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NO. 33377

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

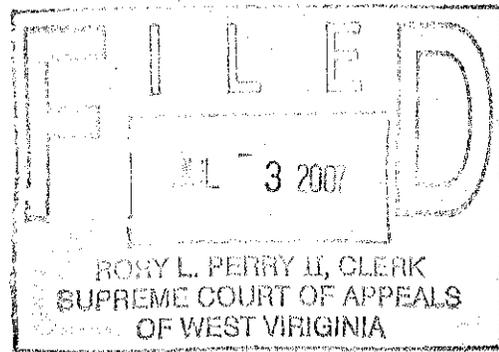
STATE OF WEST VIRGINIA,

*Appellee,*

v.

MINDY KEESECKER,

*Appellant.*



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BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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BRIEF OF APPELLEE STATE OF WEST VIRGINIA

---

I.

**KIND OF PROCEEDING AND  
NATURE OF THE RULING BELOW**

This is an appeal by Mindy Keesecker (hereinafter "Appellant") from the June 30, 2006, order of the Mercer County Circuit Court (Frazier, J.) sentencing her to three consecutive terms of one to five years in the penitentiary and five years probation upon her convictions by a jury of six counts of sexual assault in the third degree.

Appellant contends that the trial court erred by permitting the prosecutor to refer to religion during his summation, in failing to suppress the confession of the Appellant, by failing to set aside the verdict based on the prosecuting attorney's reference to uncontradicted evidence, in not finding that the intercepted telephone communication between J.G. and third parties was used as the

information for the basis of initiating the investigation, and in holding that there is a substantial risk that the Appellant will commit another crime during any period of probation or conditional discharge.

## II.

### STATEMENT OF THE FACTS

On October 13, 2005, the Mercer County returned an indictment charging Appellant with 11 counts of Third Degree Sexual Assault. The indictment alleged that Appellant had engaged in sexual intercourse [oral sex] with J.G. on five occasions between January 2005 and June 8, 2005. (R. 1-3.) The indictment also charged Appellant with committing five acts of sexual intercourse [regular intercourse] with J.G. between January 2005 and June 8, 2005. (*Id.*) The indictment also charged Appellant with engaging in sexual intrusion with J.G. on June 8, 2005. (*Id.*)

The Appellant attended church with J.G. and J.G.'s mother, Deborah H. The Appellant was the church's Worship Leader and J.G.'s counselor in church. These incidents happened while Appellant was 34 and J.G. was 15. The case was tried before a petit jury on February 7 and 8, 2006.

Appellant became close with J.G. while chaperoning J.G.'s weekend church trip to the State Youth Convention in Wheeling in September of 2004. Thereafter, Appellant and J.G. agreed to correspond through e-mail and phone. (Tr. 233.) Contact between Appellant and J.G. gradually increased, and, on one occasion, Deborah answered the phone and Appellant requested that they "be more involved other than Youth Convention trips." (Tr. 389.) There were a lot of phone calls through September, and October, and in November, J.G. took his 15th birthday money and bought a cell phone. (Tr. 391.)

During November and December things got “progressively worse.” (Tr. 392.) It got to the point where J.G. was on the internet first thing in the morning and the last thing at night, and Deborah “felt like something was going on.” (Tr. 393.) She became even more concerned when Appellant and J.G. were together at a Christmas party at the Keesecker’s. (*Id.*) The situation between J.G. and Appellant became physical at a New Year’s Eve Party at their church. Before J.G. left the party, he kissed Appellant and “she kissed [him] back.” (Tr. 234-35.) After that, they continued to communicate before and after church, and “through the week.” (Tr. 235.) It is alleged that Deborah secretly tape recorded some telephone conversations and conveyed the substance of them to the State Police. However, Trooper Christian, the investigating officer in this case, was unaware of any tape recorded conversations. (Tr. 173-74.)

Their relationship progressed past kissing on or around January 21, 2005, while J.G. was staying the night with his aunt and uncle in Princeton. (Tr. 236.) On that occasion, Appellant and J.G. made arrangements to meet in the driveway of his aunt and uncle’s house. (Tr. 238.) They met in the driveway, he got in her car, and they “performed oral sex on each other. And then [they] had sexual intercourse.” (*Id.*) The next day, Appellant went over to J.G.’s aunt and uncle’s house while J.G.’s aunt and uncle were out to lunch. (Tr. 241.) Again, J.G.’s penis inserted Appellant’s vagina. J.G. said, “[they] had sex.” (Tr. 242.) After that, Appellant and J.G. “were a lot closer.” [They] talked more,” and it became a problem with J.G.’s mother that they were so close. (Tr. 243.) Near the end of January, Deborah called Appellant and told her “don’t call so much” because she thought J.G. was having more feelings than he needed to have. (Tr. 394.) Deborah also spoke with Pastor Shrewsbury about her concern. (Tr. 374.) Pastor Shrewsbury met with Mindy and “she told [him] it was best for her to resign her position.” (Tr. 377.) The night of the Super Bowl, February 6,

2005, J.G.'s aunt "flipped out on [Appellant] and told her that she didn't want her to see [him] . . . anymore." (Tr. 243.) Deborah also found out, and the next day [his] mom received a phone call from a State Trooper. (Tr. 244.) Several days later, on February 10, J.G. tried to kill himself because he was told he could not correspond with Appellant. (Tr. 275 & 395.) The next day, Pastor Shrewsbury arranged another meeting between Deborah, himself, and Appellant. With permission from each participant, the conversation was tape recorded. During that conversation, Appellant apologized to Deborah for having inappropriate contact with J.G. (Tr. 378.) Appellant said "I stepped across the line. I shouldn't have done it. I'm sorry and I won't do it anymore." (Tr. 382.) Pastor Shrewsbury met with Appellant at least two more times and "advised her to . . . distance herself from a relationship that could be very volatile." (Tr. 379-80.) In order to protect J.G., his mother took his cell phone away and disconnected the internet. (Tr. 398.) However, J.G. began to borrow his friends' cell phones to communicate with Appellant. (Tr. 245.) Since everyone realized that Appellant and J.G. were having too close of a relationship, Appellant got a phone for him on her Sprint account. (*Id.*)

Sometime after the first two instances at J.G.'s aunt's house, Appellant and J.G. had a sexual escapade in the church. (Tr. 251.) On this Sunday night, Appellant put her mouth on J.G.'s penis. According to J.G., "[they] met in the back staircase that no one really used much. And she performed oral sex on [him.]" (Tr. 252.) At the end of the school year, J.G. went to a JROTC Banquet at Glenwood Park. While at the park, J.G. called Appellant and asked her to "come up and be with [him] for a little while." (Tr. 246.) "[They] walked through the woods . . . . And then [they] ended up having sexual intercourse." (Tr. 246-47.) Their sexual relationship continued into June, when J.G. snuck out of his house to meet Appellant. At Appellant's house, Appellant lit a candle

and played music. J.G. put his mouth on her vagina, he put his penis inside her vagina, part of his hand inserted her vagina, and his penis touched her anus. During that encounter, Appellant put her mouth on J.G.'s penis. That was the last time J.G. and Appellant had any sexual contact. (Tr. 248-51.) Eventually, J.G.'s mother found the phone Appellant had purchased for J.G. The phone contained inappropriate text messages, so she turned it over to the police, and J.G. was asked to give a statement. (Tr. 260 & 401.)

Throughout their sexual relationship, J.G. and Appellant talked about how their relationship was wrong. J.G. assured Appellant that he was "not going to say anything to anyone" because neither of them wanted anyone to "find out." (Tr. 254.) So initially, when J.G. was questioned regarding his sexual contact with Appellant, he denied having any sexual relations with her. (Tr. 262-70.) J.G. said he lied because he "wanted to protect [Appellant]," and because he "loved her." (Tr. 253.) J.G. gave that first statement to Trooper Burner who was filling in for Trooper Christian while he was on vacation. After J.G. gave that statement, Burner told Trooper Maynard that he had talked to J.G., and two days later Appellant voluntarily called to set up a meeting with Trooper Burner. (Tr. 282.) That evening, upon arrival at the police office, Appellant appeared "normal" and was not under any emotional distress. (Tr. 284-85.) Appellant started confessing about the sexual relationship she had with J.G., but Trooper Burner stopped Appellant's confession to Mirandize her. (Tr. 286-87.) Trooper Burner told her that she was being questioned in regard to the crime of Third Degree Sexual Assault, and he also told her that she was "free to leave at anytime." (Tr. 290-91.) No promises or threats were made while they went over the Miranda Rights form, and Appellant signed the form--voluntarily waiving her rights. (Tr. 293-94.) Trooper Burner then took a seven-page handwritten statement from Appellant, which detailed her sexual relations with J.G.

Appellant was given a chance to read and make changes to the statement. After reviewing her answers, Appellant initialed each correct answer. (Tr. 298-99.)

In her statement, Appellant admitted to having sexual intercourse with J.G. (Tr. 302.) She explained why, even after agreeing not to contact J.G., she continued to abuse the close family relationship. She said she knew "it was wrong . . . but [she] could not stop." (Tr. 303 & 308.) She said J.G. was like a "drug." (Tr. 308.) Appellant narrated the event of "sexual intercourse" at Glenwood Park. (Tr. 310.) She also talked about how they "made love" and "did a 69 position" the night J.G. snuck out of his house. (Tr. 310-11.) Sometime after Appellant gave her statement, J.G. was brought back to the police barracks to give a second statement. This statement was given to Trooper Christian, the investigating officer in this case, and it corroborated J.G.'s testimony at trial as well as Appellant's statement. (Tr. 274.)

Appellant believed that there would be no major consequences from what she told police. Appellant's brother communicated with a fellow church member, Trooper Maynard, regarding the case. Trooper Maynard was not directly involved in the investigation of the case, but he told Appellant's brother that the best way to get the matter behind them was to tell the truth. (Tr. 436.) Appellant understood this to mean that if she did what they told her, no criminal charges would be brought. Dr. Steven F. Dryer, a clinical psychologist, suggested that Appellant was vulnerable at that point in time as a result of her unstable relationship with her husband, and her confession showed that she was respectful of authority figures. (Tr. 475.)

Counts 1, 2, 3, 4, and 11 of the indictment, which alleged sexual assault third degree, were dismissed by the trial court at the close of the evidence. Appellant was convicted by the jury of the remaining six counts as charged in the indictment. (Tr. 576; R. 195-200.) By order entered June 30,

2006, Appellant was sentenced to the penitentiary for an indeterminate term of one to five years on each count of third degree sexual assault, to run consecutively. The court suspended the sentences in Counts 8, 9, and 10, and ordered Appellant placed on probation for five years after serving her sentence on Counts 5, 6, and 7, with the conditions that she register as a sexual offender, that she participate in sexual offender treatment, and that she have no unsupervised contact with juveniles under 18 except for her children. (Hr'g Tr. 61-62, June 30, 2005.) It is from this order that Appellant now appeals.

### III.

#### RESPONSE TO ASSIGNMENTS OF ERROR

1. The court did not err by permitting the prosecutor, during closing argument, to reference the Bible.
2. The court did not err by failing to suppress the confession of Appellant.
3. The court did not err by failing to set aside the verdict based upon the prosecuting attorney's reference to uncontradicted evidence.
4. The court did not err in finding that the intercepted telephone communication between J.G. and third parties was not used by the State as the information for the basis of initiating the investigation.
5. In reaching its decision in sentencing, the court did not err in holding that there is substantial risk that Appellant will commit another crime during any period of probation or conditional discharge.

#### IV.

#### ARGUMENT

**A. APPELLANT FORFEITED ANY ISSUES SHE MAY HAVE HAD REGARDING THE PROSECUTOR'S USE OF BIBLICAL AXIOMS DURING CLOSING ARGUMENT, THUS THE CIRCUIT COURT DID NOT COMMIT PLAIN ERROR BY PERMITTING THE PROSECUTOR TO MAKE HIS ARGUMENT.**

Appellant submits that the trial court erred by permitting the prosecutor to make references to the Bible during part of his closing argument, and she argues the doctrine of "plain error" should be applied.

**1. The Standard of Review.**

This Court has ruled in Syllabus Point 7 of *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995), that "[t]o trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings."

Assuming that an error is "plain," the inquiry must proceed to its last step and a determination made as to whether it affects the substantial rights of the defendant. To affect substantial rights means the error was prejudicial. It must have affected the outcome of the proceedings in the circuit court, and the defendant rather than the prosecutor bears the burden of persuasion with respect to prejudice.

*Id.*, Syl. Pt. 9.

An unpreserved error is deemed plain and affects substantial rights only if the reviewing court finds the lower court skewed the fundamental fairness or basic integrity of the proceedings in some major respect. In clear terms, the plain error rule should be exercised only to avoid a miscarriage of justice. The discretionary authority of this Court invoked by lesser errors should be exercised sparingly and should be reserved for the correction of those few errors that seriously affect the fairness, integrity, or public reputation of the judicial proceedings.

Syl. Pt. 7, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996).

2. Discussion.

Appellant submits that the trial court committed plain and reversible error in permitting the prosecutor to make arguments based on religion and the Bible in connection with jury deliberation. She contends the prosecutor violated his quasi-judicial duty by making these references. She argues that, while not preserved by objection at the trial below, Appellant is entitled to reversal on this ground as plain error. Appellant's arguments are without merit.

During his closing argument, the prosecutor made reference to the Bible. Specifically, he used examples from the Old Testament and he talked about the two views of God's throne. Appellant made no specific objections while the prosecutor made this rebuttal closing argument. Appellant's failure to present the issue below is no mere technical failure.

Ordinarily, a defendant who has not proffered a particular claim of defense in the trial court may not unveil it on appeal. Indeed, if any principle is settled in this jurisdiction, it is that, absent the most extraordinary circumstances, legal theories not raised properly in the lower court cannot be broached for the first time on appeal. We have invoked this principle with a near religious fervor. This variant of the "raise or waive" rule cannot be dismissed lightly as a mere technicality. The rule is founded upon important considerations of fairness, judicial economy, and practical wisdom.

*State v. Miller*, 197 W. Va. 588, 597, 476 S.E.2d 535, 544 (1996).

This Court has emphasized that before an issue may be properly addressed on appeal, the circuit court must first be given an opportunity to apply controlling legal principles to the facts presented. By failing to present her argument below, Appellant deprived the circuit court of the important opportunity to review the alleged defect.

To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court of the nature of the claimed defect. The rule in West Virginia is that parties must speak clearly in the circuit court, on pain that, if they forget their lines, they will likely be bound forever to hold their peace. The forfeiture rule that we apply today fosters worthwhile systematic ends

and courts will be the losers if we permit the rule to be easily evaded. It must be emphasized that the contours for appeal are shaped at the circuit court level by setting forth with particularity and at the appropriate time the legal ground upon which the parties intend to rely.

*State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 216, 470 S.E.2d 162, 170 (1996).

Accordingly, this Court should apply the forfeiture rule to Appellant's current assignment of error.

Of course, an Appellant's failure to object to the circuit court may be forgiven where the error is "plain." The Court set forth the criteria for plain error in Syllabus Point 7 of *State v. Miller*, *supra*, where it stated: "To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." *See also United States v. Olano*, 507 U.S. 725, 732-37 (1993); Syl. Pt. 4, *State v. Osakalumi*, 194 W. Va. 758, 461 S.E.2d 504 (1995). In *Miller*, the Court explained that "[t]he 'plain error' doctrine grants appellate courts, in the interest of justice, the authority to notice error to which no objection has been made." 194 W. Va. at 18, 459 S.E.2d at 129. However, "[p]lain error warrants reversal 'solely in those circumstances in which a miscarriage of justice would otherwise result.'" *Id.* (quoting *United States v. Frady*, 456 U.S. 152, 163 n.14 (1982)) (emphasis added).

In *State v. Bolen*, 219 W. Va. 236, 632 S.E.2d 922 (2006), the trial court committed plain error when it allowed the State to continually offer evidence to the jury about a child's religious beliefs and devotion to his faith in violation of Rule 610 of West Virginia Rules of Evidence.<sup>1</sup>

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<sup>1</sup>Rule 610 states, "Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced."

Throughout the trial, the prosecutor referred to the child's "spiritual commitment," his missionary activities, and his faithful church attendance. Defense counsel objected several times, stating the jury has sole discretion in deciding factual matters. Defense counsel thought the prosecutor was outside the scope of an opening statement, and, during the trial, thought the prosecutor was answering questions which should have been left for the jury. This Court held that the trial court committed plain error in allowing the State to introduce evidence of and comment on the child's religious beliefs to the degree that it bolstered the child's credibility. The Court found that the error seriously affected the fairness of the trial inasmuch as the jury's verdict was unduly prejudiced by evidence which could only have the affect of bolstering the child's credibility.

The present case is clearly distinguishable. In this case, the prosecutor made references to the Bible during his closing argument. Specifically, he used examples from the Old Testament and he distinguished between God's Throne of Judgment and God's Throne of Mercy. The prosecutor stated that:

[W]hen God sat on the Throne of Judgement, he judged the actions of people. . . . That's your job. To judge the actions of the Defendant and decide accordingly whether she's guilty or not guilty. . . .

. . . The Judge sits upon the Throne of Mercy. It's his job, not yours, to determine what are the consequences of her actions. Not you. And the Judge even told you that in his instructions. He told you that your decision should be based upon the law and the facts of this case without sympathy toward anyone. Without sympathy toward the Defendant. Without considering the consequences of what happened, what may happen to her if you find her guilty. That's his job to determine that. It's not your job and it's not to enter into your deliberations. That's the Judge's job. . . .

. . . And I'm a firm believer that God forgives us for our actions. . . . But just because God forgives us doesn't mean there is no consequences for our actions. . . .

And once again the Bible is replete with examples of that. Moses, the great servant of God disobeyed God. God forgave him but he still had to deal with the consequences of his actions. He still was not able to enter into the Promise Land.

King David, a person that the Bible says was a man after God's own heart, had a probably the deepest relationship with God of any person in the Old Testament. Wrote all these Psalms about his closeness with God. He sinned. Caused the death of a man by sleeping with that man's wife. And having that man killed so he could be with that man's wife. When the Prophet came to him and said God knows what you did, David fell on his face and he asked forgiveness. The Prophet Nathan said God forgives you but there's still consequences for your actions. Because of your actions the baby that you borne, that Bathsheba bears with you will die. Just because God forgives us, there's still consequences for our actions.

And part of her consequences is that she's guilty of what she's done. She's guilty of all eleven of these counts of the indictment. And it's your duty as the judges of the fact to find her guilty of each and every one of these charges.

(Tr. 548-50.) The trial court did not commit reversible error by permitting the prosecutor to make these statements. Not only was the motive behind the statements made by the prosecutor consistent with Rule 610, since they were not used for the purpose of impairing or enhancing a witness's credibility; but also, the statements were such that they would have been relied upon by the jury during deliberations. It is obvious that the prosecutor analogized for the purpose of reinforcing the jury's role during deliberations. The facts of the case *sub judice* are not similar to the facts in *Bolen*. That is, in *Bolen*, the evidence was admitted to bolster the child's credibility in violation of Rule 610, and in this case, the statements were used to guide the jury during deliberations. Furthermore, in this case, Defense counsel's failure to object allows this Court to apply the forfeiture rule where it could not in *Bolen*.

If this Court should decide to proceed under a "plain error" analysis, a different conclusion is inevitable; that is, the circuit court in this case did not did not commit "plain error that affect[ed]"

the substantial rights of [the] defendant” as the circuit court did in *Bolen*. *Miller* at 18, 459 S.E.2d at 129.

Also, in *Bolen*, the Court held that the State committed prosecutorial misconduct. In so holding, the Court adopted the four-part test applied by the Court in *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995):

Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor’s remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.

Syl. Pt. 6, *Bolen*; Syl. Pt. 6, *Sugg*.

The Court in *Sugg* did not find any prosecutorial misconduct when the prosecutor made an improper argument that may not have been supported by the evidence. The Court held that a judgement of conviction will not be set aside because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice. *Sugg*, 193 W. Va. at 405, 456 S.E.2d at 486. See *State v. Petrice*, 183 W. Va. 695, 398 S.E.2d 521 (1990) (prosecutor’s comments, although inappropriate, were not sufficient alone to justify reversal of verdict).

An examination of the factors identified in *Sugg* reveals that the conviction in this case should not be reversed. The prosecutor made these references only one time in his closing argument, so the statements were isolated and not extensive. The jury was not misled, and Appellant was not prejudiced in any way by the comments because the prosecutor made it clear the jury had sole discretion in finding Appellant “guilty or not guilty.” (Tr. 548.) Nor were the comments in any way

coercive to the jury. Being as the evidence supporting her guilt was already overwhelming, the comments could not have been directed at establishing the guilt of Appellant. And there is no indication that the prosecutor made the comments in order to divert the jury's attention to extraneous matters. In this case, the prosecutor's comments were not so "egregious and prejudicial 'that manifest injustice resulted from the prosecutor's remarks insofar as their cumulative effect denied the [defendant] [her] fundamental right to a fair trial and constituted plain error.'" *Sugg*, 193 W. Va. at 405, 456 S.E.2d at 486 (quoting *State v. Moss*, 180 W. Va. at 368, 376 S.E.2d at 574)).

**B. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS HER CONFESSION, WHICH UNDER THE TOTALITY OF THE CIRCUMSTANCES WAS A FREELY AND VOLUNTARILY GIVEN STATEMENT.**

Appellant contends that the trial court erred in failing to suppress her confession. However, the trial court based its ruling on the totality of the circumstances. The court did not deny the motion based on any one factor.

**1. The Standard of Review.**

This court has held that "[t]he State must prove, at least by a preponderance of the evidence, that confessions or statements of an accused which amount to admissions of part or all of an offense were voluntary before such may be admitted into the evidence of a criminal case." Syl. Pt. 5, *State v. Starr*, 158 W. Va. 905, 216 S.E.2d 242 (1975). In Syllabus Point 7 in *State v. Farley*, 192 W. Va. 247, 452 S.E.2d 50 (1994), this Court held that "[r]epresentations or promises made to a defendant by one in authority do not necessarily invalidate a subsequent confession. In determining the voluntariness of a confession, the trial court must assess the totality of all the surrounding circumstances. No one factor is determinative." "Ultimately, this issue boils down to whether or

not the incriminating statement ‘was freely and voluntarily made, without threats or intimidation, or some promise of benefit held out to the accused.’” *State v. Middleton*, 220 W. Va. 89, 640 S.E.2d 152, 164 (2006) (quoting *State v. Singleton*, 218 W. Va. 180, 184, 624 S.E.2d 527, 531 (2005)).

Under the facts of this case, the trial court did not err in denying the motion to suppress Appellant’s confession, which was freely and voluntarily given.

On November 21, 2006, defense counsel moved to suppress any and all statements made by Appellant, on the grounds that such statements were obtained and/or taken in violation of Appellant’s constitutional rights. (R. 144-45.) During the January 27, 2006, hearing on this issue, defense counsel stated that Trooper Burner and Trooper Maynard exploited Maynard’s “church connection” with Appellant to get to the truth. (Hr’g Tr. 47, Jan. 27, 2006.) He suggested that Trooper Maynard made representations to Appellant’s brother that caused Appellant to expect that, if she was truthful, the criminal charges would become nonexistent. (*Id.*) The court believed that she initiated the statement herself. It also believed that she acknowledged the waiver section of the Miranda Rights form, and was not under the influence of alcohol or suffering from any problem that would have interfered with her understanding her rights. Furthermore, she knew she was free to leave at any time. (Hr’g Tr. 53-54, Jan. 27, 2006.) The trial court therefore denied the motion. It ruled that based on all of the evidence she freely and voluntarily gave the statement. (*Id.* at 54.) The court allowed the matter to be presented to the jury. (*Id.* at 54-55.)

2. **Recent Authority Requires A Confession’s Voluntariness To Be Analyzed Under The Totality Of Circumstances Test.**

Appellant recognizes that recent authority requires an analysis of the totality of circumstances where confessions are taken. However, she cites *State v. Parsons*, 108 W. Va 705, 152 S.E.2d 745

(1930), to support her argument that the trial court in the present case should have suppressed Appellant's statements because the statements were given under circumstances as to foment hope in Appellant that no charges would be brought against her. As the Supreme Court noted in *Arizona v. Fulminante*, 499 U.S. 279 (1991), the correct analysis to determine the voluntariness of a confession is the "totality of circumstances" test. *Id.* at 286. The Court in *Farley* adopted this standard to overrule *Parsons*.

The Appellant argues that the confession was not voluntary even under the totality of circumstances criteria. In this regard, counselor Sylvia Wright, and Dr. Steve Dyer testified to Appellant's vulnerability and manipulability at that point in time. (Tr. 450-51 & 475.) However, the record clearly demonstrates that Appellant readily confessed to the crime without any coercive or manipulative measures being used against her. She readily initiated the meeting with Trooper Burner, and she went to the police department voluntarily. (Tr. 282.) Upon arrival at the police station, and before he ever made any inquiries, Appellant sat down and started confessing to Trooper Burner. (Tr. 286.) Only then did Trooper Burner Mirandize Appellant and tell her she was being questioned in regard to the crime of Third Degree Sexual Assault. Appellant was told she was not under arrest and that she was free to leave at any time. (Tr. 289-90.) At the time of her admission, she was 35 years old and mentally stable.

The record in this case clearly demonstrates that the trial court did precisely that which our jurisprudence requires in evaluating the admissibility of a confession, namely to apply the correct legal standard, a "totality of the circumstances" analysis. In doing so, the court found that there was no evidence that demonstrated that law enforcement officials placed any undue pressure on the Appellant, nor did the police threaten or improperly induce the Appellant to extract a confession. Further, the trial court concluded that from the totality of the circumstances the Appellant's statements

were voluntary and not the product of psychological coercion from law enforcement agents.

*State v. Singleton*, 218 W. Va. 180, 185, 624 S.E.2d 527, 532 (2005).

It is obvious, considering the totality of circumstances the Appellant acted voluntarily, and the confession was a product of her free decisions to act. Accordingly, the trial court did not err in failing to suppress Appellant's confession.

**C. THE TRIAL COURT DID NOT ERR IN FINDING THAT THE PROSECUTOR DID NOT MAKE ANY DIRECT OR INDIRECT REFERENCES TO APPELLANT'S FAILURE TO TESTIFY AT TRIAL.**

Appellant contends that the circuit court erred in permitting the prosecutor to make references to Appellant's election to remain silent and not testify at trial. However, the prosecutor did not make any impermissible references to Appellant's failure to testify at trial. The comments were made with the intention of trying to show the jury that Appellant's confession was voluntary, and they were made immediately before he summarized the testimony of defense counsel's witnesses. When read in context, the jury could not have been reminded that Appellant did not testify.

**1. The Standard of Review.**

In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review.

Syl. Pt. 3, *State v. Vance*, 207 W. Va. 640, 535 S.E.2d 484 (2000).

2. **Discussion.**

After the trial, defense counsel filed a motion for a new trial based on comments made by the prosecuting attorney during closing argument. Appellant asserted that the prosecutor made impermissible references to Appellant's failure to testify at trial.

The trial court held a hearing on June 30, 2006, to determine whether the comments constituted reversible error or violated Appellant's constitutional rights. During argument on this issue, the prosecutor noted similarities between this case and *State v. Clark*, 170 W. Va. 224, 292 S.E.2d 643 (1982). The prosecutor in this case said that the remarks were made immediately before he started summarizing the testimony of other witnesses, so in the context of the issue at hand, the comments could not have reminded the jury that Appellant did not testify. (Hr'g Tr. 6-7, June 30, 2006.) In ruling that there was no reversible error or a constitutional violation, the trial court found:

Looking at the law that is before us at this time, looking at the . . . totality and context of this statement of the Prosecutor, the Court first of all finds that there's no evidence that it was manifestly intended to be a reminder that the Defendant did not testify. And I also find that the character of the statement looking at its context was not such that it would naturally and necessarily take it to be a reminder that the Defendant did not testify. Also this court finds clearly that it was not a specific reference to the Defendant's failure to testify.

(*Id.* at 13.)

The trial Judge went on to say:

[W]hen this matter is reviewed by the Supreme Court that I take the approach that Justice McHugh took in the *Clark* case that even for argument sakes, if it had been an error, I don't believe it would be a reversible error even on a constitutional level. Because I believe that considering all the circumstances here that the remark did not effect the jury's verdict. That there was no reasonable possibility in my opinion that the remark contributed to the conviction. And the Court finds that it was harmless beyond a reasonable doubt.

(*Id.* at 13-14.)

3. **The Trial Court Did Not Commit Error Because There Was No Evidence That Was Manifestly Intended To Be A Reminder That The Appellant Did Not Testify At Trial.**

“The general rule formulated for ascertaining whether a prosecutor’s comment is an impermissible reference, direct or oblique, to the silence of the accused is whether the language used was manifestly intended to be, or was of such character that the jury would naturally and necessarily take it to be a reminder that the defendant did not testify.” *State v. Clark*, 170 W. Va. at 227, 292 S.E.2d at 646.

In *Clark*, the defendant gave a statement to the police at the scene of the crime. During closing argument, the prosecutor said “[t]here is no evidence to contradict that. There is no evidence to contradict what the defendant said there in the living room so we have to take that as what he said.” *Id.*, 170 W. Va. at 226, 292 S.E.2d at 646. The defendant argued that the prosecutor’s remarks constituted improper references to his failure to testify. The Court concluded that the remark was isolated and did not constitute a specific reference to the defendant’s failure to testify at trial. It also held there was no constitutional violation because the remark, when read in context, was not manifestly intended to be, nor was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify. The Court reasoned that this was not a case where the jury’s attention was focused on the defendant’s failure to testify because he alone could contradict the government’s evidence. The defendant’s various inculpatory statements were already given to the jury. Furthermore, it was obvious that the prosecutor was merely attempting to emphasize one piece of the State’s evidence—the testimony that the defendant had stated shortly after the crime was committed.

This case most resembles *Clark*. The prosecutor's statements that, "You never heard anybody come in here and say this was a false statement," and "No one came in here and said that she lied to the State Police," were not direct or indirect references to Appellant's failure to testify. This Court has stated that the prosecuting attorney "is free to stress the strength of the government's case and to argue the evidence and reasonable inferences therefrom, and the prosecutor is not constitutionally forbidden from telling the jury that the fact that the evidence on any given point in the case stands uncontradicted." *Clark*, 170 W. Va. at 227, 292 S.E.2d at 647. At trial, the voluntariness of Appellant's statement was a heavily contested issue. The defense put on several witnesses for the purpose of showing that Appellant's statement was not voluntary. These witnesses included Appellant's brother, Trooper Maynard, and two experts. The remarks in question were made directly before the prosecutor began summarizing the testimony of these other witnesses. When read in context, the jury could not have necessarily taken these as comments on Appellant's failure to testify. Much like *Clark*, this was not a case where the jury's attention was focused on Appellant's failure to testify since there were other witnesses (Appellant's brother, Maynard, and the experts) who could have contradicted the State's evidence. From the record it is obvious that the prosecutor was merely attempting to emphasize one piece of the State's evidence—Appellant's statement as freely given to the State Police. It is also clear that the prosecutor was not seeking to penalize Appellant for not taking the stand. There were no impermissible comments made during closing argument.

Appellant makes a list of several cases that cite *State v. Green*, 163 W. Va. 681, 260 S.E.2d 257 (1979). The trial court correctly distinguished between these cases and the case at bar. In *Green* the prosecutor made specific references to the defendant, told the jury that the defendant refused to

look them in the eye, and made derogative comments about the defense lawyer. *Green* is not analogous to this case. In *State v. Sprague*, 214 W. Va. 471, 474, 590 S.E.2d 664, 667 (2003), the Court reversed due to the prosecutor's comments to the effect that "[d]efendant . . . as you've seen from this trial, has not contradicted any of the State's evidence or any of the State's testimony basically about the events that occurred . . . ." The Court in *Sprague* noted that the prosecutor's specific reference to the "Defendant" clearly prejudiced Appellant as it highlighted the fact that Appellant did not take the stand. However, the prosecutor in this case made no such specific reference, but rather referenced "anybody" who testified as to the voluntariness of Appellant's confession. Moreover, *Sprague* was solely being tried on the issue of venue as far as the jury was concerned. Therefore, in context, the statements were definitely not proper.

In *State v. Mills*, 211 W. Va. 532, 566 S.E.2d 891 (2002), the prosecutor's comment that Appellant has never shown remorse for his actions was clearly a direct comment on Appellant's failure to testify. In context, the Court believed this was a glaring reference to the defendant's failure to testify because it was made just after the State made improper reference to highly inflammatory evidence not in the record. It also believed that the remark reminded the jury that the defendant did not show any remorse while testifying, because he did not testify. Again, in this case, the prosecutor did not specifically refer to "the defendant." Nor did the prosecuting attorney make reference to highly inflammatory material before he made the comments.

Appellant cites cases in which the prosecuting attorneys make extremely damaging comments that only serve to remind the jury the accused did not testify at trial. This case does not fit in the same category.

4. Even If There Was An Error It Was Harmless Beyond A Reasonable Doubt.

The Court in *State v. Boyd*, 160 W. Va. 234, 245, 233 S.E.2d 710, 718 (1977), held that “where the State defends against the claim that a right guaranteed by our Constitution has been violated, on the basis that the violation is harmless error, it is incumbent on the State to show that the error was harmless beyond a reasonable doubt.” The trial court in this case properly supported its finding that, even if there was error, it was harmless beyond a reasonable doubt:

In support of that, the Court finds that as in all cases, I instructed the jury on the defendant’s right not to testify and how they were to properly consider that. And you have to look . . . when you look at the totality of this, this was not a runaway jury. The jury found her not guilty of five counts in this matter. So this jury was in my opinion a fair, impartial jury that was following the law and doing the best they could in this case.

(Hr’g Tr. 14, June 30, 2006.)

The trial court, as did the Court did in *Clark*, considered all of the circumstances and found that the remark did not effect the jury’s verdict. Moreover, there was no reasonable possibility that the remark contributed to the conviction. (*Id.*) The court properly concluded without abusing its discretion.

**D. THE STATE OF WEST VIRGINIA DID NOT UTILIZE UNLAWFULLY OBTAINED EVIDENCE IN THE INVESTIGATION OF ITS CASE.**

Appellant argues that the State used illegally obtained information for their purposes of investigating the case, and that all evidence collected thereafter—including the confession of Appellant—should be suppressed.

**1. The Standard Of Review.**

“Evidence which is located by the police as a result of information and leads obtained from illegally seized evidence constitutes “the fruits of the poisonous tree” and is . . . inadmissible in evidence.” *State v. Stone*, 165 W. Va. 266, 272, 268 S.E.2d 50, 55 (1980) (quoting *French v. State*, 198 So. 2d 668 (Fla. Dist. Ct. App. 1967)). However, this Court has observed that “absent a constitutional violation, the ‘fruits of the poisonous tree’ doctrine has no applicability.” *State v. Bradshaw*, 193 W. Va. 519, 540, 457 S.E.2d 456, 477 (1995).

**2. Discussion.**

On February 7, 2006, defense counsel moved to have the case dismissed and to exclude any evidence that was derived from a tape recorded telephone call that was allegedly done in violation of West Virginia State Code and United States Code, which make it illegal to both intercept electronic communication and use the information from the interception. During the pretrial motion, the prosecutor noted that there had to be State action in order for the evidence to be suppressed under the exclusionary rule and The Fruits of the Poisonous Tree Doctrine. (Tr. 164-65.) He said that since Deborah Shrewsbury acted as a private individual in recording the conversations, there was no State action and therefore no constitutional violation. (Tr. 166.) The substance of defense counsel’s argument was that State Police used Deborah’s recordings to obtain Appellant’s inculpatory statement. (Tr. 164.) However, Trooper Christian, the investigating officer in this case, testified under oath that he was not aware of any taped telephone conversations, and that he was only aware of the text messages received off of J.G.’s cell phone. (Tr. 173-74.) According to him, the taped recordings did not serve as the basis for him to start the investigation, nor did they have anything to do with any actions he took during the course of the investigation. (Tr. 174-75.) The

prosecutor said that he did not intend to use any of the evidence related to the taped telephone calls in his case-in-chief. In denying the motion to exclude evidence derived from the recordings the trial court found:

I don't think I have to rule now if it's illegal or illegal for a parent to tape a phone conversation between their child and an adult. However, it appears to me clearly from the officer's testimony that they were not aware of this and it's not factor in their investigation.

(Tr. 183.)

3. **There Was No State Action And No Constitutional Violation, The Alleged Recorded Telephone Conversations Were Not Connected To The State's Investigation Or Case-In-Chief.**

As Deborah Shrewsbury did not testify at the pre-trial hearing, the only testimony regarding the existence of telephone recordings came secondhand from Pastor Charles G. Shrewsbury. (Tr. 179-80.) He testified that Deborah disclosed to him that she had recorded telephone calls between J.G. and Appellant. With this testimony, strong evidence exists that the tape recordings were indeed illegally obtained by Deborah. Nevertheless, it is inappropriate for Appellant to automatically mesh the recordings with the State Police investigation. Insofar as the investigation went, the recordings were a completely separate matter because, as Deborah testified, finding inappropriate text messages on J.G.'s cell phone was what brought everything to a head. (Tr. 401.) Naturally, had the recordings been used in any part of the investigation, J.G. would have undoubtedly been asked to give his statement months before he actually did. At the hearing, the State testified that it was unaware of any taped telephone conversations. The State said that it did not intend to use them as evidence in its case, and most importantly, it did not use the conversations as evidence in its case.

Appellant hopes for this Court to find some sort of a tenuous connection between the alleged illegal recordings and the investigation-in-chief; however, as the trial judge said, "I don't see much of a connection there." (Tr. 166.) The record makes it quite apparent that J.G.'s initial statement was given immediately after his mother discovered the phone that Appellant bought him. Days later, Appellant voluntarily confessed, and it was this confession which lead to her conviction. Simply put, the illegal recordings may have constituted a "poisonous tree," but the information obtained from the recordings most certainly did not constitute the "fruit" used to convict Appellant.

The State did not record any telephone conversations and did not use any evidence from the recordings in its investigation; there is no State action, and no constitutional violation.

**E. THE TRIAL COURT DID NOT ERR IN FINDING THAT THERE IS SUBSTANTIAL RISK THAT APPELLANT WILL COMMIT ANOTHER CRIME DURING ANY PERIOD OF PROBATION OR CONDITIONAL DISCHARGE.**

Appellant asserts that the trial court erred in finding that putting her on total probation would not serve to deter others who would take advantage of vulnerable young people, and would not be in the public's interest.

**1. The Standard Of Review.**

In reviewing the findings of fact and conclusions of law of a circuit court concerning an order on a motion under Rule 35 of the West Virginia Rules of Criminal Procedure, we apply a three-pronged standard of review. We review the decision on the Rule 35 motion under an abuse of discretion standard; the underlying facts are reviewed under a clearly erroneous standard; and questions of law and interpretations of statutes and rules are subject to de novo review.

Syl. Pt., *State v. Head*, 198 W. Va. 298, 480 S.E.2d 507 (1996).

2. **Discussion.**

On June 30, 2006, at the sentencing hearing, defense counsel moved the Mercer County Circuit Court to suspend any sentences and place Appellant on total probation. In order to address the criteria for probation, the court went through the pre-sentence report, the attached reports, letters from friends, family, community, and it divided the case into aggravating and mitigating factors. (Hr'g Tr. 56, June 30, 2006.) The positive factors included Appellant having children, an education, a good family, a job, and no criminal record. The overwhelming aggravating factor was her actions with J.G. in this case. (*Id.* at 57.) She was J.G.'s Sunday School teacher and chaperone in church, and she continued to abuse the close family relationship even after she agreed not to have any further contact or relationship with him. (*Id.* at 58.) The court had the benefit of reviewing several doctors' evaluations, various letters from the community, and defense counsel's sentencing memo. The court found:

Considering all of that, I don't believe this is an appropriate case for complete probation. I believe that probation in this case if fully applied would unduly denigrate the seriousness of this offense. And I believe that the victim, the victim's mother, and society is entitle to retribution and punishment in this case.

I've been here many years and one of the purposes of sentencing in addition to punishment and rehabilitation is deterrence. I believe that this is as applicable . . . more than any other area I think in these offenses. That individuals, you know, we're all weak and we all are tempted and that we must understand that if a person shoot, stabs, kills another person, steals, robs, that there are consequences for that by the courts and by society. And I expect in my opinion to put her on total probation would in my opinion not be in the public's interest and not exact the necessary deterrents to others who would take advantage of young people. And particularly vulnerable young people.

On the other hand, I do not believe this is a case for the maximum sentence considering the mitigating factors, the conclusions of the mental health people in this case. So I think it'll be a combination of penitentiary and probation in this matter.

(*Id.* at 60-61.)

The court sentenced Appellant to three consecutive terms of one to five years in the penitentiary and five years probation upon her convictions by a jury of six counts of sexual assault in the third degree.

3. **The Court Did Not Abuse Its Discretion In Sentencing Appellant.**

This Court has recognized that “the decision as to whether the imposition of probation is appropriate in a certain case is entirely within the circuit court’s discretion.” *State v. Duke*, 200 W. Va. 356, 364, 489 S.E.2d 738, 746 (1997). The discretionary nature of a trial court’s authority is pointed out in West Virginia Code § 62-12-3 (1988), which states:

Whenever, upon the conviction of any person eligible for probation under the preceding section, it shall appear to the satisfaction of the court that the character of the offender and the circumstances of the case indicate that he is not likely again to commit crime and that the public good does not require that he be fined or imprisoned, the court, upon application or of its own motion, may suspend the imposition or execution of sentence and release the offender on probation for such period and upon such conditions as are provided by this article . . . .”

In this case, the trial court did not believe that Appellant deserved total probation. Appellant argues to the contrary. However, in her argument, Appellant seems to cloak herself in only the most positive light. She plainly fails to address all of the factors that played a role in her sentencing. Simply, she forgets that she continued to have a relationship with a juvenile after the juvenile’s mother told her to end the relationship. She ignores the fact that she continued to have a sexual relationship with a 15-year-old boy, even after the church asked her to stop the relationship. And, Appellant overlooks that she blatantly violated her bond conditions by continuing to have contact

with the boy, even after the charges were brought in this case. (Hr'g Tr. 31, Dec. 5, 2005.) From the beginning, Appellant has not been willing to take responsibility for her actions, so her tendency has been to place blame on her marriage as well as the victim. In her argument, Appellant brushes reality aside.

At the sentencing hearing, the trial judge balanced the several aggravating and mitigating factors, and he properly concluded that Appellant was not an appropriate candidate for total probation. Under the facts of this case, the trial court did not abuse its discretion in denying the motion to place Appellant on total probation.

V.

CONCLUSION

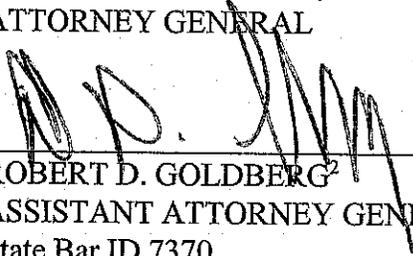
For the foregoing reasons, the judgment of the Circuit Court of Mercer County should be affirmed by this Honorable Court.

Respectfully submitted,

STATE OF WEST VIRGINIA,  
Appellant,

by counsel,

DARRELL V. McGRAW, JR.  
ATTORNEY GENERAL



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<sup>2</sup>Counsel wishes to thank second-year law student Brock Stotts, a second-year law student at the West Virginia University College of Law, whose outstanding legal skills and substantial assistance made this brief possible.

**CERTIFICATE OF SERVICE**

I, ROBERT D. GOLDBERG, Assistant Attorney General and counsel for the Appellee, do hereby certify that I have served a true and accurate copy of the foregoing "Brief of Appellee" upon counsel for Appellant by depositing said copy in the United States mail, with first-class postage prepaid, this 3<sup>rd</sup> day of July, 2007 addressed as follows:

To: Mark McMillian, Esq.  
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ROBERT D. GOLDBERG