

**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS**

STATE OF WEST VIRGINIA,

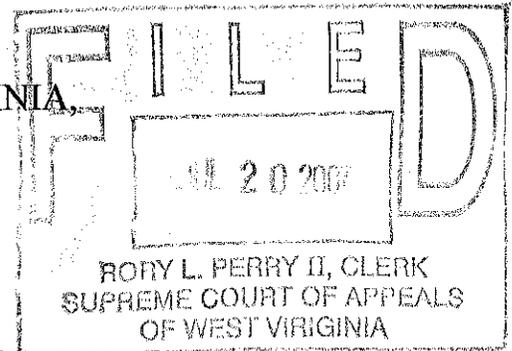
Appellee,

v.

MINDY KEESECKER,

Appellant.

DOCKET NO. 33377



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**APPELLANT'S REPLY TO BRIEF OF APPELLEE**

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Submitted for Appellant by Counsel:

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In response to the brief of the Appellant, the State dedicates nearly a third<sup>1</sup> of its brief to a “statement of the facts” that selectively recites excerpts from the State’s theory of the case so as to construct a version of events full of sexual intrigue. The Appellant, however, urges that the Court consider those issues relevant to the legal infirmities alleged to have affected the trial in the case below. The State in essence asserts, in spite of authority to the contrary, that the Appellant waived her rights with respect to the extensive biblical/religious remarks made during the State’s closing argument by not preserving same by objection; this, in spite of clear recent authority that the same is plain error. The State also intends to minimize the affect of those remarks by characterizing them as being made “only one time in closing argument”. This, notwithstanding the “one time” consumed three full continuous pages of the trial transcript. Further, the State while conceding that certain promises were made by police officials with respect to putting the alleged criminal acts “behind her” should she give a confession, that this was appropriate considering the totality of the circumstance.

The State also justifies or rationalizes the Prosecutor’s clear reference to the Defendant’s failure to testify at trial through a rather incredible construction of those events as found in the

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<sup>1</sup>Thirty-one percent by word count.

record.

With respect to the secretly recorded conversations alleged to have occurred between the Appellant and the State's alleged victim, the State concedes that such tapes existed but were not used by the State in the furtherance of its case<sup>2</sup> and the State further concedes that while those tapes were a "poisonous tree" that no "fruits" were used in such furtherance of its case. With respect to the Appellant having been found to be at risk to re-offend as it would relate to her eligibility for probation, the State misapprehends the Appellant's position and has restated it as the Appellant asserting a right to receive probation. In fact, it is the Appellant's position that she was improperly *disqualified* from eligibility for probation based on the overwhelming evidence before the Court.

### **Religious References**

As a threshold matter the State would urge the Court to find that the Appellant waived her rights regarding the assignment of error with respect to the Prosecutor's remarks relating to the bible and religion by not objecting during the trial of the case. Secondly, the State suggests that the primary authority in this case, State v. Bolen, 632 S.E.2d. 922 (W.Va. 2006), is distinguishable from the case *sub judice*. The State's argument must fail as to both issues.

First, regarding the issue as to whether *Bolen* is distinguishable from the present case, while the State's case in chief drew focus to the fact that a connection between the defendant and the State's alleged victim involved mutual activities involving church activities, the focus of the objectionable conduct came during closing argument. As noted *ante*, three pages of transcript were devoted to biblical and religious references. Remarkably, the State characterizes this as

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<sup>2</sup>In spite of the fact that the only means by which defense counsel became aware of it was through the State's discovery.

occurring “...only one time in closing argument”. In *Bolen*, the Court found “[W]e are drawn to the sheer number of ‘references’ to C. J.’s religious beliefs, not only in testimony elicited by the State but also in its opening statement and **closing argument**”. (Emphasis added.) The essence of the violative conduct of the Prosecutor in *Bolen* was that the Prosecutor used extensive religious references to bolster the credibility of a witness. In the case at bar, more egregiously, the Prosecutor makes exhaustive argument that religion should be considered as a basis to justify a verdict.

Should this Court find that, as contemplated by *Bolen* that the religious references constitute reversible error, the inescapable conclusion is that it is plain error. Following the analysis articulated in *Bolen*, emanating from State v. Miller, 459 S.E.2d. 114 (W.Va. 1995), it is clear that the conduct complained of here was plain error and an objection to preserve same was unnecessary, and as this trial was prior to the decision in *Bolen*, could not have been anticipated.

### **The Confession**

The State maintains that while acknowledging the improper conduct of the police in this case, that given the “totality of circumstances” the confession should be deemed admissible. The Appellant agrees that the totality of circumstances test is appropriate as first articulated in Arizona v. Fulminante, 499 U.S. 279 (1991), later adopted by State v. Farley, 452 S.E.2d. 50 (W.Va. 1994). The State attempts to characterize the terms under which the Appellant arrived at the State Police barracks as one in which she “readily initiated a meeting with Trooper Burner, and she went to the police department voluntarily.” Brief of Appellee at page 16. The same is an inaccurate recitation of facts as adduced at trial. In fact what actually occurred was the product of Trooper Maynard telling the Appellant’s brother, in anticipation of him relating the same to the Appellant, that the best way to get the matter behind them was to tell the truth. The State

concedes that the Appellant understood this to mean that if she did what they told her, no charges would be brought. The State further concedes that the "Appellant believed that there would be no major consequences from what she told the police". Brief of Appellee at page 6. With those elements in place, it is urged that the Court find it patently apparent that anything done by the Appellant thereafter was simply an acquiescence to police authority and the product of either the police causing her to foment hope or despair or both relating to her situation. In either instance the same cannot lie in harmony with a voluntary statement when considering the totality of circumstances.

#### **The State's Reference to the Appellant's Failure to Testify at Trial**

Here, the State would encourage the Court to adopt a rule that would permit the State to make references to a defendant's failure to testify so long as the State utilizes clever phraseology. In the present case, the Prosecutor during closing argument said the following: "You never heard anybody come in here and say this was a false statement" and, following the objection of Counsel which was overruled, "No one came in here and said that she lied to the state police. No one ever said the state police wrote down wrong what she said." (Transcript at page 513.) Even considering the entirety of the record in this case, those references could have been *only* referring to the Appellant. Indeed, she alone could have been the person referred to by the Prosecutor as the person who could have refuted those statements. The sexual encounters alleged were simply between two person and there is no allegation that witnesses were present or that there was physical evidence collected. Accordingly, those remarks could have only been interpreted as a reference to the Appellant. Even the trial court judge, although ultimately finding for the State, as his initial impression, noted the following.

The general test, to be used by the Court to determine if a prosecutor's

comment is an impermissible reference, whether direct or oblique, to the silence of the accused is whether the language used was manifested intended to be or of such character that the jury would naturally and necessarily take it to be a reminder that the defendant did not testify.

That still seems to be the test. At this point there's a lot of cases going back, you know, for a hundred years. And cases aren't all necessarily, in my opinion, totally consistent. But that appears to be the test.

There was a case, fairly similar case out of this Court, State versus Green back in '78 or '79 where the prosecutor in closing argument made reference to, "No one said those things didn't take place." And then later on, said, "No one in this courtroom ever said she didn't do it." And the Supreme Court reversed that case and granted a...granted a new trial on that. (Transcript - May 22, 2006 - page 5.)

It is the Appellant's position that the Trial Court's initial instincts were absolutely correct on that point. The State's references, to which timely objection was made, constitutes reversible error.

### **The Unlawful Wire Taps**

The Appellant is aware of the State's position that the police were not aware of the wire taps. However, while the Defendant was never able to develop independent evidence of the individual awareness of the taped conversations, perhaps the answer lies in the rhetorical question: how did the notes regarding the recorded calls wind up in the files of the investigating officer? The Appellant is aware that Trooper Christian testified that he was unaware of the calls, but the fact remains that the notes regarding the calls were in the very files of his investigation in this case. During pre-trial hearings, Deborah Shrewsbury Hawks invoked her fifth amendment rights concerning the tapes and her pastor, the Reverend Charles Shrewsbury, confirmed that Deborah had disclosed to him that she had recorded telephone calls between J.G. and the Appellant. (Transcript pp. 179-180.) The State readily concedes the existence of a "poisonous tree" but disputes

that “fruits” from the tree existed. The Appellant would urge the Court to resolve that question in favor of the Appellant, insofar as the final notes of the state police constitute the smoking gun evidence of the knowledge of the calls.

With respect to the State’s argument regarding the government involvement issue, the Appellant would urge the Court to consider that the *use* of such recordings is impermissible without respect to whether those were collected under government authority. In West Virginia DHHR v. David L., et. al., 453 S.E.2d. 646 (W.Va. 1994), the Court considered whether telephone recordings of a child’s conversation with a third party could be lawfully recorded. The Court found that that conduct violated West Virginia Code § 62-1D-3(a)(1) and 18 U.S.C. 2511, and finding “therefore, the audio tapes are inadmissible.” In that case, no government involvement was initiated until *after* the recording was made by a private property. In that case the tapes were then presented to the prosecuting attorney’s office for use in a child custody matter. As noted *supra*, the tapes were held inadmissible. Accordingly, all evidence that was derivative of those recordings should have been suppressed at trial and the admission of same at trial constitutes reversible error.

### **The Substantial Risk Question**

The State mis-characterizes the Appellant’s position by stating that “under the facts of this case, the trial court did not abuse it’s discretion in denying the motion to place the Appellant on total probation.” The Appellee misapprehends Appellant’s position on that point. The Appellant in fact asserts that it was error in finding that “...there is a substantial risk that the defendant will commit another crime during any period of probation or conditional discharge....” Stated differently, the Appellant asserts

that it was error for the court to determine that she was disqualified as a candidate for probation and could not be considered for same. In support of the same the Defendant asserts that the entire record of this case is such that, aside from the allegations resulting in the instant convictions, suggests that she was ever guilty of other crime or misconduct. In fact, the psychological studies performed not only on behalf of the Appellant, but that which was directed by the Court disclosed that she was not likely to re-offend. Because nothing in the record suggested a propensity to re-offend, and in fact the exact opposite, the Court erred in reaching that conclusion.

### **Conclusion**

WHEREFORE, for reasons appearing in the Appellant's Brief and advanced herein, the Court should reverse the convictions below and award such relief as this Court deems proper under law.

Respectfully submitted,

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Appellant,

By Counsel.



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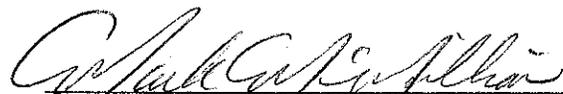
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MINDY KEESECKER, Defendant Below,  
Appellant

**CERTIFICATE OF SERVICE**

I, Mark McMillian, undersigned counsel for the Appellant, certify that a true and exact copy of the accompanying *Appellant's Reply to Brief of Appellee* was served upon the State of West Virginia by regular U.S. Mail postage paid to Robert D. Goldberg, Esq., West Virginia Attorney General's Office, 1900 Kanawha Boulevard, E., Rm E-26, Charleston, WV 25305-0220 on this the 20<sup>th</sup> day of July, 2007.



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