

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, PLAINTIFF BELOW,

APPELLEE,

APPEAL NO.: 34136

CASE NOS.: 01-F-01

04-F-70

v.

RONALD REED, SR, DEFENDANT BELOW,

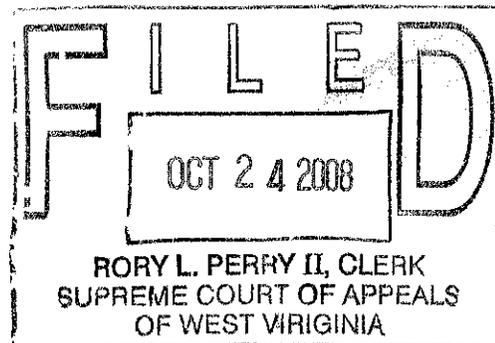
APPELLANT

REPLY OF APPELLEE

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APPELLANT

REPLY OF APPELLEE

**TO: THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF
APPEALS OF THE STATE OF WEST VIRGINIA**

HON. ELLIOTT E. MAYNARD, CHIEF JUSTICE

HON. JOSEPH P. ALBRIGHT, JUSTICE

HON. ROBIN JEAN DAVIS, JUSTICE

HON. LARRY V. STARCHER, JUSTICE

HON. BRENT D. BENJAMIN, JUSTICE

RORY L. PERRY, II, CLERK

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United States Supreme Court

Crawford v. Washington, 541 U.S. 36 (2004)

West Virginia Supreme Court of Appeals

State v. Guthrie, 194 W. Va. 657, 461 S.E.2d 163 (1995)

State v. Hatfield, 169 W. Va. 191, 286 S.E.2d 402 (1982)

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

State v. Miller, 194 W Va. 3, 459 S.E.2d 114 (1995)

State v. Myers, 204 W. Va. 449, 513 S.E.2d 676 (1988)

State v. Triplett, 187 W. Va. 760, 421 S.E.2d 511 (1992)

KIND OF PROCEEDING AND NATURE OF RULING IN THE LOWER TRIBUNAL

This is an appeal by Mr. Reed (Defendant, Appellant) from a final Order entered by the Ohio County Circuit Court (Mazzone, J.) on April 13, 2007 after a three-day jury trial. This Order sentenced Mr. Reed to not less than ten (10) nor more than (20) years in prison on each of the thirty-one (31) counts of Sexual Abuse by a Custodian; not less than one (1) nor more than five (5) years in prison on each of the thirty (30) counts of Sexual Assault in the Third Degree; not less than ten (10) nor more than (20) years in prison on each of the two (2) counts of Sexual Abuse by a Parent; not less than five (5) nor more than fifteen (15) years in prison on each of the two (2) counts of Incest; not less than fifteen (15) nor more than thirty-five (35) years in prison on one count of Sexual Assault in the First Degree. The sentences were ordered to run consecutively. (Record, Vol. III at 410-412). After the trial, Mr. Reed filed a Rule 33 Motion for a New Trial and a Motion for a Judgment of Acquittal, both of which were denied.

In his appeal, Mr. Reed alleges that his right to confront the witness used against him was violated when the videotaped deposition of Detective Keith Brown was admitted into evidence and played for the jury at the trial.¹ Mr. Reed also alleges that his due process rights were violated when the State failed to disclose the psychological reports and criminal records of A.P. and J.P.²

FACTS AND PROCEDURAL HISTORY

Sometime around September 2000, an investigation was started concerning allegations of sexual abuse and/or assault by Ronald Reed involving his daughter J.L.R. The abuse started when J.L.R. was

¹ Mr. Reed makes other allegations but if this Court finds that Mr. Reed's Sixth Amendment rights have been violated, the other allegations are moot.

² Their initials identify the alleged minor victims of sexual abuse. *See e.g. In re Emily*, 208 W. Va. 325, 329 n.1, 540 S.E.2d 542, 546 n.1 (2000).

approximately five years old and continued for a number of years. J.L.R. was approximately twenty years old when the investigation started. During the course of the investigation, it was discovered that Mr. Reed had sexually assaulted other young girls. He had impregnated J.K. on two separate occasions while she was still a juvenile. Evidence was also discovered that Mr. Reed had sexually assaulted and/or abused A.P. and J.P., who were sisters, when they were still juveniles. Some of the abuse of these young girls had occurred in Ohio so the State of West Virginia lacked the power to prosecute some of the incidents of sexual abuse and/or assault.

The allegations against J.L.R. led to criminal charges being filed against Mr. Reed in Ohio County Magistrate Court. (Record, Vol. III at 6-8). Warrants were issued for the arrest of Mr. Reed on October 4, 2000 and he was arrested on November 24, 2000 at which time bond was set. (Record Vol. I at 10-13, 6-9). Don Yannerella was appointed to represent him. (Record, Vol. I, at 14-15, 20). A preliminary hearing was held at which probable cause was found and the case bound over to the Ohio County Circuit Court. (Record, Vol. I at 78-81).

On January 8, 2001, Mr. Reed was indicted by an Ohio County Grand Jury on one (1) count of First Degree Sexual Assault, two (2) counts of Second Degree Sexual Assault, one (1) count Sexual Abuse by a Custodian, two (2) counts of Incest and two (2) counts of Sexual Abuse by a Parent regarding J.L.R. as well as other victims who were revealed during the investigation. These other victims were: A.P., age 17 (at the time of the indictment, the abuse occurred much earlier), J.P. age 15 (at the time of the indictment, the abuse occurred much earlier), and J.K. (Record, Vol. I at 1-4). After the State disclosed discovery, Mr. Yannerella filed a Motion seeking the psychological, medical, school, juvenile counseling records and juvenile records of the victims. (Record, Vol. I at 315-321). The next day, on February 7,

2001, Mr. Yannerella filed another Motion requesting the same type of records. This Motion sought the records of A.P., Sandra Mae Reed, J.P. and J.K. (Record, Vol. I at 384-385). The State filed a Response to these Motions arguing that the records requested were not in the control of the State.³ (Record, Vol. I at 396-399). Mr. Yannerella requested co-counsel be appointed and Stephen Herndon was appointed to assist him on April 18, 2001. (Record, Vol. I at 322-324, 452-453).

Thereafter, Mr. Yannerella filed a Motion to Withdraw. This Motion was granted and Mr. Herndon remained as counsel. Laura Spadaro was subsequently appointed as co-counsel. After receiving complaints from Mr. Reed that he no longer wanted Mr. Herndon to represent him, Mr. Herndon filed a Motion to Withdraw. An Order was entered stating that Mr. Herndon would continue to represent Mr. Reed. Soon thereafter, Ms. Spadaro filed a Motion to Withdraw that was not ruled upon immediately. Mr. Herndon filed a Second Motion for Leave to Withdraw. The Court granted this Motion on August 25, 2003. This Order also directed Laura Spadaro to act as stand-by counsel for Mr. Reed at a recusal hearing on July 21, 2003. (Record, Vol. I at 699-703). Brett Ferro was then appointed to represent Mr. Reed. Ms. Spadaro's Motion to Withdraw was granted on August 25, 2003.⁴ (Record, Vol. I at 699-702, 704-707).

During the investigation and pendency of Mr. Reed's case, it became known to law enforcement that Mr. Reed impregnated J.K. when she was approximately thirteen years old. Through DNA testing it was learned that Mr. Reed fathered two children with J.K. (Record, Vol. II, Trial Transcript, July 7, 2005,

³ These Motions were not ruled upon for some time and Mr. Yannerella had already withdrawn when an order was entered.

⁴ It appears these Orders were entered some time after the actual hearings took place.

at 295, lines 2-5, 299-300).

Near the beginning of the prosecution of Mr. Reed, in April of 2001, the State had retained the services of Dr. Dennis Maceiko to examine J.L.R. Dr. Maceiko was retained to determine if J.L.R. had the characteristics of a victim of sexual abuse. Mr. Herndon filed two Motions in Limine seeking to bar the testimony of Dr. Maceiko. (Record, Vol. I at 550-554, 555-556). At a hearing on these Motions, Mr. Herndon acknowledged receiving Dr. Maceiko's report. (Record, Vol. II, Transcript of November 13, 2002 hearing, at 5, lines 2-10). After Mr. Herndon withdrew, Mr. Ferro filed numerous motions seeking the production of Dr. Maceiko's report. The State was directed to produce Dr. Maceiko's report and any records relied upon by an expert with regard to A.P. by an Order entered on November 18, 2002.⁵ (Record, Vol. I, at 605-606). The Motions in Limine seeking to bar the testimony of Dr. Maceiko filed by Mr. Herndon were granted and as a result, Dr. Maceiko never testified at trial. (Record, Vol. III at 292-298).

During the course of the prosecution of Mr. Reed, it was discovered that Mr. Reed had been abusing another young girl, A.P. Mr. Reed was indicted by an Ohio County Grand Jury with thirty (30) counts of Third Degree Sexual Assault; thirty (30) counts of Sexual Abuse by a Custodian and five (5) misdemeanor counts of Contributing to the Delinquency of a Child on May 10, 2004. (Record, Vol. III at 1-31). The State filed A Motion to Consolidate the new counts (04-F-70) and the older charges (01-F-01) and the cases were consolidated on June 25, 2004. (Record, Vol. III at 61-63, 67-68). Around

⁵ This Order was from a hearing held on November 1, 2002 and is apparently the Order referenced by Mr. Reed in his Brief. *See*, Record, Vol. I, at 605-606 and Appellant's Brief, p 39. This Order was also in response to the Motions filed by Mr. Yannerella seeking the records of the victims. *See infra*, page 7.

this time, Brett Ferro was permitted to withdraw from representing Mr. Reed and Kevin Neiswonger appointed.

Mr. Reed had requested discovery pursuant to Rule 16 of the West Virginia Rules of Criminal Procedure in case number 01-F-01 on January 19, 2001. (Record, Vol. I at 85-89). The State requested reciprocal discovery and also provided Mr. Reed with its discovery disclosures on January 19, 2001. (Record, Vol. I at 90-92, 93-97). J.P. and A.P. were listed as witnesses in the State's Discovery Disclosure. The State produced discovery in case number 04-F-70 in open court on May 21, 2004. The State supplemented discovery numerous times throughout the course of Mr. Reed's case.

When Mr. Reed's case was finally set to be tried in 2005, the lead investigator Detective Keith Brown, received orders from the Army National Guard that he was going to be deployed to Iraq for at least a year. Rather than continue the trial yet again, Mr. Reed's attorney at the time, Mr. Neiswonger, and the State agreed to take the deposition of Detective Brown. (Record, Vol. III, Transcript of Pre-Trial Hearing, December 7, 2004, at 4-5). A Notice of Stipulation relating to the deposition of Detective Keith Brown was filed by the State on December 17, 2004 and he was deposed on January 5, 2005. At the deposition, Mr. Reed was represented by Kevin Neiswonger and was present in person. During the deposition, Mr. Neiswonger did not object to any of the questions asked by the State but did cross-examine Detective Brown. Mr. Neiswonger's cross-examination of Detective Brown consisted of: confirming the age of J.L.R., that Detective Brown had been contacted by the West Virginia Department of Health and Human Resources (DHHR) in regards to J.L.R., the name of the DHHR worker, that fact that J.L.R. told Detective Brown that Mr. Reed was also abusing J.K., that Detective Brown had never spoken with Mr. Reed during the investigation, that the only evidence was a series of statements from the

alleged victims and DNA testing, and confirming that a record of the statements of the alleged victims existed. (Transcript of Deposition of Deposition of Detective Keith Brown, January 5, 2005, at 31-36).

Shortly after the deposition, Mr. Neiswonger filed a Motion to Withdraw. Mr. Neiswonger was permitted to withdraw and J. Perry Manypenny was appointed. Mr. Manypenny immediately filed a Motion to Withdraw. Attorney Christopher Scheetz was then appointed to represent Mr. Reed.⁶ Mr. Scheetz would remain as counsel for Mr. Reed throughout the trial. Before the trial, Mr. Scheetz filed a Motion to Suppress the Deposition of Detective Keith Brown on May 12, 2005. This Motion did not address any alleged violation of the Sixth Amendment and was denied by the Trial Court. (Record, Vol. III at 125-128). Detective Brown's videotaped deposition was played at the trial.

At the close of the State's case-in-chief, Mr. Reed's attorneys moved to dismiss the counts of the indictment in case number 01-F-01 that related to J.L.R. on the grounds that there was insufficient evidence. The State agreed to dismiss Counts One and Two of the Indictment, conceding that it had not met its burden of proof. Counts One and Two of the Indictment in case number 01-F-01 were then dismissed by the Trial Court. (Record, Vol. II, Trial Transcript, July 8, 2005, at 142, lines 4-7).

After a three day trial, on July 9, 2005, Mr. Reed was found guilty of two (2) counts of Incest as it pertains to J.L.R., two (2) counts of Sexual Abuse by a Parent as it pertains to J.L.R., one (1) count of Sexual Assault in the First Degree as it pertains to J.P., one (1) count of Sexual Abuse by a Custodian as it pertains to J.P., thirty (30) counts of Sexual Assault in the Third Degree as it pertains to A.P. and thirty (30) counts of Sexual Abuse by a Custodian as it pertains to A.P. (Record, Vol. III at 340-366).

⁶ Edward Gillison was appointed co-counsel at some point.

On August 10, 2005, Mr. Reed filed a Motion for a New Trial and a Motion for Judgment of Acquittal. (Record, Vol. III at 368-385). In his Motion for a New Trial, Mr. Scheetz raises for the first time an objection to the admission of Detective Brown's deposition based on the fact that it allegedly contained double hearsay. (Record, Vol. III at 368-379). In his Motion for Judgment of Acquittal Pursuant to Rule 29(c) of the W.V.R.C.R.P., Mr. Scheetz raises the issue of whether the admission of Detective Brown's deposition violated the Sixth Amendment of the United States Constitution. These were denied by the trial Court by an Order on April 13, 2007. In that same Order, Mr. Reed was sentenced to not less than ten (10) nor more (20) years in prison on each of the thirty-one (31) counts of Sexual Abuse by a Custodian; not less than one (1) nor more than five (5) years in prison on each of the thirty (30) counts of Sexual Assault in the Third Degree; not less than ten (10) nor more than (20) years in prison on each of the two (2) counts of Sexual Abuse by a Parent; not less than five (5) nor more than fifteen (15) years in prison on each of the two (2) counts of Incest; not less than fifteen (15) nor more than thirty-five (35) years in prison on one count of Sexual Assault in the First Degree. The sentences were ordered to run consecutively. (Record, Vol. III at 410-412).

Mr. Scheetz filed a Motion to Extend Appellate Deadlines on August 13, 2007 that was granted on August 20, 2007. (Record, Vol. III at 413-415). Mr. Scheetz filed another Motion to Extend Appellate Deadlines on September 12, 2007. (Record, Vol. III at 420-422). The Court granted this Motion on September 14, 2007. (Record, Vol. III at 425). Mr. Scheetz filed a Petition for Appeal on November 27, 2007. The Petition was accepted by this Court as to Assignment of Error No. 1: "Whether the trial court erred in denying the petitioner's motion for judgment of acquittal because the evidence was insufficient to support a guilty verdict;" Assignment of Error No. 12: "Whether the admission of Detective Brown's

deposition violated the petitioner's right to counsel free from conflict and the petitioner's right to confront witness against him;" and Assignment of Error No. 23: "Whether the State's failure to provide psychological and criminal records of A.P. and J.P. violated Article III, Section 14 of the West Virginia Constitution and *Brady* and its progeny" by an Order entered on May 22, 2008.

JURISDICTION

A final order from the Ohio County Circuit Court was entered on April 3, 2007. The petition for appeal was filed on November 27, 2007 and granted on May 22, 2008. The jurisdiction of this Court rests on W. Va. Const. Art 8 § 3 and W. Va. Code § 58-5-1 (1998).

SUMMARY OF ARGUMENT

I. TO CHALLENGE THE STRATEGIC DECISION OF MR. REED'S COUNSEL NOT TO OBJECT TO ANY OF THE STATE'S QUESTIONS AT DETECTIVE BROWN'S DEPOSITION, AN INEFFECTIVE ASSISTANCE OF COUNSEL ARGUMENT MUST BE PRESENTED TO THIS COURT. STRATEGIC OR TACTICAL DECISIONS ARE ORDINARILY NOT SUBJECT TO REVIEW FOR INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL.

If there is any violation of the Sixth Amendment, it is the result of ineffective assistance of counsel. Mr. Reed's attorney, for whatever reason, failed to object to *any* of the questions asked of Detective Brown and did not thoroughly cross-examine him. The proper vehicle for determining ineffective assistance of counsel allegations is a habeas corpus ad subjiciendum petition. At this stage in the proceedings, this Court is without sufficient information to determine if Mr. Reed's counsel was effective or ineffective. The record is simply not developed enough. *State v. Triplett*, 187 W. Va. 760, 421 S.E.2d 511 (1992).

II. THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRES THE OPPORTUNITY TO CONFRONT WITNESSES. DETECTIVE BROWN WAS SUBJECT TO CROSS-EXAMINATION AT THE VIDEOTAPED DEPOSITION. MR. REED WAIVED ANY SIXTH AMENDMENT VIOLATION BY NOT OBJECTING TO ANY QUESTIONS ASKED BY THE STATE AND BY NOT CROSS-EXAMINING DETECTIVE BROWN MORE THOROUGHLY.

The Sixth Amendment mandates that a defendant be afforded the opportunity to confront the

witnesses against him. *Crawford v. Washington*, 541 U.S. 36 (2004). *Crawford* spells out what that means: “Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.” *Id.* In this case, Mr. Reed had the opportunity to confront the witnesses against him. He had the opportunity to object to the questions posed to Detective Brown by the State. Mr. Reed failed to object to *any* of the questions posed to Detective Brown. Further, Mr. Reed had the opportunity to cross-examine Detective Brown and took advantage of that opportunity. Because Mr. Reed failed to object to any of the questions asked of Detective Brown by the State and cross-examined Detective Brown, he waived his right to object to any alleged violation of the Sixth Amendment.

IIA. THE EVIDENCE PRESENTED AT TRIAL RELATING TO A.P. WAS NOT INSUFFICIENT. WHEN VIEWED MOST FAVORABLY FOR THE PROSECUTION, A JURY COULD HAVE FOUND MR. REED GUILTY BEYOND A REASONABLE DOUBT.

When viewed in a light most favorable to the Prosecution, the evidence presented at trial relating to A.P. was sufficient to convince a person of the defendant’s guilt beyond a reasonable doubt. *State v. Guthrie*, 194 W. Va. 675, 461 S.E.2d 163 (1995).

III. PSYCHOLOGICAL RECORDS OF A.P. AND J.P.

Mr. Reed contends that the State was ordered to produce the psychological records of A.P. and J.P. Mr. Reed is mistaken. The State was only ordered to produce a report of its expert psychologist Dr. Dennis Maceiko and any records relied upon by an expert with regards to A.P. Dr. Maceiko’s report was given to Mr. Reed’s attorney, Stephen Herndon, in open court at a hearing held on November 13, 2002.

IV. THE ALLEGED NON-DISCLOSURE OF ANY CRIMINAL HISTORIES OF A.P. AND J.P. WAS NOT PREJUDICIAL. MR. REED WAS NOT SURPRISED ON A MATERIAL ISSUE AND THE PREPARATION AND PRESENTATION OF HIS CASE WAS NOT HAMPERED. THUS, THE ALLEGED NON-DISCLOSURE WAS NOT FATAL TO THE STATE'S CASE.

Mr. Reed contends that the failure of the State to disclose the criminal histories of A.P. and J.P. violated his due process rights. Mr. Reed alleges that the presentation of his defense was hampered by the non-disclosure. Even if Mr. Reed's defense was hampered, he was not surprised on a material issue. *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982). The issue was whether Mr. Reed sexually abused underage girls - not whether A.P. and J.P. had criminal records.

ARGUMENT

I. TO CHALLENGE THE STRATEGIC DECISION OF MR. REED'S COUNSEL NOT TO OBJECT TO ANY OF THE STATE'S QUESTIONS AT DETECTIVE BROWN'S DEPOSITION, AN INEFFECTIVE ASSISTANCE OF COUNSEL ARGUMENT MUST BE PRESENTED TO THIS COURT. STRATEGIC OR TACTICAL DECISIONS ARE ORDINARILY NOT SUBJECT TO REVIEW FOR INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL.

Mr. Neiswonger made a strategic decision not to object to any of the State's questions or more thoroughly cross-examine Detective Brown. When Mr. Neiswonger agreed to an evidentiary deposition of Detective Brown, he was aware that it would be for use at trial. (Record, Vol. III, Transcript of hearing, December 7, 2004 at 4, lines 21-24). Strategic or tactical decisions of defense counsel ordinarily do not give rise to ineffective assistance of counsel violations. *State v. Triplett*, 187 W. Va. 760, 513 S.E.2d 676 (1998). At the present time, it is not known why Mr. Neiswonger did not object to any of the questions asked by the State or more thoroughly cross-examine Detective Brown. It is only with the aide of hindsight, and a more fully developed record, that this decision can possibly be seen as ineffective.

For this reason, ineffective assistance of counsel claims ordinarily are not reviewable on direct appeal. The proper vehicle to determine ineffective assistance of counsel claims is a habeas corpus ad

subjudiciendum petition. Syl. Pt. 10, *State v. Triplett*, 187 W. Va. 760, 421 S.E.2d 511 (1992). There is simply not a sufficient record before this Court to make a determination of whether Mr. Neiswonger's performance was effective or ineffective.

II. THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRES THE OPPORTUNITY TO CONFRONT WITNESSES. DETECTIVE BROWN WAS SUBJECT TO CROSS-EXAMINATION AT THE VIDEOTAPED DEPOSITION. MR. REED WAIVED ANY SIXTH AMENDMENT VIOLATION BY NOT OBJECTING TO ANY QUESTIONS ASKED BY THE STATE AND BY NOT CROSS-EXAMINING DETECTIVE BROWN MORE THOROUGHLY.⁷

The admission of Detective Brown's deposition at the trial did not violate the Sixth Amendment. Mr. Reed waived any alleged violation by not objecting to any questions asked by the State. A waiver is "the intentional relinquishment or abandonment of a known right." *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

Near the time this case was finally set for trial in Ohio County Circuit Court, the lead investigator, Detective Keith Brown of the Wheeling Police Department, received orders from the Army National Guard deploying him to Iraq for at least a year. Rather than continue the trial yet again, Mr. Reed's counsel at the time, Kevin Neiswonger, and the State agreed to depose Detective Brown and record it for use at trial. (Record, Vol. III, Transcript of Pre-Trial Hearing, December 7, 2004, at 4-5). Mr. Reed was present at the deposition as was his counsel. During the direct examination of Detective Brown by the State, Mr. Neiswonger did not make any objections. (Transcript of Deposition of Detective Keith Brown, January 5, 2005, at 3-30). After the State rested, Mr. Neiswonger cross-examined Detective Brown. Mr.

⁷ Mr. Reed asserts that there is insufficient evidence to support his conviction. The basis for this assertion is that his right to confront witnesses under the Sixth Amendment to the United States Constitution was violated by the admission of Detective Brown's deposition. If this Court finds that this is indeed the case, there is no need to reach the insufficiency of evidence argument.

Neiswonger's cross-examination of Detective Brown consisted of: confirming the age of J.L.R., that Detective Brown had been contacted by the West Virginia Department of Health and Human Resources (DHHR) in regards to J.L.R., the name of the DHHR worker, that fact that J.L.R. told Detective Brown that Mr. Reed was also abusing J.K., that Detective Brown had never spoken with Mr. Reed during the investigation, that the only evidence was a series of statements from the alleged victims and DNA testing, and confirming that a record of the statements of the alleged victims existed. (Transcript of Deposition of Deposition of Detective Keith Brown, January 5, 2005, at 31-36).

After the verdict, Mr. Scheetz filed a Motion for Judgment of Acquittal on the grounds that Mr. Neiswonger had a possible conflict while representing Mr. Reed. (Record, Vol. III at 368-385). Mr. Scheetz also filed a Rule 33 Motion for a New Trial. *Id.* This Motion was the first time that the a possible violation of the Sixth Amendment to the United States Constitution was raised. The Trial Court by an Order entered on April 13, 2007 denied these Motions. (Record, Vol. III at 410-412).

In the case now to be decided, Mr. Reed's attorney was present at the videotaped deposition of Detective Brown. He had the opportunity to object to any questions asked by the State but for whatever reason, chose not to do so. Mr. Neiswonger, with his client present, also had the opportunity to cross-examine Detective Brown and took advantage of that opportunity.

And because Mr. Reed waived any objection to the testimony of Detective Brown, there can be no review for plain error. *State v. Myers*, 204 W. Va. 449, 513 S.E.2d 676, 687 (1998).

IIA. THE EVIDENCE PRESENTED AT TRIAL RELATING TO A.P. WAS NOT INSUFFICIENT. WHEN VIEWED MOST FAVORABLY FOR THE PROSECUTION, A JURY COULD HAVE FOUND MR. REED GUILTY BEYOND A REASONABLE DOUBT.

STANDARD OF REVIEW

For claims involving insufficiency of the evidence, a de novo standard of review is applied. *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996).

ARGUMENT

Mr. Reed asserts that there was insufficient evidence presented at trial to find beyond a reasonable doubt that he sexually assaulted A.P. Mr. Reed is mistaken.

Claims of insufficiency of the evidence must be examined to determine if the evidence is believed, it is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995). Further, the evidence must be viewed in a light most favorable to the prosecution. *Id.* All inferences and credibility assessments that a jury might have drawn must also be viewed in a light most favorable to the prosecution. *Id.*

In *Guthrie*, the defendant was convicted of First Degree Murder. The Defendant stabbed another person in the neck after the person made fun of him and snapped him in the nose with a towel. The defendant challenged his conviction on the grounds that there was insufficient evidence to support a finding of First Degree Murder. The West Virginia Supreme Court of Appeals disagreed and listed the evidence offered by the prosecution at trial: the victim's actions were irritating to the defendant well before the stabbing took place, his anger was building with each comment and flip of the towel, witness testimony the defendant attempted to stab the victim a second time as he fell to the ground and the victim was slashed in the arm as he fell, and the defendant's statement that he "had the right to respond, finally to this act of

aggression that was perpetrated against [him].” *Guthrie*, 194 W. Va. at 670, 461 S.E.2d at 176. The West Virginia Supreme Court of Appeals then found that all this was probative evidence of premeditation and deliberation. *Id.*

In his Brief Mr. Reed lists the evidence presented at trial relating to A.P. The evidence presented was as follows: A.P.’s direct testimony, 404(b) evidence from Jennifer Kinney of some conduct at a gas station, and 404(b) evidence from two Sears employees. (Appellant’s Brief at 33). Viewing this evidence in a light most favorable to the prosecution and crediting all inferences and credibility assessments in favor of the prosecution, Mr. Reed defeats the very argument he puts forth.

As in *Guthrie*, there is a plethora of evidence, when viewed most favorably to the Prosecution that any rational trier of fact could have found him guilty beyond a reasonable doubt.

III. PSYCHOLOGICAL RECORDS OF A.P. AND J.P.

In his brief, Mr. Reed asserts that the State was ordered to produce psychological records of A.P. and J.P. by an Order from November 1, 2002. Mr. Reed is mistaken in his assertion. The Order from November 1, 2002 directs the State to provide Mr. Reed with a report concerning the findings and conclusions of Dr. Maceiko and with any records relied upon by an expert with regard to A.P.⁸ (Record, Vol. I at 605-606). Dr. Maceiko was not asked to evaluate A.P. and therefore there were no records provided to Dr. Maceiko. Thus Dr. Maceiko did not rely upon any records. Further, Dr. Maceiko never testified at trial. These records (and the psychological records of J.P. and J.L.R.) were requested by Mr. Reed on February 6, 2001 in a Motion to Request Psychological, Medical, School, Juvenile Counseling

⁸ See Order entered December 18, 2002 from hearing held on November 1, 2002. (Record, Vol. I at 605-606).

Records and Juvenile Records. (Record, Vol. I at 315-321). A Supplemental Motion to Request Psychological, Medical, School, and Juvenile Counseling Records and Juvenile Records was filed by Mr. Reed on February 7, 2001 seeking the records of A.P., Sandra Mae Reed, J.P. and J.K. (Record, Vol. I at 384-385). The State filed a Response to these Motions on February 23, 2001 arguing that the records requested by Mr. Reed were not in the control of the State. (Record, Vol. I at 396-399). The report of Dr. Maceiko was disclosed to prior counsel of Mr. Reed, Stephen Herndon, at a hearing on November 13, 2002. (Record, Vol. II, Transcript of November 13, 2002 hearing at 5, lines 2-10).

IV. THE ALLEGED NON-DISCLOSURE OF ANY CRIMINAL HISTORIES OF A.P. AND J.P. WAS NOT PREJUDICIAL. MR. REED WAS NOT SURPRISED ON A MATERIAL ISSUE AND THE PREPARATION AND PRESENTATION OF HIS CASE WAS NOT HAMPERED. THUS, THE ALLEGED NON-DISCLOSURE WAS NOT FATAL TO THE STATE'S CASE.

STANDARD OF REVIEW

Non-disclosure of evidence pursuant to a court order is prejudicial when the defense is surprised on a material issue and where the failure to make the disclosure hampers the preparation and presentation of the defendant's case. *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982).

ARGUMENT

The failure of the prosecution to disclose evidence after a court grants a pre-trial discovery motion is fatal to the prosecution's case where the non-disclosure is prejudicial. *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982). Non-disclosure is prejudicial "where the defense is surprised on a material issue and where the failure to make the disclosure hampers the preparation and presentation of the defendant's case." *Id.* In *Hatfield*, the defendant was found guilty of First Degree Murder of his next-door neighbor. The neighbor rented an apartment from the defendant. On the day of the murder, the victim

discovered that the defendant had shut off the gas to the apartment. An argument ensued between the victim and the defendant cumulating in the shooting. As part of his appeal, the defendant argued that the Prosecution failed to disclose before trial the ownership of a pistol found several days after the murder had occurred. The gun was found beneath an old car seat under the victim's front porch. *Hatfield*, 169 W.Va. at 203. The defendant contended that if his counsel had known that the owner of the gun was someone other than the victim, he would not brought out the fact that the gun had been found. *Id.* The West Virginia Supreme Court of Appeals disagreed stating: "... the ownership by a third party of the gun ... cannot be deemed an exculpatory fact. The finding of the gun bore on the issue of defendant's claim of self-defense. It was the defendant's position that at the time of the shooting, he thought the victim had a gun. The claim of self-defense was not materially affected by who owned the gun allegedly used by the victim." *Id.*

Mr. Reed requested discovery pursuant to Rule 16 of the West Virginia Rules of Criminal Procedure in case number 01-F-01 on January 19, 2001. (Record, Vol. I at 85-89). The State requested reciprocal discovery and also provided Mr. Reed with its discovery disclosures on January 19, 2001. (Record, Vol. I at 90-92, 93-97). J.P. and A.P. were listed as witnesses in the State's Discovery Disclosure. The State supplemented discovery numerous times throughout the course of Mr. Reed's case. Mr. Reed was indicted in case number 04-F-70 for crimes against A.P., and the State provided discovery to Mr. Reed's attorney in open court. (Record, Vol. III at 34-38). A.P. and J.P. were also listed as witnesses in this disclosure. Throughout the course of Mr. Reed's case, no motion to compel was ever filed by any attorney of Mr. Reed seeking the criminal histories of A.P. and J.P. The first time any mention is made of the criminal records of A.P. and J.P. is in Mr. Reed's Petition for Appeal.

Like *Hatfield*, in the case now to be determined, the non-disclosure of the criminal histories, if any,

of A.P. and J.P. was not prejudicial to Mr. Reed. The criminal histories of A.P. and J.P. who were juveniles at the time of the allegations and trial were not material issues. They did not bear directly on Mr. Reed's guilt or innocence. At best, any criminal history would have impacted the credibility of A.P. and J.P., not the guilt or innocence of Mr. Reed. It is doubtful that a criminal conviction of A.P. or J.P. would have exculpated Mr. Reed. Also, it is hard to conceive how the lack of the criminal records of A.P. and J.P. hampered the presentation of Mr. Reed's case. The issue in Mr. Reed's case was whether he sexually assaulted the victims - not whether A.P. and J.P. had criminal convictions, as juveniles.

CONCLUSION

For at least ten years prior to being convicted, Mr. Reed sexually abused at least two different young girls. J.K., a juvenile, bore two children that were proven to be his by DNA evidence. No errors were committed at Mr. Reed's trial. Any objection to the admission of Detective Brown's deposition and the statements contained therein were waived when Mr. Reed's attorney failed to object to any questions asked by the State. Because Mr. Reed had representation at the deposition, any alleged errors on his attorney's part must be reviewed under an ineffective assistance of counsel standard - which is ordinarily not reviewable on direct appeal.

The alleged discovery violations were not prejudicial to Mr. Reed. Contrary to what Mr. Reed asserts in his Petition for Appeal and in his Brief, the State was never ordered to disclose the psychological records of A.P. and J.P. The State was merely ordered to disclose Dr. Maceiko's report and any records relied upon by an expert with regard to A.P. The failure of the State to disclose any possible criminal histories of A.P. and J.P. were not prejudicial to Mr. Reed. They did not surprise him on a material issue and did not hamper the preparation and presentation of Mr. Reed's case. It is hard to conceive how the

lack of criminal histories of A.P. and J.P. hampered Mr. Reed's defense.

Therefore, the verdict rendered by the jury should not be disturbed and Mr. Reed's sentence should be affirmed.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Scott R. Smith", written over a horizontal line.

Scott R. Smith
Prosecuting Attorney
Ohio County, West Virginia

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, PLAINTIFF BELOW,

APPELLEE,

APPEAL NO.: 34136

CASE NOS.:01-F-01

04-F-70

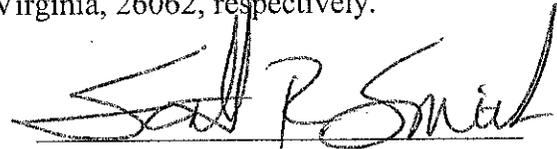
v.

RONALD REED, SR, DEFENDANT BELOW,

APPELLANT

CERTIFICATE OF SERVICE

Service of the foregoing *Reply of Appellee* was had upon the Appellant, Ronald Reed, Sr., by delivering a true copy thereof, to his attorneys, Christopher Scheetz and Edward Gillison, this 23rd day of October, 2008 by U.S. Mail, to their last known addresses of 2004 Eldedersville Road, Follansbee, West Virginia, 26037; 3139 West Street, Weirton, West Virginia, 26062, respectively.



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