
NO. 33600

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

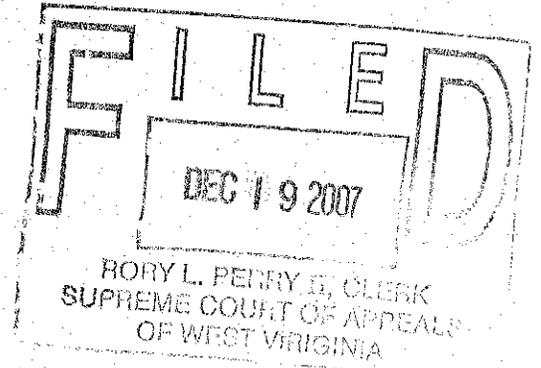
STATE OF WEST VIRGINIA,

Appellee,

v.

JOHN LOWERY,

Appellant.



BRIEF OF APPELLEE,
STATE OF WEST VIRGINIA

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

BARBARA H. ALLEN, WWSB # 1220
MANAGING DEPUTY ATTORNEY GENERAL
STATE CAPITOL, ROOM E-26
CHARLESTON, WEST VIRGINIA 25305
304-558-2021

Counsel for Appellee

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. KIND OF PROCEEDING AND NATURE OF RULINGS BELOW	1
III. STATEMENT OF THE FACTS	3
IV. ISSUES PRESENTED	6
V. ARGUMENT	6
A. The Trial Court Did Not Err In Permitting The Reverend Mr. Ely To Testify As To His Admonitions To The Appellant; No Clergy- Communicant Privilege Was Involved	6
B. The Trial Court Did Not Abuse Its Discretion In Denying The Appellant's Motion For A Mistrial Following A Brief Outburst In Court By The Victim's Father	11
C. The State Proved Beyond A Reasonable Doubt That The Appellant Was More Than Four Years Older Than The Victim	13
VI. CONCLUSION	14

TABLE OF AUTHORITIES

	Page
CASES	
<i>Norris v. Risley</i> , 918 F.2d 828 (9th Cir. 1990)	11
<i>State v. Franklin</i> , 174 W. Va. 469, 327 S.E.2d 449 (1985)	11
<i>State v. Moss</i> , 180 W. Va. 363, 376 S.E.2d 569 (1988)	11
<i>State v. Potter</i> , 197 W. Va. 734, 478 S.E.2d 742 (1996)	10
<i>State v. Richey</i> , 171 W. Va. 342, 298 S.E.2d 879 (1982)	13, 14
<i>State v. Stewart</i> , 278 S.C. 296, 295 S.E.2d 627 (1987)	11, 12
<i>State v. Taylor</i> , 55 Ariz. 29, 97 P.2d 927 (1940)	11, 12
<i>State v. Winebarger</i> , 217 W. Va. 117, 617 S.E.2d 467 (2005)	11
STATUTES	
W. Va. Code § 57-3-9	6, 11
W. Va. Code § 61-8B-5	1, 13
W. Va. Code § 61-8B-9	1

No. 33600

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

STATE OF WEST VIRGINIA,

Appellee,

v.

JOHN LOWERY,

Appellant.

BRIEF OF THE APPELLEE,
STATE OF WEST VIRGINIA

I.

INTRODUCTION

The record in this case tells a sad, sorry, dispiriting story of an older married man pursuing an intimate relationship with a fifteen year old girl -- a naive girl torn between her obvious attraction to the man and her fear of having her parents discover what she was up to during after-school hours.

II.

KIND OF PROCEEDING AND NATURE OF RULINGS BELOW

On July 26, 2006, the Appellant was indicted on three counts of third degree sexual assault, W. Va. Code § 61-8B-5, and three counts of third degree sexual abuse, W. Va. Code § 61-8B-9, all arising from a relationship with A.D., a person being less than sixteen years old and incapable of consent.

At the trial, the prosecution called seven witnesses, one of them the victim, A.D. During her testimony, the transcript shows that a gentleman in the courtroom stood up and shouted, "You bastard! You bastard!" after which he was immediately escorted out by the bailiff. The court instructed the jury to ". . . disregard that outburst." (Tr. at 116.) Defense counsel moved for a mistrial, which was denied. (Tr. at 116-117.)

At the conclusion of the victim's testimony, the State moved to dismiss Count 2 of the Indictment, which was granted. (Tr. 144-145.)

At the conclusion of the State's case in chief, the State moved to dismiss Count 3 of the Indictment, which was granted. (Tr. 193.) Defense counsel moved to dismiss the remaining counts of the Indictment, which was denied. (Tr. 191-196.) Following argument on the proposed instructions, the jury was called back into court and the defense then rested. (Tr. 208-209.)

Following the instructions of the court and the closing argument of counsel, the jury retired to deliberate. At that point, defense counsel moved for judgment of acquittal based on the State's failure to prove the defendant's age. The court reserved ruling on the motion, stating that "[t]hat will be something, depending on what the jury does, I'll have you all brief for me." (Tr. 252.)

The jury convicted the Appellant on all remaining counts in the Indictment: Counts 1 (misdemeanor), 4 (felony), 5 (felony) & 6 (misdemeanor).

The Appellant filed two post-trial motions. The first, Motion for Judgment of Acquittal, was based wholly on the State's failure to prove the Appellant's age. (App. 141.) The second, Motion for New Trial, was based wholly on the spectator outburst that took place during the victim's testimony. (App. 145.)

On October 26, 2006, the court denied the Appellant's post trial motions and sentenced him to an effective sentence of 2-10 years, specifically: 1-5 years each on Counts 4 and 5, to be served consecutively; and 90 days each on Counts 1 and 6, to be served concurrently with the sentence on Count 4. (App. 156.)

This appeal followed.

III.

STATEMENT OF THE FACTS

The relationship between the Appellant and his fifteen year old victim, A.D., took place in late 2005 and early 2006. Both were members of the New Covenant Missionary Baptist Church, where A.D.'s mother was an assistant pastor. A.D. participated in an afterschool program at the Second Avenue Community Center in West Charleston; the Appellant was a member of the Center's dance team, which A.D. choreographed. The Appellant was thirty-five (more about that later), married and the father of several children; A.D. was either fourteen or fifteen. (Tr. 99, 103.)¹

The Appellant began making advances toward A.D. on an occasion when he was sitting in a car and she put her hand on the car door. (Tr. 101.) Some time later, when she was helping him put things away after a bake sale, he "... closed the door behind me, and I'm, like, Okay, what are you doing? And so, he, like, kissed me, and stuff... and he just wouldn't stop. So, I'm, like, okay, alright. But then I said that I wasn't going to tell anybody." (Tr. 103.)

The relationship progressed to an afternoon tryst at A.D.'s father's house in January, 2006, where there was touching of A.D.'s breasts and hugging. (Tr. 104-107.) Sometime after that, A.D.

¹Although A.D. testified that she was fourteen when the relationship began, the totality of the testimony suggests that she turned fifteen almost immediately thereafter.

met the Appellant at a trestle near the church, where there was finger penetration of A.D.'s vagina. (Tr. 107-109.)

In February, 2006, A.D. met the Appellant at an abandoned apartment behind the Appellant's house on Sixth Street, where there was oral sex and then intercourse. (Tr. 111-114.) According to A.D., she kept telling the Appellant to quit it, ". . . but then he was, like, 'no.'" (Tr. 114.) The intercourse stopped when A.D. took a cell phone call from her mother, who asked "'Where are you at?' And I thought she was around, somewhere around where I was. So, I hurried up and pushed him off of me, and I got my stuff on, and I got (sic) pulled my pants up, and I got all of my stuff that I had, and I hurried up and ran down the street so that she wouldn't see me." (Tr. 114.)

Although both the Appellant and A.D. were attempting to keep their relationship a secret, relatives and church members were suspicious. Lewanda Macklin, A.D.'s aunt, testified to several instances of ambiguous conduct involving the Appellant and A.D. that took place at her house. (Tr. 172-174.) Wanda Allen, a member of the church, saw the Appellant and A.D. on several occasions when they were walking down the street (Tr. 75-78). Her unease about the situation led her to talk to her minister, the Reverend James Ely (Tr. 80), and also to A.D.'s mother, Linda Duncan. (Tr. 79.)

The Reverend Mr. Ely, who had also seen the Appellant and A.D. walking together, told the Appellant to stay away from A.D. (Tr. 148-149.) Linda Duncan also confronted the Appellant, telling him that "I will have you put under the jail . . .," but the Appellant denied any relationship with A.D. (Tr. 83-84.)

With respect to Mr. Ely, the following cross-examination took place:

Q: Were you speaking to John Lowery in your capacity as his minister?

A: At the time, I was speaking to him in several capacities, really; as a friend, as the overseer of the Second Avenue Center, and as a minister.

Q: Okay. And as a minister also; was that your testimony?

A: Yes.

Q: And you had a private discussion with him as his minister?

A: This conversation that we had was primarily as me being the overseer of the Second Avenue Center, because that's where he was working for us.

Q: So, you were not speaking to him as his minister at that time?

A: If we've got to separate the two, no.

(Tr. 150-51.)

A.D. finally admitted her relationship with the Appellant after a strange series of events. Tammy Coles, the Appellant's sister-in-law, became suspicious about calls being made from the family cell phone to a number she believed to be that of Lewanda Macklin, A.D.'s aunt. Jumping to the conclusion that the Appellant was having an affair with Ms. Macklin, she went to confront Ms. Macklin at the home of Linda Duncan, Ms. Macklin's sister and A.D.'s mother. When she talked to Ms. Duncan, she learned that the number being called was A.D.'s number, not Ms. Macklin's. At this point both she and Ms. Duncan knew what was happening, notwithstanding all the denials from the Appellant and A.D. (Tr. 85-89; 156-158.)²

Thereafter, Ms. Duncan asked Jason Coles to speak to her daughter, who finally told the truth to him (Coles) about her relationship with the Appellant. (Tr. 89-90.) She was taken to Women's

² Phone records were put into evidence showing a number of calls made from the Appellant's phone to A.D.'s phone, including calls 38 minutes and 44 minutes in duration. (Tr. 159-165)

and Children's Hospital for an examination. The results of the examination were normal for a fifteen year old girl; the examining physician could not rule rape in or out. (Tr. 176-191.)

IV.

ISSUES PRESENTED

1. The trial court did not err in permitting the Reverend Mr. Ely to testify as to his admonitions to the Appellant; no clergy-communicant privilege was involved.
2. The trial court did not abuse its discretion in denying the Appellant's motion for a mistrial following a brief outburst in court by the victim's father.
3. The State proved beyond a reasonable doubt that the Appellant was more than four years older than the victim.

V.

ARGUMENT

A. The Trial Court Did Not Err In Permitting The Reverend Mr. Ely To Testify As To His Admonitions To The Appellant; No Clergy-Communicant Privilege Was Involved.

Because the Reverend James Ely is the minister of the New Covenant Missionary Baptist Church, which counts the Appellant among its members, the Appellant claims that W. Va. Code § 57-3-9 prohibited Mr. Ely from testifying that he told the Appellant to stay away from the victim, A.D.

In support of this argument, the Appellant makes statements of fact to this Court that are highly misleading at best. The Appellant says that "John Lowery was a member of Reverend Ely's church and had been receiving martial (sic) counseling from Reverend Ely for sometime prior to charges being filed against him . . . During his testimony, Reverend Ely testified to the substance of

Mr. Lowery's counseling in direct violation of W. Va. Code § 57-3-9." (Appellant's Brief at p.2.) Accordingly, says the Appellant, "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." (Appellant's Brief at p. 4.)

The jury was never told that the Appellant had sought counseling from the Reverend Ely; the transcript cites in the Appellant's brief are to pre-trial arguments made to the court by the Appellant's counsel, not to any evidence given at the trial.

Here is the entirety of Mr. Ely's testimony on direct examination:

Q: Would you state your name please.

A: Reverend James D. Ely.

Q: And you are a minister here in Charleston?

A: Yes.

Q: Where is your church located?

A: Over on Charleston's West Side, on First Avenue. 1404 First Avenue.

Q: How long have you been in the ministry, sir?

A: Seventeen years.

Q: 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 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. Ashley Duncan?

A: Yes.

Q: I will direct your attention to the month of February, approximately three weeks after that, did you have an occasion to be dropping your wife off for an activity?

A: Yes, sir.

Q: Could you tell the ladies and gentlemen of the jury where you were heading on that occasion?

A: My wife is a member of the Symphony Chorus, and so I had taken her to the Symphony practice over at UC. And I was on my way back home, on First Avenue, and I saw people walking down Bream Street, and I thought that one of them was Ashley. So, I drove around the corner and went back and –

MR. SULLIVAN: Your Honor, I'm going to object to relevance.

MR. MORRIS: Judge, it's relevant – the testimony will be that he saw these two people together after he had counseled the Defendant concerning –

THE COURT: The objection is overruled.

MR. MORRIS: Thank you.

BY MR. MORRIS:

Q: Go ahead.

A: I saw them walking together, and I stopped and asked where she was going, and she said she was going to her father's house, and he was supposedly walking her to her father's house.

Q: Reverend Ely, I'm going to direct your attention to the next day. Did you have any opportunity to once again counsel the Defendant concerning staying away from Ms. Ashley Duncan?

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

MR. MORRIS: Judge, I'm 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.

MR. MORRIS: Thank you.

BY MR. MORRIS:

Q: Did you tell him to stay away from the Defendant – [A.D.]?

A: Yes.

Q: Now, I'm going to direct your attention to – that was on Tuesday, February 28?

A: Yes.

Q: Okay. I'm going to direct your attention to Friday, March the 3rd, and ask if you had an opportunity to see the Defendant and [A.D.] again?

A: Yes.

Q: And where did you see them at?

A: On the corner of – he was on the corner of – Florida Street divides Grant and Third Avenue. It's basically the same street, but on one side it's called Third Avenue, and on the other side it's called Grant Street. So, he was on the corner of Florida and Third, and she was on the corner of Florida and Grant.

Q: What were they doing when you saw them?

A: They were talking across to each other.

MR. MORRIS: I believe that's all I have.

(Tr. at 146-150.)

West Virginia Code § 57-3-9 provides in relevant part that:

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. . . .

In this case, the trial court correctly ruled that although Mr. Ely would not be permitted to testify as to any communications made by the Appellant to him, he could testify as to his statements made to the Appellant. Both as a matter of statutory construction and under the facts and circumstances of this case, the trial court's ruling was correct.

There is a four-part test for determining whether a communication to a clergyman is privileged under the statute: (1) the communication must be made to a clergyman, (2) it may be in the form of confidential confession or communication, (3) it must be made to the clergyman in his professional capacity, and (4) it must have been made in the course of discipline enjoined by the rules of practice of the clergyman's denomination. *State v. Potter*, 197 W. Va. 734, 478 S.E.2d 742 (1996).

In the instant case, the Appellant did not make any confidential confession or communication to Mr. Ely; rather, Mr. Ely testified that he went to the Appellant to warn him to stay away from the victim, A. D.³ Additionally, Mr. Ely testified that he spoke to the Appellant while wearing three hats, so to speak, but that "[t]his conversation that we had was primarily as me being the overseer of the Second Avenue Center, because that's where he was working for us." (Tr. 150-151.)

The transcript of the trial reveals that the State's direct examination of Mr. Ely was a model of brevity and care. He testified only that he counseled the Appellant concerning some allegations that had been made concerning him and A.D.⁴ (Tr. 147); that three weeks later he saw the Appellant and A.D. walking down Bream Street together, at which point he asked A.D. where she was going (Tr. 148); that the next day he again told the Appellant to stay away from A.D. (Tr. 149); and that several days later he saw the Appellant and A.D. together again (Tr. 149-150).

³This is significant, because one can envision a scenario where admonitions from the clergyman come in response to some communication from a defendant. In such a case, the jury might well infer the substance of the communication from the fact of the response. Here, in contrast, any communication to Mr. Ely came from other parishioners who were worried about what they perceived to be an improper relationship between the Appellant and A.D. That, plus the evidence of his own eyes, is what led Mr. Ely to seek out the Appellant and attempt to warn him off.

⁴Presumably by Mrs. Allen. (Tr. 80.)

None of this contravenes the prohibitions of W. Va. Code § 57-3-9, since none of it even hints at any “confession or communication” made by the Appellant to Mr. Ely. Therefore, the trial court correctly ruled that the testimony of Mr. Ely was admissible.

B. The Trial Court Did Not Abuse Its Discretion In Denying The Appellant’s Motion For A Mistrial Following A Brief Outburst In Court By The Victim’s Father.

During the testimony of A.D., an individual in the courtroom, apparently A.D.’s father although this is not confirmed in the record, stood up and shouted “You bastard! You bastard!” He was promptly escorted out by the bailiff, and the court instructed the jury to “. . . disregard that outburst.” (Tr. at 116.) Defense counsel moved for a mistrial, which was denied. (Tr. at 116-117.)

The decision to grant or deny a motion for mistrial is reviewed by this Court under an abuse of discretion standard.

The 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. A trial court is empowered to exercise this discretion only when there is a “manifest necessity” for discharging the jury before it has rendered its verdict. This power of the trial court must be exercised wisely; absence the existence of manifest necessity, a trial court’s discharge of the jury without rendering a verdict has the effect of an acquittal of the accused and gives rise to a plea of double jeopardy.

State v. Winebarger, 217 W. Va. 117, 127, 617 S.E.2d 467, 477 (2005) (citations omitted).

In the instant case, the courtroom disturbance was brief and was promptly corrected, first by the bailiff, who escorted the offending spectator out, and then by the trial court, who directed the jury to ignore the outburst. In this regard, the situation facing the trial court was totally different from that presented in the cases upon which the Appellant relies: *State v. Franklin*, 174 W. Va. 469, 327 S.E.2d 449 (1985); *Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990); *State v. Moss*, 180 W. Va. 363, 376 S.E.2d 569 (1988); *State v. Stewart*, 278 S.C. 296, 295 S.E.2d 627 (1987); and *State v. Taylor*, 55 Ariz. 29, 97 P.2d 927 (1940).

In *Franklin*, a large group of spectators wearing Mothers Against Drunk Drivers badges were present throughout the trial, for the specific purpose of influencing the jury. Similarly, in *Norris*, some fifteen spectators wearing prominent "Women Against Rape" badges sat in the courtroom throughout the trial, manned the elevators used by jurors, and sold refreshments on behalf of the State right outside the courtroom door. Here, in contrast, there was one individual who "blew up" briefly and was hustled right out of the courtroom, followed by a strong cautionary instruction by the judge. The outburst appears to have been only a few seconds in duration, and there is no indication in the record that the offending spectator ever came back to the courtroom.

In *Moss*, the court was confronted with a situation where the prosecutor went on the radio while the trial was still in progress and asserted (among other things) his absolute confidence that the defendant was guilty. The trial court denied a motion for mistrial and refused to even poll the jury to determine whether its members had heard the prosecutor's comments.⁵ Here, in contrast, we have a four second outburst from one spectator, not a clear-cut violation of ethics by the prosecutor, followed by the spectator's immediate ejection and a strong curative instruction from the court.

In *Stewart*, the courtroom was overcrowded with impassioned spectators – they were in every available seat and lined up along the wall – who were making comments *sotto voce* about the defendant's guilt, glaring and making faces and the jurors, and engaging in raucous laughter at some of the testimony. Similarly, in *Taylor*, the courtroom spectators burst into applause during the State's closing argument. In both *Stewart* and *Taylor*, the message to the jury was clear: the *community* wants this guy convicted. Here, in contrast, the message to the jury was that one person wanted the

⁵There is no indication that he gave a cautionary instruction to the jury, and logic indicates that he would not have since his reason for not polling the jury was his asserted confidence that the jury had obeyed his instructions about exposure to media accounts of the case.

Appellant convicted, and that his behavior was improper (witness his prompt ejection from the courtroom) and should be disregarded (per the court's immediate instruction).

The trial court was clearly within the bounds of discretion in deciding that a brief outburst, followed by an ejection and a curative instruction, did not create manifest necessity for a mistrial.

C. The State Proved Beyond A Reasonable Doubt That The Appellant Was More Than Four Years Older Than The Victim.

The statute under which the Appellant was charged with the felony counts, W. Va. Code § 61-8B-5, requires, *inter alia*, that the Appellant be at least four years older than the victim. The Appellant contends that the State failed to prove this element of the felony offenses because there was no direct evidence of the Appellant's age – which, incidentally, was 35 at the time he began seducing a 15 year old girl.

In Syllabus Point 6 of *State v. Richey*, 171 W. Va. 342, 298 S.E.2d 879 (1982), this Court held that:

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 some additional evidence suggesting the defendant's age.

In the instant case, the jury could have found beyond a reasonable doubt that the Appellant was more than four years older than A.D. by considering the following:

First, the Appellant's appearance. The comments of counsel when this issue came up (Tr. 252) indicate that the Appellant looks to be in his mid-thirties, which he is.

Second, the fact that the Appellant has a wife and children. (Tr. 102.)

Third, the testimony of A.D. acknowledging that she knew “. . . [the Appellant] was quite a bit older than [she was]” (Tr. 102.)

Fourth, the reaction of Wanda Allen and the Reverend James Ely to what they suspected was going on between the Appellant and A.D.; one would not expect such concern if the Appellant had been a boy rather than a man.

In short, here as in *Richey*, “[a]lthough the State was rather careless in presenting evidence on the age element in the present case, we believe there was sufficient evidence to carry the question to the jury and, consequently, we find no error.” *State v. Richey, supra*, 171 W. Va. at 351, 298 S.E.2d at ___.

VI.

CONCLUSION

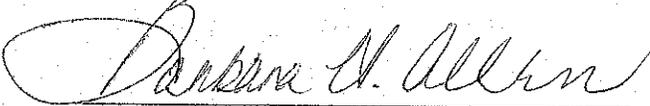
For all of the reasons set forth in this Brief and apparent on the face of the record, the judgment of the Circuit Court of Kanawha County should be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Appellee,

By counsel,

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL

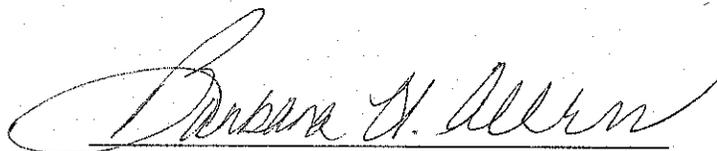


BARBARA H. ALLEN, WVSB # 1220
Managing Deputy Attorney General
State Capitol, Room E-26
Charleston, West Virginia 25305
304-558-2021

CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of the Appellee, State of West Virginia* was mailed to counsel for the Appellant by depositing it in the United States mail, with first-class postage prepaid, on this 19th day of December, 2007, addressed as follows:

Crystal L. Walden, Esq.
Assistant Public Defender
Office of the Public Defender
P.O. Box 2827
Charleston, WV 26330-2827


BARBARA H. ALLEN