
NO. 34219

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

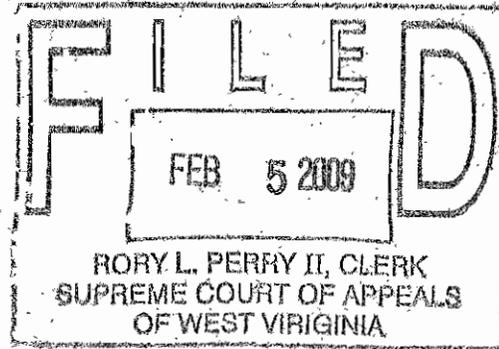
STATE OF WEST VIRGINIA,

Appellee,

v.

JOSEPH FRITACHE WHITE,

Appellant.



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 Joseph Fritache White (hereinafter "Appellant") from the December 13, 2007, order of the Circuit Court of Mineral County (Frye, J.), which sentenced him to three consecutive terms of 10-25 years in the state penitentiary, upon his conviction by a jury of three counts of second degree sexual assault in violation of West Virginia Code § 61-8B-4.

On appeal, Appellant claims that the circuit court erred by admitting improper evidence and denying his motion for mistrial. However, as will be demonstrated herein, both of these grounds were waived by Appellant. Even if not waived, any resulting error was harmless.

II.

STATEMENT OF FACTS

Appellant was convicted of raping Rhenda Cook, a social acquaintance he had known for several months prior to the crimes. The defense at trial was to put the victim's credibility at issue.

Although aspects of the victim's testimony and lifestyle choices could arguably have undermined her credibility, several, if not all, key aspects of her testimony were corroborated by direct testimony or physical evidence. Contrary to the assertions of Appellant, this is not a case of "he said, she said" tipped in favor of the prosecution by prejudicial, extraneous material brought before the jury.

According to the testimony at trial of Rhenda Cook (hereinafter "the victim"), she and Appellant had formed a friendship over several months preceding the crimes. The victim initially met Appellant at a local pool hall and bar and thereafter developed a friendship. Appellant and the victim not only saw each other socially, he often took her and her daughter places because they did not have a car. (Tr. 116-17.) The victim testified that her time with Appellant was always in the company of others, and there was no intimate relationship between them.

On the night of the assaults, the victim had spent the evening drinking and socializing in her home with Appellant and other friends. (Tr. 121.) When it became late in the evening, the victim's son told her "Mom, I don't want anybody hanging out here." (Tr. 120.) One of the guests volunteered his home and the victim and Appellant left and went to that person's residence. At approximately 4:00 a.m. the victim announced she wanted to leave, and Appellant offered to give her a ride home. They left together, but Appellant said he needed to stop along the way to buy cigarettes. Although there was a convenience store on the route to the victim's house, Appellant

claimed he wanted to go to a store in a different direction instead. The victim told Appellant he was going in the wrong direction, but he continued on without stopping. (*Id.* at 122-23.) When the victim realized Appellant was continuing in the wrong direction she asked him, "Where are you going? Why don't you take me home?" (*Id.* at 123.) Appellant said he wasn't taking her home. The victim then called her boyfriend and told him what Appellant had said. At that point, Appellant took the victim's cell phone and threw it in the back seat. After Appellant took the victim's cell phone, the latter jumped out of the moving car. The victim testified that when she landed on the ground, she injured her knee and was unable to escape. Appellant stopped the car, grabbed her by the ankle and dragged her back to his vehicle. At this point, Appellant put the victim in the back seat, forcibly removed articles of her clothing and raped her vaginally, performed oral sex on her and forced her to perform oral sex on him. The victim stated that she fought back by punching and hitting Appellant during the attack. (*Id.* at 127-30.) While she was being raped, the victim's cell phone rang several times but she was unable to answer it because she was restrained by Appellant.

Following the attack, the victim promised Appellant she would not report the crimes, and he took her home. (*Id.* at 132.)

CORROBORATING EVIDENCE AND TESTIMONY

Sometime in the early morning hours of January 4, 2007, James E. Berg, a long-haul trucker, received a call while on the road from his fiancée, Rhenda Cook. Mr. Berg testified that the call was disconcerting and disjointed. When Mr. Berg first answered the call, he heard the victim saying, apparently to a third party, "Why are you going that way? That is not the way to my house." (Tr. 30.) The victim told Mr. Berg she was with Appellant whom she referred to as "Giuseppe." Mr. Berg gathered from the content of the conversation that the victim and Appellant were driving east on

Route 45 in Keyser. Mr. Berg then again heard the victim asking "Giuseppe" why they were not going toward her residence. At that point, the phone connection terminated abruptly. Mr. Berg tried to reach the victim, but she did not answer. Shortly thereafter, Mr. Berg received another call from the victim. Mr. Berg testified that during the second call, the victim talked to him as if he "were her mother." (Tr. 33.) The victim said to Mr. Berg, "Well, Mom, I'll be home in time to pick up Jill." (*Id.* at 33-34.) Mr. Berg immediately called the West Virginia State Police and told them Ms. Cook was in some sort of trouble and described what he thought was her approximate location.

Corporal Harry C. Myers of the West Virginia State Police was dispatched from his home to investigate. Corporal Myers traveled in the area of Route 45 searching for the vehicle described by Mr. Berg, but he did not locate it or the victim. The corporal testified that he had been provided with both the victim's and Appellant's cell phone numbers and he had tried to reach them both, unsuccessfully. (Tr. 43-44.) When Corporal Myers did not locate the victim, he returned to his residence.

Early that morning, Sergeant John Droppleman of the West Virginia State Police received a communication that a sexual assault had been reported, and he was ordered to the victim's home to investigate. When Sergeant Droppleman arrived at the victim's residence, he observed that she was limping, had a swollen ankle and exhibited other injuries including abrasions and bruising. The victim also smelled strongly of alcohol but appeared to be coherent. Sergeant Droppleman stated that the victim told him that Appellant had kidnapped and raped her. The victim told Sergeant Droppleman that she had tried to escape and described in detail the location where she jumped out of the vehicle including the description of a house nearby. After the initial interview, Sergeant

Droppleman took the victim to Potomac Valley Hospital for treatment and administration of a rape test kit. (Tr. 51-54.)

At this point in his testimony, the State questioned Sergeant Droppleman about the formal statement he took from the victim and moved the statement into evidence. (*Id.* at 56.) The trial court offered the statement to defense counsel for examination then asked the latter if there were any objections to the admission of the evidence to which he replied, "I have no objection, Your Honor." (*Id.*) The statement was admitted and the testimony continued. Sergeant Droppleman then testified that the victim displayed injuries including several marks around the neck and ankle area. (*Id.* at 57-58.)

After Sergeant Droppleman took the victim's statement he, along with Corporal Siler, went to the area described by the victim. A house matching the victim's description was in the area. Also, during the victim's statement, she told Sergeant Droppleman she had grabbed Appellant's glasses, crumpled them up and tossed them out of the vehicle. (*Id.* at 60.) Sergeant Droppleman recovered a pair of glasses in the precise area described by the victim. The glasses displayed a fingerprint on the lens and were bagged and taken into evidence. (*Id.* at 70.)

Following the initial investigation, Sergeant Droppleman and Corporal Siler obtained a warrant for Appellant's arrest and took him into custody at his home. Following the arrest, the officers secured Appellant's vehicle for investigation. During the course of the investigation the officers took several photographs and swabs. The inside of the vehicle exhibited what appeared to be blood spots in the back seat where the victim said the assaults took place. At a later point in the investigation, bodily fluid samples were taken from Appellant and submitted for DNA testing. (*Id.* at 81.)

CORROBORATION BY PHYSICAL EVIDENCE

The glasses recovered during the investigation were submitted for fingerprint evidence testing. The fingerprint expert testified at trial that the fingerprints on the glasses recovered at the scene, and later determined to be Appellant's, matched those of the victim. (*Id.* at 100.) The rape kit tested positive for Appellant's DNA. (*Id.* at 114.) A nurse testified that the victim's injuries were consistent with her description of the attack, including ankle and neck abrasions and a knee injury. (*Id.* at 90-91.)

III.

RESPONSE TO ASSIGNMENTS OF ERROR

The assignments of error in Appellant's Brief are quoted below, followed by the State's response:

1. EVIDENCE INADVERTENTLY ADMITTED
2. EVIDENCE NOT PROPERLY ADMITTED
3. EVIDENCE MORE PREJUDICIAL THAN PROBATIVE

State's Response:

All three of the assignments of error asserted in Appellant's Brief may be addressed in one response: There was no error in the admission of the victim's statement to police because Appellant, through counsel, knowingly and intentionally waived any error by affirmatively agreeing to its admission, stating that he had no objection upon inspection.

Additionally, Appellant assigned the following error in his Petition for Appeal, which was not addressed in his Brief:

THE COURT ERRED IN REFUSING TO DECLARE A MISTRIAL.

State's Response:

Appellant raised this issue in his Petition for Appeal, but failed to mention it in his Brief. Consequently, he has waived this assignment of error, and this Court need not examine it.

IV.

ARGUMENT

A. **THE TRIAL COURT DID NOT ERR IN ADMITTING THE VICTIM'S STATEMENT BECAUSE APPELLANT AFFIRMATIVELY AGREED TO ITS ADMISSION. THUS, APPELLANT WAIVED ANY RIGHT FOR THIS COURT TO EXAMINE THIS ISSUE.**

Despite the fact that improper evidence was submitted to the jury, Appellant waived his right to have this issue heard on appeal. The question contained in the victim's statement which indicated that Appellant was a registered sex offender was not admissible, yet Appellant's counsel knowingly and intentionally waived any error by affirmatively agreeing to its admission, stating that he had no objection. Thus, this Court need not consider whether or not it was properly admitted.

1. **The Standard of Review.**

"Under the 'plain error' doctrine, 'waiver' of error must be distinguished from 'forfeiture' of a right. A deviation from a rule of law is error unless there is a waiver. When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined. By contrast, mere forfeiture of a right--the failure to make timely assertion of the right--does not extinguish the error. In such a circumstance, it is necessary to continue the inquiry and to determine whether the error is 'plain.' To be 'plain,' the error must be 'clear' or 'obvious.'" Syl. Pt. 8, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

Syl. Pt. 4, *State v. Donley*, 216 W. Va. 368, 607 S.E.2d 474 (2004).

2. **No Matter How Appellant Characterizes the Admission of the Evidence Contained in the Victim's Statement, He Affirmatively Agreed to its Admission. Therefore, He Has Waived His Right to Have this Issue Heard by this Court.**

Sergeant Droppleman testified that he took a statement from the victim at her residence on January 6, 2007, two days after the offenses took place. (Tr. 55.) The last page of the statement contained an exchange where the officer asked the victim if she knew Appellant was a registered sex offender. (See R. 65; State's Exhibit #1 supplement.) Appellant concedes that this evidence was not intentionally offered by the State, and the State concedes that its consideration by the jury would have been improper because it would not have been admissible for any purpose under the West Virginia Rules of Evidence.

However, this statement was moved into evidence by the State without objection by Appellant's counsel after he had inspected it. In fact, Appellant's counsel affirmatively stated that he had no objection to its admission. During the trial, the following exchange took place:

MR. NELSON: I would like to move that [victim's statement] into evidence.

MR. SIRK: Can I see it?

MR. NELSON: Sure.

THE COURT: No objection?

MR. SIRK: I have no objection, Your Honor.

THE COURT: Granted.

(Tr. 56.)

This exchange establishes that Appellant knowingly and intentionally relinquished or abandoned a known right, as opposed to merely forfeiting one by not making a timely assertion, as

was held in *Donley, supra*. Therefore, there is no error, and an inquiry as to the effect of a deviation from the rule of law need not be determined. In fact, the Court in *Donley* went even further in holding the following:

This Court also observed in *State v. Knuckles*, 196 W. Va. 416, 473 S.E.2d 131 (1996), that “waiver necessarily precludes salvage by plain error review.” 196 W. Va. at 421, 473 S.E.2d at 136. “In other words, ‘[w]hen a right is waived, it is not reviewable even for plain error.’” *State v. Myers*, 204 W. Va. 449, 460, 513 S.E.2d 676, 687 (1998) (quoting *State v. Crabtree*, 198 W. Va. 620, 631, 482 S.E.2d 605, 616 (1996)); see also *Morris v. Painter*, 211 W. Va. 681, 686, 567 S.E.2d 916, 921 (2002) (Davis, Chief Justice, dissenting).

Donley, 216 W. Va. at 374, 607 S.E.2d at 480.

Similar to the instant case, in *State v. Whittaker*, 221 W. Va. 117, 650 S.E.2d 216 (2007), this Court found a waiver and upheld the trial court’s decision to admit evidence of cockfighting paraphernalia with a limiting instruction in a voluntary manslaughter case, where it found that the appellant did not object and in fact specifically acquiesced in the trial court’s ruling. *Id.* at 131-32, 650 S.E.2d at 230-31. Additionally, this Court found that an assignment of error regarding a jury instruction was waived where, when asked if there were any objections to the court’s charge, defense counsel replied, “I have none, Your Honor.” *State v. Slater*, 222 W. Va. 499, ___, 665 S.E.2d 674, 684-85 (2008). Apart from the fact that *Slater* dealt with a jury instruction rather than an evidentiary matter, this waiver language is identical to that used in the case at bar.

In his brief, Appellant ignores the fact that once the jury brought this evidence to the circuit court’s attention, he instructed the panel to disregard it and removed it from the statement they were reviewing. (Tr. 217-19.) As Appellant concedes, the prosecutor stated that he had no idea that this was in the statement. (*Id.* at 218.) Appellant also explains his failure to object to this evidence by stating that his copy of the statement did not contain this last page, whereas the copy submitted to

the jury did. (*See* Appellant's Brief at 3.) However Appellant gives no proof of this, and there is absolutely nothing in the transcript or record to support his claim. The victim's complete statement, including the page at issue here, appears at least twice in the record of these proceedings: in the State's responses to discovery filed on May 16, 2007 (R. 65, 78), and in the West Virginia State Police report filed on September 12, 2007, nearly two weeks before Appellant's trial on September 25-26, 2007 (*see* R. 181, and pages following). It seems unlikely that a single page would have been omitted from Appellant's copy of this statement. Even if this claim were true, Appellant's counsel requested and was given an opportunity to examine the statement before it was admitted into evidence. His failure to note this alleged discrepancy is entirely attributable to him.

In light of all of this, Appellant clearly relinquished and abandoned a known right and thereby waived his right to have this Court determine the evidentiary matter. Therefore, his argument fails.

B. ALTHOUGH APPELLANT ASSERTED IN HIS PETITION FOR APPEAL THAT THE CIRCUIT COURT ERRED IN DENYING HIS MOTION FOR MISTRIAL, HE IGNORES THIS ISSUE IN HIS APPELLATE BRIEF. CONSEQUENTLY, HE HAS WAIVED THIS ASSIGNMENT OF ERROR.

Appellant asserted in his Petition for Appeal that the circuit court erred in denying his motion for mistrial. However, Appellant completely ignores this argument in his Brief to this Court, and does not raise it as an assignment of error. Therefore, he has waived his right to have this Court consider this issue on appeal.

However, should this Court find otherwise, it should also find that any error that occurred was harmless due to the overwhelming amount of evidence supporting Appellant's conviction for these offenses. If the inadmissible evidence submitted to the jury is removed, the remaining evidence was sufficient to convict Appellant, and it was not prejudicial in nature.

1. **The Standard of Review.**

“Assignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived.” Syl. Pt. 6, *Addair v. Bryant*, 168 W. Va. 306, 284 S.E.2d 374 (1981).

“Although we liberally construe briefs in determining issues presented for review, issues which are not raised, and those mentioned only in passing but are not supported with pertinent authority, are not considered on appeal.” *State v. LaRock*, 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996).

2. **Because Appellant Does Not Raise the Issue of the Circuit Court Committing Error in Its Denying His Motion for Mistrial in His Brief, This Assignment of Error Is Deemed Waived, and This Court Need Not Consider It.**

In his Brief to this Court, Appellant fails to address the assignment of error he included in his Petition for Appeal that the circuit court erred in denying his motion for mistrial. In accordance with *Addair* and *LaRock*, because this issue was not raised or argued in his brief, it is waived and should not be considered on appeal. This rule has been consistently applied by this Court:

This Court has previously adhered to the rule that “[a]lthough we liberally construe briefs in determining issues presented for review, issues which are not raised, and those mentioned only in passing but are not supported with pertinent authority, are not considered on appeal.” *State v. LaRock*, 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996); *Accord State v. Adkins*, 209 W. Va. 212, 216 n.5, 544 S.E.2d 914, 918 n.5 (2001) (per curiam); *State v. Allen*, 208 W. Va. 144, 162, 539 S.E.2d 87, 105 (1999); *State v. Easton*, 203 W. Va. 631, 642 n.19, 510 S.E.2d 465, 476 n.19 (1998); *State v. Riley*, 201 W. Va. 708, 712, 500 S.E.2d 524 n.2 (1997) (per curiam); *State v. Phelps*, 197 W. Va. 713, 721 n.5, 478 S.E.2d 563, 571 n.5 (1996) (per curiam); *State v. Lilly*, 194 W. Va. 595, 605 n.16, 461 S.E.2d 101, 111 n.16 (1995).

Morris v. Painter, 211 W. Va. 681, 685, 567 S.E.2d 916, 920 (2002) (Davis, Chief Justice, dissenting). Regarding the failure to raise a claim in a brief, Chief Justice Davis in *Morris* noted:

Indeed, we crystallized the raise or waive rule in syllabus point 6 of *Addair v. Bryant*, 168 W. Va. 306, 284 S.E.2d 374 (1981), wherein it was said that “[a]ssignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived.” *Accord State v. Lockhart*, 208 W. Va. 622, 627 n.4, 542 S.E.2d 443, 448 n.4 (2000); *State v. Helmick*, 201 W. Va. 163, 172, 495 S.E.2d 262, 271 (1997); *State v. Potter*, 197 W. Va. 734, 741 n.13, 478 S.E.2d 742, 749 n.13 (1996); Syl. Pt. 9, *State v. Garrett*, 195 W. Va. 630, 466 S.E.2d 481 (1995); *State v. George W.H.*, 190 W. Va. 558, 563 n.6, 439 S.E.2d 423, 428 n.6 (1993); *State v. Lola Mae C.*, 185 W. Va. 452, 453 n.1, 408 S.E.2d 31, 32 n.1 (1991); Syl. Pt. 1, *State v. Schoolcraft*, 183 W. Va. 579, 396 S.E.2d 760 (1990); *State v. Sayre*, 183 W. Va. 376, 379 n.2, 395 S.E.2d 799, 802 n.2 (1990); *State v. Stacy*, 181 W. Va. 736, 739 n.3 384 S.E.2d 347, 350 n.3 (1989); *State v. Moss*, 180 W. Va. 363, 374 n.16, 376 S.E.2d 569, 580 n.16 (1988); *State v. Flint*, 171 W. Va. 676, 679 n.1, 301 S.E.2d 765, 768 n.1 (1983); *State v. Fairchild*, 171 W. Va. 137, 150 n.7, 298 S.E.2d 110, 123 n.7 (1982); *State v. Buck*, 170 W. Va. 428, 430 n.2, 294 S.E.2d 281, 284 n.2 (1982); *State v. Church*, 168 W. Va. 408, 410 n.1, 284 S.E.2d 897, 899 n.1 (1981).

Morris, 211 W. Va. at 685, 567 S.E.2d at 920 (Davis, Chief Justice, dissenting).¹

By failing to address the circuit court’s denial of his mistrial motion in his Brief to this Court, Appellant has waived his right to have it heard on appeal. Because Appellant has not briefed this assignment of error, it should be deemed by this Court to have been abandoned. *LaRock*, 196 W. Va. at 302, 470 S.E.2d at 621. Therefore, this Court need not consider the matter any further.

3. Even If this Issue Was Not Waived, the Circuit Court Did Not Abuse its Discretion in Refusing to Grant a Mistrial.

Should this Court find that Appellant did not waive this issue, it should also find that there was no error in the circuit court’s refusal to grant a mistrial under these circumstances. “The decision to grant or deny a motion for mistrial is reviewed under an abuse of discretion standard.” *State v. Lowery*, 222 W. Va. 284, ___, 664 S.E.2d 169, 173 (2008).

¹This Court has also applied the rule inversely, holding that where an appellant raised a claim in his brief that was not assigned as error in his petition for appeal, it was not properly before the Court. *Canterbury v. Laird*, 221 W. Va. 453, 458, 655 S.E.2d 199, 203-04 (2007).

During deliberations, jurors discovered this evidence on the last sheet of the victim's statement to the police. The jury sent a written question to the circuit judge asking whether it was proper for them to have access to this information. After conferring with counsel, the judge promptly sent back written instruction that the jury should not consider it. (Tr. 217-19.) In addition to answering the jury's question "No," the judge also removed the last page of the statement that had the improper evidence before giving it back to the panel. (Tr. 219.) When the court asked counsel if they wanted anything else added or said, Appellant's defense counsel replied:

MR. SIRK: No. I think for the record I probably need to move for a mistrial. I mean I realize it was entered without objection but I mean that is so damaging. I mean I think I need at least on the record make a Motion for a Mistrial.

THE COURT: Your Motion will be denied at this point because the statement was admitted without objection and the court assumes that you know what is in the statement.

(Tr. 218.)

In light of the court's instruction and the removal of the sheet that contained the improper information, there was no abuse of discretion in its refusal to grant the motion for mistrial.

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.

State v. Williams, 172 W. Va. 295, 304, 305 S.E. 2d 251, 260 (1983) (citations omitted). *See also Lowery, supra* at ___, 664 S.E.2d at 173; *State v. Winebarger*, 217 W. Va. 117, 127, 617 S.E.2d 467, 477 (2005).

There was no manifest necessity for discharging the jury in the instant case before it had rendered its verdict. Considering all of the circumstances and the broad discretion given the trial

court, this Court should find that the circuit court did not abuse its discretion in denying Appellant's motion for mistrial.

C. EVEN IF NOT WAIVED, ANY ERROR IN THE HANDLING OF THIS EVIDENCE WAS HARMLESS.

Alternatively, even if this Court finds that Appellant did not waive this issue, the overwhelming evidence of his guilt rendered any error harmless. In Syllabus Point 1 of *State v. Ferrell*, 184 W. Va. 123, 399 S.E.2d 834 (1990), this Court held:

“Where improper evidence of a nonconstitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury.” Syllabus point 2, *State v. Atkins*, 163 W. Va. 502, 261 S.E.2d 55 (1979).

By employing the standard set in *Ferrell*, when this improper evidence is removed, there is indeed overwhelming evidence presented to convict Appellant of these offenses. The trial testimonies of the victim, her fiancé and the police officers as well as the medical evidence was more than enough evidence for a jury to find Appellant guilty beyond a reasonable doubt. In light of all the evidence properly presented by the State at trial, one question from a policeman to the victim contained in a statement that was, according to Appellant, mistakenly presented to the jury—where the judge instructed to disregard and removed it—had no prejudicial effect.

In *State v. Sheppard*, 172 W. Va. 656, 310 S.E.2d 179 (1983), this Court ruled as harmless the erroneous admission of an out-of-court identification where properly-admitted, uncontradicted in-court identifications were also made by two witnesses, and stolen money was recovered from the

victim's vehicle after he escaped from the appellant's kidnapping him. *Id.* at 665-66, 310 S.E.2d at 182-83. Regarding this, the Court held:

[T]he erroneous admission of the improper out-of-court identification testimony was "merely cumulative of other overwhelming evidence properly before the jury." *Brown v. United States*, 411 U.S. 223, 231, 93 S.Ct. 1565, 1570, 36 L.Ed.2d 208, 215 (1973), *quoted in State v. Vance*, [164 W. Va. 216, 230, 262 S.E.2d 423, 431 (1980)]. Consequently, we conclude that the improper admission of the out-of-court identification testimony was harmless beyond a reasonable doubt.

Sheppard, 172 W. Va. at 665-66, 310 S.E.2d at 183.

Of course, in the instant case, the circuit court instructed the jury to disregard the improper evidence contained in the victim's statement. It is presumed that a jury will follow the instructions given to it by the court. *Cf. State v. Williams*, 172 W. Va. 295, 305, 305 S.E.2d 251, 261 (1983) ("In the absence of a showing of juror exposure to prejudicial publicity during the course of trial, it will be presumed that the jurors followed the trial court's instructions to avoid or ignore such publicity.")(citation omitted). The record is devoid of any evidence that the jurors in Appellant's trial relied in any way on this information in reaching their verdict. In light of the evidence against Appellant, if the circuit court committed any error, it was harmless here as well.

The victim's testimony alone was sufficient to convict Appellant of these offenses. This Court held in Syllabus Point 2 of *State v. McPherson*, 179 W. Va. 612, 571 S.E.2d 333 (1988):

"A conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible, the credibility is ordinarily a question for the jury." Syl. Pt. 5, *State v. Beck*, 167 W. Va. 830, 286 S.E.2d 234 (1981).

In the case at bar, the victim's testimony was not inherently incredible, and was corroborated by enough direct, physical and circumstantial evidence to convict Appellant. As previously stated, the victim's fiancé heard her on his cell phone asking Appellant why they were not going straight

to her house. After this, the victim's fiancé tried to call her repeatedly, but she was unresponsive. Her injuries were documented by medical personnel. A rape kit tested positive for Appellant's DNA. The investigating officers found blood spots in the area of the vehicle where the victim said the offenses occurred. The victim accurately described a house located in the area where the car was parked and the assaults took place. She also described Appellant's eyeglasses which she said she threw out of the vehicle. Sergeant Droppleman found these glasses precisely in the area that she described to him in her statement. These glasses had her fingerprints on them.

Apart from the circuit judge's instruction to disregard the improper evidence and its removal, this was one small item—in the form of a question to the victim—contained in a seven-page typewritten statement, rather than substantial, documented evidence or detailed testimony. It seems very unlikely that this was prejudicial in nature in light of all of the circumstances surrounding it.

In light of this, if this Court finds any error in the circuit court's dealing with this evidence—with no objection by Appellant—it should be deemed harmless. Thus, Appellant's convictions should be upheld.

V.

CONCLUSION

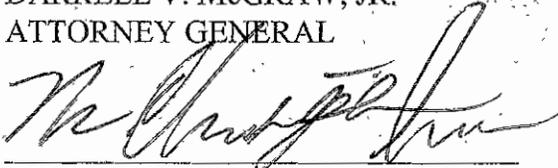
For the foregoing reasons, the judgment of the Circuit Court of Mineral County should be affirmed by this Honorable Court.

Respectfully submitted,

State of West Virginia,
Appellee,

By counsel

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CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certified that a true and correct copy of the foregoing *Brief of Appellee, State of West Virginia* was mailed to counsel for the Appellant by depositing it in the United States mail, first-class postage prepaid, on this 5th day of February, 2009, addressed as follows:

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