

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

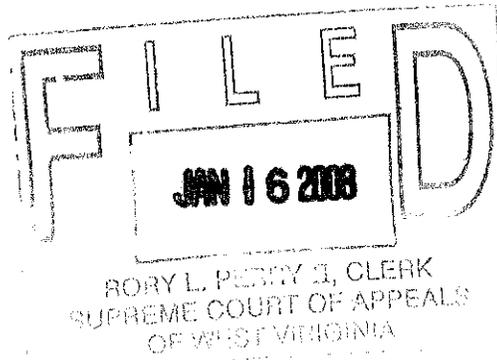
STATE OF WEST VIRGINIA,

v.

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

JOHN LOWERY,

Petitioner.



APPELLANT'S REPLY BRIEF

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REPLY ARGUMENT

I.

Statement of Facts

Mr. Lowery does not dispute the facts as presented in the State's Brief.

II.

Mr. Lowery correctly asserted his counseling relationship with Reverend Ealy fell within the protections of W.Va. Code § 57-3-9

Mr. Lowery rightfully claims W.Va. Code § 57-3-9(2001)(2005 Repl. Vol.) prohibited Reverend Ealy¹ from testifying during his trial. Reverend Ealy was the minister of Mr. Lowery's church, *Tr. 147*, was providing Mr. Lowery marital counseling, *Tr. 15*², and testified over Mr. Lowery's objection to the contents of several conversations which occurred between him and Mr. Lowery that even Reverend Ealy himself described as "counseling." *Tr. 17, 147-149, State's brief 7-9* The fact that Reverend Ealy's testimony was limited to what he said by the trial court is irrelevant, as the State was able to illicit the substance of the counseling during his testimony, thereby defeating the sole purpose of the clergy communicant privilege found in W.Va. Code § 57-3-9. *See also State v. Potter, 197 W.Va. 734, 478 S.E2d 742 (1996)*

¹ Counsel just recently discovered while going through the Record in this case that Reverend Ealy's name was misspelled by the Court Reporter "Ely" in the trial transcript and wanted to alert this Court of the mistake and the proper spelling of his name.

² The State claims that counsel provided facts to this court in a fashion it described as "highly misleading at best." *State's brief 6* The State alleged counsel failed to inform this Court that some of the cites were to pretrial arguments and the jury was not aware of any counseling between Reverend Ealy and Mr. Lowery. Counsel disagrees with this assertion. In the very first cite to the record in Appellant's brief, counsel stated the following: "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*" Additionally, the State's assertions also ignore the fact that jurors heard the communications which occurred between Mr. Lowery and Reverend Ely referred to as "counseling" on numerous occasions throughout Reverend Ely's testimony and is what counsel was addressing in Appellant's brief in the sentences the State chose to quote. *Tr. 147-155* Counsel addresses this issue further within this reply.

In support of its argument that W.Va. Code § 57-3-9 does not apply, the State makes assumptions which have no support in the record and ignores facts which are in evidence. The counseling sessions which occurred between Reverend Ealy and Mr. Lowery are now being portrayed in the State's brief as mere "admonitions" that do not fall within the protections of W.Va. Code § 57-3-9. *State's brief 6* However, both the prosecutor and Reverend Ealy described the sessions as "counseling" numerous times in front of the jury at trial. *Tr. 146-150, State's Brief 7-9* The State attempts to discount the counseling sessions which occurred by deeming them to be impromptu sessions spurred by complaints of concerned parishioners and Reverend Ealy's own observations. *State's brief 10* However, even if that were the case, it does not change the fact the conversations were counseling between Reverend Ealy and Mr. Lowery on an issue which clearly falls within the realm of marital counseling. The State completely discounts or ignores the possibility the counseling which Reverend Ealy refers to in his testimony could have been regularly scheduled counseling sessions, in which he brought up these additional concerns. The record is not clear as to how and when the sessions occurred. The one thing that is clear from the record is the communications were in the form of counseling between Reverend Ealy, in his role as counselor, and Mr. Lowery, the communicant, and therefore fell under the protections of W.Va. Code § 57-3-9.

The State further claims counsel misled this Court asserting the jurors were not told Mr. Lowery was involved in counseling with Reverend Ealy. *State's brief 6-7* However, the very testimony quoted in the State's brief clearly demonstrates that jurors were in fact aware Mr.

Lowery was counseled by Reverend Ealy.³ *State's brief 7-9* The first mention of counseling came during a question from the prosecutor: "... 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?" *Tr. 147, State's brief 7* Even the way this question was posed invited the jurors to assume Mr. Lowery had something to hide or that Mr. Lowery had in fact stated something which was incriminating, as was asserted in Appellant's brief.⁴ Furthermore, the idea of counseling is that one admits or acknowledges he or she has a problem and seeks counseling to resolve it. There were other instances where the conversations which occurred between Reverend Ealy and Mr. Lowery were discussed as "*counseling*" in front of the jury. Such as:

Mr. Morris: Judge it is relevant—the testimony will be that he saw these two people together after he had *counseled* the Defendant concerning-- *Tr. 148, State's Brief 8*

Mr. Morris: ...Did you have any opportunity to *once again counsel* the Defendant concerning staying away from Ms. Ashley Duncan? *Tr. 148, State's Brief 8*

Mr. Sullivan: The *counseling* that was referred to by the prosecutor, you were doing that *counseling* as John Lowery's minister? *Tr. 150*

In a footnote, the State acknowledges and attempt's to discount the very argument Mr. Lowery asserted in his original brief. *States brief 10 n.3* However, the State puts a spin on the

³ While the words marital counseling were not mentioned in front of the jury, it is apparent jurors were made aware Mr. Lowery and Reverend Ely were involved in a counseling relationship. When jurors heard Reverend Ely say I counseled him regarding A.D. this opens the possibility of numerous natural assumptions to be made regarding Mr. Lowery. Such as Mr. Lowery admitted the relationship and was being counseled, or Mr. Lowery understood the relationship was wrong and was seeking counseling. All of which were harmful and inappropriate assumptions.

⁴ Counsel realizes that the prosecutor was attempting to ensure the trial court's ruling was obeyed when he posed the question, however it still does not change the fact that it allowed the jurors to believe Mr. Lowery had something to hide, or that he admitted to the relationship with A.D.

facts in this footnote which completely ignores the fact that Reverend Ealy was in a counseling relationship with Mr. Lowery, a fact that cannot be ignored in this case and a fact which was established in the record. *Tr. 15, 147-149, State's Brief 7-9* We do not know, nor according to W.Va. Code § 57-3-9 should we know, exactly what was said in these sessions and it is pure speculation on the part of the State to assert that none of the sessions Reverend Ealy testified to were in response to or contained a confession or communication made by Mr. Lowery. *State's Brief 10, 11*

The State also attempts to refute Mr. Lowery's argument by referring to the testimony Reverend Ealy gave on cross-examination, explaining he was speaking to Mr. Lowery in several capacities as "a friend, as the overseer of the Second Avenue Center, and as a minister." *Tr. 151* He then said if he were forced to choose between those three he would say he was speaking to Mr. Lowery as his employer. *Id.* Appellant would argue in this situation there is no separating these roles as they are clearly intertwined and on the record Reverend Ealy stated that he "counseled" Mr. Lowery. Additionally according to West Virginia law, that is not Reverend Ealy's decision to make. The clergy-communicant privilege is held by the communicant in West Virginia, therefore this Court should judge this situation from Mr. Lowery's perspective. *W.Va. Code 57-3-9, State v. Potter, 197 W.Va. 734, 478 S.E2d 742 (1996)*⁵ Mr. Lowery was approached by his counselor to discuss an issue which clearly falls within the realm of marital counseling, and they discussed that issue on several occasions. *Tr. 147-149* Furthermore, no

⁵ In his *Handbook on Evidence for West Virginia Lawyers*, Justice Cleckley explains that in West Virginia "[o]nly the penitent holds the privilege. The clergy may however assert the privilege for the penitent." *Franklin D. Cleckley, Handbook on Evidence for West Virginia Lawyers, § 5-4(F)(4) at 5-140 (2000)* Counsel would also note Justice Cleckley authored *State v. Potter, 197 W.Va. 734, 478 S.E2d 742 (1996)*.

where in Revered Ealy's testimony is there any indication Mr. Lowery was reprimanded or that his job depended on his compliance with this "counseling."

If one looks at the seriousness of the issue at hand, and Reverend Ealy's actions, it becomes quite clear Reverend Ealy was actually speaking to Mr. Lowery in his capacity as a counselor, not as an employer. There was no testimony by Reverend Ealy that Mr. Lowery was reprimanded or that Mr. Lowery was fired due to his disregard of the "counseling." It is the role of a counselor to continue counseling and helping a person with an issue until it is resolved even if that means having the same discussion on more than one occasion, unlike that of employer and employee. Reverend Ealy's actions represented that of a counselor.

The limitation the trial court placed on Reverend Ealy's testimony, allowing him to testify only to what he said and nothing Mr. Lowery said, does not satisfy W.Va. Code § 57-3-9 as the State tries to argue. *State's Brief 9* If this Court were to accept the State's argument it would in fact render the clergy communicant privilege meaningless as the State would be able to present the substance of counseling in any case by simply calling the clergy to testify only as to what they communicated to the communicant. For instance, if a Reverend was called in a domestic violence case and was given the same admonishment as Reverend Ealy and then asked by the prosecutor did you have an opportunity to counsel D regarding his volatile relationship with his wife? Answer---Yes, I told him that violence was never the right answer.⁶ This testimony not only discloses the couple was in counseling, it also discloses the subject matter of

⁶ Now assume that due to the one-sided nature of this testimony the following facts were true about this hypothetical situation: Although their relationship was rocky there had never been any violence between the two; however, due to volatile situation they feared it could eventually reach that point. However, as presented the testimony invites jurors to assume the exact opposite: that the relationship had turned violent, they sought counseling but even that did not work.

the counseling and invites numerous assumptions to be made by jurors, many of which may be unfounded and all of which are highly prejudicial to the defendant.

In Mr. Lowery's case the trial court's ruling allowed the State to expose the very information the clergy communicant privilege was created to protect. Even though Reverend Ealy was only allowed to testify as to what he said, his testimony informed jurors that Mr. Lowery had been counseled several times regarding A.D. and had been told by his counselor to stay away from her. From Reverend Ealy's testimony, jurors would naturally believe that Mr. Lowery in fact acknowledged the relationship with A.D. or admitted to it and was seeking help from Reverend Ealy. Any of these assumptions clearly benefited the State. Therefore, Reverend Ealy's testimony was highly prejudicial to Mr. Lowery, it corroborated A.D.'s testimony, and it was a direct violation of W.Va. Code § 57-3-9.

III.

The trial court should have declared a mistrial based on the outburst created by A.D.'s father which occurred during a critical point in A.D.'s testimony

The State claims the outburst which occurred in Mr. Lowery's case took no more than four seconds of the court's time. *State's brief 12* The State's approximation as to the length of the outburst is obviously only taking into account the time that it took A.D.'s father⁷ to stand and yell "you bastard, you bastard." This time frame fails to take into account the entirety of the disturbance he caused, all of which was witnessed by the jurors and impacted their decision in this case. The State fails to acknowledge the amount of time it took the bailiff to physically remove A.D.'s father from the court room, the time it took for the court to admonish the jurors,

⁷ The State asserts it was never established that the outburst was created by A.D.'s father. In the initial discussion of who it was, the prosecutor stated: "I believe, I've never met him before, but I believe that may have been the father of the victim..." *Tr. 117* Additionally, when addressing counsel's renewed motion at sentencing in regard to the outburst the trial court referred to the man as "a father." *Sentencing 6*

and finally the additional time which was spent holding the bench conference in which trial counsel moved for a mistrial.

The State also asserts that the trial court gave a “strong curative instruction” on more than one occasion. *State’s brief 12* The curative instruction given to jurors following the outburst which occurred in Mr. Lowery case was as follows: “Ladies and gentlemen of the jury, you will disregard that outburst.” *Tr. 116* This instruction was no different than any other curative instruction given by trial courts everyday in this state for a variety of reasons.

Finally, the State spends the majority of its argument on this issue distinguishing the facts of the cases relied on by counsel from the facts involved in Mr. Lowery’s case. *State’s Brief 12* While the facts of the cases counsel relied on in support of this argument can be distinguished the law announced in these cases is on point. Outbursts, attempts to interfere or send a message to jurors, and media coverage by their very nature are going to differ, however the law governing how to deal with them when they occur is the same and should be applied uniformly. One person who in a loud, emotional, intimidating, and vulgar fashion sends his message in a courtroom to jurors, as occurred in Mr. Lowery’s case, could have just as much if not more impact as 15 to 20 people sitting quietly in a court room with badges or several people in a galley clapping or laughing. *See State v. Franklin, 174 W.Va. 469, 327 S.E.2d 449 (1985); Norris v. Risley, 918 F.2d 828 (Mont. 1990); State v. Stewart, 278 S.C. 296,303, 295 S.E2d 627,630 (1982); State v. Taylor, 97 P.2d 927,932, 55 Ariz 29,41 (1940); State v. Moss, 180 W.Va. 363,367, 376 S.E.2d 569,573 (1988).*

Mr. Lowery’s constitutional right to a fair trial was violated by this outburst. Trial counsel did a wonderful job of describing on the record the atmosphere created in the courtroom “...I don’t think there is any way the jury can disregard what just happened, or the emotion of

what just happened....” *Tr. 116-117* “It’s going to prejudice them ...I think they are more likely to convict the Defendant for unfair reasons outside of what is happening at trial.” *Tr. 117* Mr. Lowery’s trial had just started, the outburst occurred during a critical point in A.D.’s testimony, potentially bolstering that testimony, and she was the only witness that offered substantive testimony at trial. Therefore, the trial court should have declared a mistrial to ensure Mr. Lowery would enjoy the most basic right guaranteed to every criminal defendant, the right to a fair trial. Mr. Lowery did not receive his right to a fair trial as is guaranteed to him by both the Sixth and Fourteenth Amendments, United States (U.S.) Constitution, and Article III, §§ 10, 14, West Virginia (W.Va.) Constitution.

IV

The State failed to prove with certainty Mr. Lowery was four years older than A.D., an essential element of W.Va. Code § 61-8B-5.

The State conceded at sentencing that it did not prove Mr. Lowery’s age. “In this case, the State did not establish his exact age. In fact there was no mention of his age whatsoever, and that was the State’s fault.” *Sentencing 8-9* No matter how many times the State now chooses to remind this Court, of how large the actual age difference was, it does not change the fact that during trial the State failed to demonstrate, with certainty, Mr. Lowery was at least four years older than A.D. and therefore did not carry its burden. None of the evidence in the record the State currently points to establishes with certainty Mr. Lowery was in fact 19.

The State relies on Mr. Lowery’s appearance, which this Court clearly stated in *Richey* could not be the only evidence of the age difference.⁸ *Syl. Pt. 6 State v. Richey, 171 W.Va. 342, 298 S.E.2d 879 (1982)* The second form of evidence the State relies on is Mr. Lowery is married

⁸ While jurors could arrive at their own conclusion based on Mr. Lowery’s appearance, it is important to note that jurors did not hear the discussion regarding Mr. Lowery’s age. *State’s Brief 13*

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 LOWERY

By Counsel



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CERTIFICATE OF SERVICE

I, Crystal L. Walden, hereby certify that on the 16th day of January, 2008, I sent via United States Postal Service a copy of the foregoing Appellant's Reply Brief to Barbara H. Allen, Managing Deputy 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 'C. L. Walden', written in black ink.

Crystal L. Walden
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