens*, 107 S.C. 448, 93 S.E. 139 (1917) (The presence of spectators holding posters was grounds for a new trial as it was an attempt to influence the jury to arrive at a verdict through outside influences and outside public opinion.)

In *Norris v. Risley*, 918 F.2d 828 (Mont. 1990), the court reversed a conviction based on a group of women wearing buttons reading "women against rape. In reaching its decision the court looked at the jurors' exposure to the buttons under two different facets of a defendant's right to a fair trial: "the presumption of innocence and the right of confrontation and cross-

examination.” *Id. at 831* The court held that the presumption of innocence requires that a criminal defendant be tried in an atmosphere undisturbed by public passion. *Id.* The Court explained the women wearing the buttons created “an unacceptable risk of impermissible factors coming into play.” (internal citations omitted) *Id.* The Court explained: “[t]he women who wore the buttons intended to convey a message.”¹¹ *Id. at 832*

When addressing the buttons as they applied to the right to confrontation and cross examination, the court held that the presence of the women wearing the buttons constituted a statement. *Id. at 833* This statement was not subjected to the constitutional protections to which such evidence is ordinarily subjected; therefore, the defendant had no way to refute the buttons. *Id.* The Court also pointed out that it is very likely that the alleged victims’ testimony was bolstered by the buttons which is impermissible. Further, the Court held the buttons created an unacceptable risk that the jury’s determination of credibility was influenced by the courtroom showing of support. And a defendant charged with a crime is entitled to have his guilt or innocence determined solely based on the evidence introduced at trial. *Id.*

The outburst by A.D.’s father was an attempt to influence the jury through an outside influence. His outburst was emotional, outrageous, inflammatory and therefore highly prejudicial to Mr. Lowery. The outburst served as a statement to the jury which Mr. Lowery was unable to refute or cross-examine. Further, it occurred during a critical point in A.D.’s testimony and impressed on the jury his belief of what his daughter just testified to, thereby bolstering her testimony on a critical point in the State’s case. Furthermore, the father’s outburst could have been very intimidating to jurors as they might have feared his reaction to them if they were to find Mr. Lowery not guilty. In support of his motion for a mistrial, counsel argued jurors were

¹¹ In reaching this decision the appellate court relied on this Court’s decision in *State v. Franklín*.

likely to convict based on unfair reasons outside what is happening at trial. This outburst denied Mr. Lowery the right to a fair trial as guaranteed by the U.S. and W.Va. Constitutions and therefore he is entitled to a new trial.

III. Mr. Lowery's Conviction For Sexual Assault In The Third Degree, W. Va. Code §61-8b-5(A)(2) (2000)(2005 Repl. Vol.), Is Not Supported By Sufficient Evidence As The State Failed To Prove He Was At Least Four Years Older Than A.D., An Essential Element Of This Offense.

Standard of Review: The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. *Syl. Pt.1, State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995)*

In response to counsel's motion for judgment of acquittal, the State conceded it did not produce evidence of Mr. Lowery's age at trial and that was the State's fault. *Sentencing Hearing Tr. 9* To satisfy the statutory requirement of W.Va. Code§ 61-8B-5(a)(2) (2000)(2005 Repl. Vol.)¹², the State was required to show Mr. Lowery was at least 19 years and 5 months old to successfully demonstrate he was four years older than A.D. The only evidence the State presented at trial that even remotely addressed Mr. Lowery's age was that he was a married man with two babies.¹³ *Sentencing Hearing Tr. 7* The court denied counsel's motion for judgment of

¹² W.Va. Code § 61-8B-5(a)(2) states:

(a) A person is guilty of sexual assault in the third degree when:
(2) The person, being sixteen years old or more, engages in sexual intercourse or sexual intrusion with another person who is less than sixteen years old and who is at least four years younger than the defendant and is not married to the defendant.

¹³ In West Virginia the legal age of marriage is eighteen, sixteen with parental consent. Additionally, the fact that a man has two children is not indicative of an age greater than eighteen. The State failed to produce any evidence that demonstrated Mr. Lowery was nineteen years of age or older.

acquittal, stating that Mr. Lowery looks to be in his thirties and noted that the pre-sentence report reflected that he was in fact thirty-five.¹⁴ The court also found there was sufficient evidence in the record to support the jury finding Mr. Lowery was more than four years older than A.D., however, the court failed to identify the specific evidence on which it based this finding.

Sentencing Hearing Tr. 10

In *Syl. Pt. 6, State v. Richey, 171 W.Va. 342, 298 S.E.2d 879 (1982)*, this Court specifically addressed the age requirement found within W.Va. Code §61-8B-5(a)(2)(2000)(2005 Repl. Vol.):

Where the exact age is not required to be proved, the defendant's physical appearance may be considered by the jury in determining age **but there must be additional evidence suggesting the defendant's age.** (emphasis added)

In *Richey*, this Court held the State had presented sufficient evidence of the defendant's age to satisfy the statutory requirements, because aside from the defendant's physical appearance the State elicited testimony from the victim that he believed the defendant was between forty and fifty. Additionally, the defendant was a member of the West Virginia House of Delegates which required the minimum age of eighteen. *Richey, 171 W.Va. at 350, 298 S.E.2d at 887* Furthermore, unlike Mr. Lowery's case, in *Richey*, the State was only required to prove the defendant was eighteen, a point that it proved with certainty due to the defendant's position in the West Virginia House of Delegates. *Id.*

The State argued it was not required to prove Mr. Lowery's exact age and by his appearance it was apparent that Mr. Lowery is older than 19. However, as just discussed above, this Court has held that the State must introduce evidence beyond the defendant's appearance to satisfy the requirements of W.Va. Code § 61-8B-5(a)(2)(2000)(2005 Repl. Vol.). The State failed to produce any evidence at trial that established Mr. Lowery was nineteen. The State

¹⁴ See footnote 6

argued it had met its burden by showing that Mr. Lowery was the married father of two babies; however, an eighteen-year-old man could easily fall within this category. Mr. Lowery's case required the State to prove with more specificity his age because the State had an obligation to prove an age beyond majority to satisfy the statutory requirements. An obligation, as demonstrated above, the State did not meet; therefore the court committed reversible error by denying counsel's motion for judgment of acquittal. Since the State failed to prove an essential element of its case, Mr. Lowery's convictions must be reversed.

RELIEF REQUESTED

For the above reasons, Mr. Lowery requests that his convictions and sentences be reversed and his case remanded to the circuit court for a new trial. If the Court agrees there was insufficient evidence for his convictions of the sexual assault in the third degree, this Court should order these charges be dismissed.

Respectfully submitted,

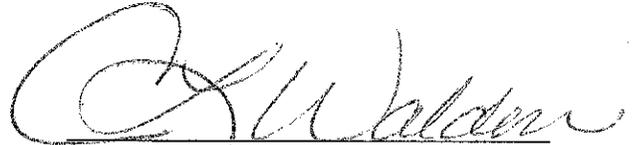
John H. Lowery
By Counsel



Crystal L. Walden
Assistant Public Defender
W.Va. Bar No. 8954
Kanawha County Public Defender Office
P.O. Box 2827
Charleston, WV 25330
(304) 558-2323

CERTIFICATE OF SERVICE

I, Crystal L. Walden, hereby certify that on the 12th day of December, 2007, I sent via United States Postal Service a copy of the foregoing Appellant's Brief to Robert D. Goldberg, Assistant Attorney General, State Capitol Building 1, Room E-26, 1900 Kanawha Boulevard East, Charleston, West Virginia 25305.

A handwritten signature in cursive script, appearing to read 'Crystal L. Walden', written over a horizontal line.

Crystal L. Walden
Counsel for Petitioner