

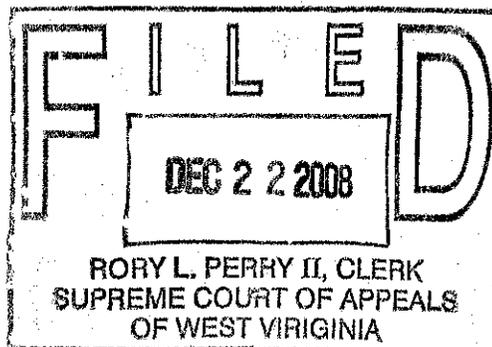
Appeal No. 34496

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,  
Appellee,

V.

RICHARD MALFREGEOT,  
Appellant.



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APPEAL FROM THE CIRCUIT COURT OF  
HARRISON COUNTY, WEST VIRGINIA  
CASE NO. 07-M-AP-4-2  
HONORABLE THOMAS A. BEDELL, PRESIDING

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BRIEF ON BEHALF OF APPELLANT,  
RICHARD MALFREGEOT

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**I. THE NATURE OF PROCEEDING  
AND RULINGS BELOW**

To the Honorable Justices of the Supreme Court of Appeals of the State of West Virginia:

The appellant, Richard Malfregeot, by Thomas G. Dyer and Mary Guy Dyer, his counsel, respectfully represents that he is aggrieved by the order of the Circuit Court of Harrison County, West Virginia, entered November 5, 2007, convicting him of the misdemeanor offense of stalking/harassment in violation of *West Virginia Code* §61-2-9a(a) at the conclusion of a non-jury trial.

The defendant-appellant was charged with stalking/harassment in the Magistrate Court of Harrison County, West Virginia, as a result of the investigation by Officer Mike Lemley of the Bridgeport Police Department pursuant to the complaint of Michael Longston, Sr., that his daughter, Lauren L.<sup>1</sup>, a student at Bridgeport Middle School, had been stalked and/or harassed by Richard Malfregeot, who was at that time a teacher and athletic coach at Bridgeport Middle School. A non-jury trial was held in the Magistrate Court of Harrison County, West Virginia, on May 2, 2007 and at the conclusion, the appellant was convicted of the misdemeanor offense of stalking/harassment by Magistrate Tammy Marple. The appellant was fined \$500.00, and sentenced to six months in the regional jail, which was suspended, and he was ordered to have no contact with the victim, Lauren L. for four years from the date of his conviction. On May 2, 2007, the appellant filed his Notice of Appeal with the circuit court with respect to his misdemeanor conviction. On October 3, 2007 a non-jury trial was held before the Honorable Thomas A. Bedell, Judge. By order entered November 5, 2007, the appellant was convicted of the misdemeanor offense of stalking/harassment and the circuit court sentenced him to six months incarceration from October 3, 2007, thereby giving him credit for all time previously served, and fined him \$500.00. The court ordered that the sentence of incarceration and fine be suspended and that the appellant be placed on unsupervised probation for a period of two years from October 3, 2007. On December 5, 2007 the appellant filed his Notice of Intent to Appeal. By order entered February 8, 2008, the time period for the appellant to file his Petition for Appeal was extended to May 5, 2008.

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<sup>1</sup> Due to the sensitive nature of the facts, the last names of all juveniles referred to herein will not be used, following the practice of this Court.

The appellant appeals the judgment and order of the Circuit Court entered November 5, 2007 convicting the appellant of stalking/harassment in violation of *West Virginia Code* §61-2-9a(a.).

## **II. RICHARD MALFREGEOT'S FINDING OF FACT**

During the 2005-2006 school year, the appellant Richard Malfregeot was employed by the Harrison County Board of Education as a teacher and coach at Bridgeport Middle School. He had been employed by the Board of Education for thirteen years and had coached numerous girls basketball and softball teams, all without any complaint or incident. (Tr. August 30, 2007 at 148-5.) Bridgeport Middle School is a "neighborhood" school. The teachers and students are friendly with each other. (Tr. August 30, 2007 at 114.) The teachers engage in academic and non-academic conversations with the students. (Tr. August 30, 2007 at 114.) Many teachers display photographs in their classrooms that students have given to them. (Tr. August 30, 2007 at 122, 124, 164, 169.) It is not unusual for students and teachers to hug each other or joke with one another. (Tr. August 30, 2007 at 167-8, 170.)

Not unlike most schools, when the class bell rang at Bridgeport Middle School, the teachers were required to stand in the hallways and assist in monitoring the students. (Tr. August 30, 2007 at 114-5.) The teachers were encouraged to engage and interact with the students. Mr. Malfregeot was required to monitor the hallway on both sides of his classroom between classes as were all teachers. (Tr. August 30, 2007 at 115.) The area that the appellant was required to monitor included the area where Lauren L.'s locker was located. (Tr. August 30, 2007 at 136, 144.)

The appellant, Richard Malfregeot, first met Lauren L. in the early fall of 2005, while on a football team bus trip. (Tr. August 30, 2007 at 11.) At that time he was an assistant coach and Lauren L. was a cheerleader. During the bus trip Mr. Malfregeot was seated directly behind Lauren L. and her best friend Chelsey E. (Tr. August 30, 2007 at 12.) Mr. Malfregeot was previously acquainted with Chelsey E. and during the bus trip he engaged in a conversation with Chelsey E. and Lauren L., as well as with many of the other students on the bus. (Tr. August 30, 2007 at 12.)

Thereafter, the appellant would often see Lauren L. between classes at her locker which was located outside of his classroom, or in the school lunchroom and when he did, he would engage her in conversation and joke with her as he did with many of the other students, male and female, at the school. On several occasions, he put his arm around her, an act which was not uncommon between teachers and students. (Tr. August 30, 2007 at 117.) At some point during the year, some friends of Lauren L. gave Mr. Malfregeot some photographs of them and Lauren L., which he put up in his classroom, until one of Lauren L.'s friends, Natalie L., took them down when Lauren L. told her that she didn't like her picture. (Tr. August 30, 2007 at 206.) Lauren L. and Mr. Malfregeot had a very friendly teacher-student relationship, not unlike the teacher-student relationship he had with other students including her best friend Chelsey E. (Tr. August 30, 2007 at 80, 88.) Mr. Malfregeot didn't treat Lauren L. any different than the other students. (Tr. August 30, 2007 at 80, 88, 144 and 157.)

Throughout the school year, Lauren L. was very friendly with Mr. Malfregeot and never told her best friends, her parents, the school principal or Mr. Malfregeot that he made her feel uncomfortable in any way. All of Mr. Malfregeot's interactions with

Lauren L. were at Bridgeport Middle School and never did any teacher or student, including Lauren L.'s best friends who had seen Lauren L. and Mr. Malfregeot talking together on numerous occasions, witness him engage in any behavior around Lauren L. that was inappropriate or outside the scope of a normal teacher-student relationship.

However, in April 2006, Mr. Malfregeot was at the school working at the concession stand during a basketball tournament when he met a young man that he soon discovered was Lauren L.'s brother. The two struck up a conversation and Lauren L.'s brother informed Mr. Malfregeot that Lauren L. "had a big crush" on a boy named Derek G. Mr. Malfregeot then said to Lauren L.'s brother, "let's call her and tell her Derek G. is at the gym". (Tr. August 30, 2007 at 195.) Mr. Malfregeot then asked Lauren L.'s brother for Lauren L.'s cell phone number and he placed a call to her. (Tr. August 30, 2007 at 69.) Lauren L. did not answer, but Mr. Malfregeot left a message identifying himself and informing Lauren L. that "Derek G. is at the middle school." (Tr. August 30, 2007 at 36-7.) Upon discovering the phone message, Lauren L. informed her parents. Her father immediately contacted the school principal who referred him to the school board where he registered a complaint. Lauren L.'s father thereafter contacted the Bridgeport City Police and requested an investigation. However, approximately one or two days after contacting school principal Carol Crawford, Lauren L. and Chelsey E. returned to her office to tell her that "It's okay so you don't have to do anything." (Tr. August 30, 2007 at 123.) Mrs. Crawford advised her that the investigation had already been initiated and could not be terminated. (Tr. August 30, 2007 at 123.) Following the investigation, the appellant was charged with the misdemeanor offense of stalking.

### **III. ASSIGNMENTS OF ERROR AND THE RULINGS OF THE COURT BELOW**

By order entered November 5, 2007, the appellant, Richard Malfregeot, was found guilty and convicted of the misdemeanor offense of stalking/harassment in violation of *West Virginia Code* §61-2-9a(a.) following a trial *de novo* held in front of the Honorable Thomas A. Bedell, Judge on August 30, 2007. At the conclusion of the trial, the court directed the parties to submit proposed findings of fact and conclusions of law with respect to the evidence presented at trial. The circuit court further ordered that a presentence investigation be conducted of the appellant.

On October 3, 2007, a hearing was convened for the purpose of pronouncing the court's rulings and orders resulting from the non-jury trial. During the hearing, the circuit court announced that "all of the facts alleged by the victim ... [had] been established beyond a reasonable doubt." (Tr. October 3, 2007 at 11.) The circuit court convicted the appellant on the basis that the appellant willfully and repeatedly followed the victim and that he had contact with her at her locker, and in the lunchroom, and that he had other contacts with her in and out of school. (Tr. October 3, 2007 at 13.) The circuit court further found that the appellant's conduct was intentional and willful and was such as would cause a reasonable person to be "distressed or concerned". (Tr. October 3, 2007 at 14.) The court concluded that the appellant was grooming the victim for some further relationship on some other level. (Tr. October 3, 2007 at 14-15.)

By order entered November 5, 2007, the court set forth further findings in support of its ruling and order. The court found that the appellant harassed Lauren L. by engaging in willful conduct directed toward her that caused Lauren L. mental and

emotional injury which included frequent regular contact with Lauren L. who was not one of the appellant's students; discussions with Lauren L. regarding personal non-school matters; placing his arm around Lauren L.; holding Lauren L.'s hand; playing with Lauren L.'s hair; rubbing Lauren L.'s shoulders; displaying photographs of Lauren L. in his classroom with one of the photographs depicting her in pajama-like clothing; refusing to remove the photograph in his classroom despite being requested to do so by Lauren L.; calling Lauren L. on her cell phone on a non-school day and leaving a message which could reasonably be construed as an enticement to come to the location where the appellant was located; and showing Lauren L. that he had saved her cell phone number on his phone. The court further found that the appellant "followed" Lauren L. by going to locations where he knew she was present even though she was not in any of his classes, and by calling her on her cell phone.

The appellant, Richard Malfregeot, respectfully submits that the Circuit Court of Harrison County, West Virginia, erred in convicting the appellant of the misdemeanor offense of stalking/harassment based upon the following:

- A. The evidence was insufficient to convict the appellant beyond a reasonable doubt of stalking/harassment in violation of *West Virginia Code* §61-2-9a(a.).
  1. The circuit court's findings of fact were clearly erroneous.
- B. The circuit court erred in applying the law to the facts.
  1. The petitioner did not "follow" Lauren L..
  2. The petitioner did not "harass" Lauren L..
    - a. The conduct of the petitioner was not willful conduct directed at Lauren L..
    - b. The actions of the petitioner would not cause a reasonable person mental injury or emotional distress.

c. The petitioner did not seek to establish a personal or social relationship with Lauren L..

**IV. POINTS AND AUTHORITIES  
RELIED UPON**

It is well established law in this State that “[a] criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments ... in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt.” Syl. Pt. 3, in part, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Further, “[t]he function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the appellant’s guilt beyond a reasonable doubt ... [therefore] the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.” Syl. Pt. 1 *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

In reviewing challenges to criminal convictions, the standard of review is dependant upon whether the particular challenge involves determinations involving the law, the facts, or a mixture of the two. Issues raised regarding questions of law are reviewed *de novo*. Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.* 194 W.Va. 138, 459 S.E.2d 415 (1995). A review of the final order and ultimate disposition by a circuit court is

based on an abuse of discretion standard and the underlying factual findings by the circuit court are reviewed using a clearly erroneous standard. Syl. Pt. 1 *Burnside v. Burnside*, 194 W.Va. 263, 460 S.E.2d 264 (1995). "However, ostensible findings of fact, which entail the application of law or constitute legal judgments which transcend ordinary factual determinations, must be reviewed *de novo*." Syl. Pt. 1, in part. *State ex rel. Cooper v. Caperton*, 196 W.Va. 208, 470 S.E.2d 162 (1996).

**A. THE EVIDENCE WAS INSUFFICIENT TO CONVICT THE APPELLANT BEYOND A REASONABLE DOUBT OF STALKING/HARASSMENT IN VIOLATION OF WEST VIRGINIA CODE §61-2-9a(a).**

*West Virginia Code §61-2-9a(a)* (stalking; harassment; penalties; definitions)

provides as follows:

"(a) Any person who willfully and repeatedly follows and harasses a person with whom he or she has or in the past has had or with whom he or she seeks to establish a personal or social relationship, whether or not the intention is reciprocated, a member of that person's immediate family, his or her current social companion, his or her professional counselor or attorney, is guilty of a misdemeanor and, upon conviction thereof, shall be incarcerated in the county or regional jail for not more than six months or fined not more than one thousand dollars, or both."

During the sentencing hearing held on October 3, 2007, the circuit court found that all of the facts alleged by the victim, Lauren L. had been proved beyond a reasonable doubt, that the appellant did not deny any of the facts although the appellant offered other explanations and other interpretations of his actions, and therefore, there were no facts in dispute. (Tr. October 3, 2007 at 11.) The circuit court further found the appellant willfully and repeatedly followed the victim, Lauren L. due to his contact with her at her locker, his contact with her in the lunch room, and other contacts with her in and out of school

(Tr. October 3, 2007 at 13) and that his conduct was willful and intentional and was such as would cause a reasonable person to be “distressed or concerned”. (Tr. October 3, 2007 at 14.) The court concluded in finding that the appellant was “grooming the victim for some further relationship on some other level.” (Tr. October 3, 2007 at 14-15.) The circuit court made numerous other findings of fact and conclusions of law in its November 5, 2007 order. The appellant would respectfully submit to this Court that the findings of fact made by the circuit court were clearly erroneous and that the evidence was insufficient to convict him of stalking/harassment in violation of *West Virginia Code* §61-2-9a(a).

**1. THE CIRCUIT COURT’S FINDINGS OF FACT WERE CLEARLY ERRONEOUS.**

Our Court has held that a “finding [of fact] is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the **entire evidence** [emphasis added] is left with a definite and firm conviction that a mistake has been committed.” *Phillips v. Fox*, 193 W.Va. 657, 661, 458 S.E.2d 327, 331 (1995), quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 295 68 S.Ct. 525, 542, 92 L.Ed 746, 766 (1948). The appellant would respectfully assert that the circuit court’s findings of fact in support of his conviction were clearly erroneous because the circuit court did not view them as part of the **entire evidence** before it and the court failed to take into consideration the context and setting in which the acts occurred as testified to by the witnesses.

The appellant respectfully alleges that the circuit court erred by making the following findings of fact which are clearly erroneous:

7. That upon first meeting the Defendant, the Defendant began discussing with the victim her boyfriend.

8. That after first meeting the Defendant, the Defendant began approaching the victim at school.

9. That after first meeting the victim, the Defendant began approaching her at school in the bus room, in the cafeteria, in the hallway, and at her locker.

10. That at the outset, the Defendant's contact with the victim was sporadic but that as the school year progressed, the Defendant began having contact with the victim on a daily basis, with such contact occurring several times per day.

12. That because the victim did not have the Defendant as a teacher, there was no legitimate reason for the Defendant to have such frequent contact with the victim.

14. That almost all contact between the victim and the Defendant was initiated by the Defendant.

15. That regardless of where the contact between the Defendant and victim took place, the Defendant would not discuss academic or school related issues with the victim during his contact with her, but that the Defendant would instead discuss personal matters such as the victim's boyfriend and the victim's appearance.

17. That the victim and other witnesses testified that other teachers did not go to the student's lockers on a daily basis.

18. That witnesses testified that teachers at the school did not discuss with the students the types of things that the Defendant discussed with the victim.

21. That the victim testified that the Defendant had taken photographs of her.

26. That the Defendant did not take all of the photographs that depicted the victim and which were displayed in the Defendant's classroom. However, the Defendant had obtained several photographs depicting the victim.

30. That the victim testified that once she was made aware of the photographs being displayed in the Defendant's classroom, she became upset.

31. That the Defendant was asked to remove the photographs of the victim from the Defendant's classroom, but that the Defendant refused to do so.

33. That the photographs were eventually removed from the Defendant's classroom by another

student because the Defendant would not remove the photographs himself.

37. That the victim never gave the Defendant permission to place his arm around the victim.

47. That the Defendant told the victim's younger brother that he would need to first speak with the victim to make sure that it was alright for the victim's younger brother to have the football.

All of the conduct of the appellant referred to herein, and alleged by Lauren L., occurred at Bridgeport Middle School in Bridgeport, Harrison County, West Virginia, during regular school hours. The circuit court failed to view the evidence as a whole and take into consideration the context and setting within which the acts occurred and the daily routine and climate present at Bridgeport Middle School as was testified to by the teachers called as witnesses, as well as the school principal.

Carol Crawford, the principal of Bridgeport Middle School; Richard Pratt, an eighth grade West Virginia studies teacher at Bridgeport Middle School; Alice Osborne, a teacher at Bridgeport Middle School; Rita Robbins, a teacher at Bridgeport Middle School; Tom Fogg, a teacher at Bridgeport High School and football coach; and Beverly Fogg, a teacher at Bridgeport Middle School testified on behalf of the appellant. The testimony of all of these teachers set the stage upon which the evidence before the court must be viewed and upon which the evidence must be taken in context.

The atmosphere during the school day at Bridgeport Middle School is happy, cordial, and sociable. The teachers engage in frequent dialogue with the students with respect to school and non-school activities, and the teachers, as well as the students are very affectionate. School principal Carol Crawford testified that it was not unusual for teachers to put their arm around a student (Tr. August 30, 2007 at 117,) and that all of the

middle school children and teachers are “engaging” and the atmosphere is very friendly. (Tr. August 30, 2007 at 14.) Principal Carol Crawford testified that she had, in the past, seen the appellant joking with students (Tr. August 30, 2007 at 116) and teacher Tom Fogg testified that both he and the appellant had a reputation for being a jokester/prankster. (Tr. August 30, 2007 at 171-72.) Mrs. Crawford also testified that it was common for the teachers to have pictures of the students on the board in their rooms and that students often give her pictures which they expected would be put up in the classroom. (Tr. August 30, 2007 at 122.) Teacher Richard Pratt testified that the teachers are constantly interacting with the students all of the time. (Tr. August 30, 2007 at 137.) Teacher Tom Fogg testified that it was important to develop a rapport with the students because the students can learn better if they are relaxed and they are more receptive to what is said in the classroom. (Tr. August 30, 2007 at 172.) In fact, Mr. Fogg testified that teachers develop a rapport with **all** students and not only the students in the teacher’s class but with students that they see in the hallway, whether or not they know their names. (Tr. August 30, 2007 at 174-75.) The facts before the circuit court must be viewed in the context of the setting at Bridgeport Middle School, because it is within this setting that the State alleged and the court ultimately convicted the appellant of stalking and harassing Lauren L.

The appellant would respectfully contend, preliminarily, that many, if not most of the acts alleged in the findings of fact made by the circuit court and which are ultimately used to support the court’s conclusions of law, could have been made by **any** student. The appellant was a teacher and coach at the school attended by Lauren L. The evidence established that the appellant treated Lauren L., in most regards, like any other student at

Bridgeport Middle School. In fact, her best friend, Chelsey E. testified that the appellant did not treat Lauren L. any different than the other students. (Tr. August 30, 2007 at 80.) The appellant and Lauren L. had nothing more than a teacher-student relationship. The appellant spoke to Lauren L. in the hallway, at her locker, in the lunchroom, and at school activities. He spoke with her about school and non-school related topics, as did the other teachers. All acts alleged to have been committed by the appellant were on school property. He hugged her which was common between the teachers and students at Bridgeport Middle School. He asked her to type a football letter for him which was not unusual or inappropriate for a teacher to do. The circuit court has taken all of these facts out of context and therefore its findings are erroneous.

The court's findings numbers 7, 8, 9, 10, 12, 14, 15, 17, 18, and 37 are all statements of fact related to the appellant's behavior and conduct in the context of being a teacher at Lauren L.'s school. It was undisputed that Lauren L. met the appellant on a bus trip. It was further undisputed that after meeting Lauren L., the appellant throughout the year, spoke with her more frequently. That is not unusual, that is human nature. It was erroneous of the court to find that the interchanges between the appellant and Lauren L. occurred because the appellant "approached" her. The fact is that the evidence only established that the appellant was present in the same area, i.e. the hallway or the lunchroom. The appellant did not "approach" Lauren L. any more or any differently than he "approached" other students.

A significant portion of the State's allegations and the factual findings of the court are based on the alleged conduct of the appellant in frequently going to or being at Lauren L.'s locker. The State failed to present any testimony with respect to the location

of her locker in relationship to the defendant-appellant's classroom. However, the undisputed testimony presented in the appellant's case was that Lauren L.'s locker was several yards from the appellant's classroom. (Tr. August 30, 2007 at 115.) The teachers at Bridgeport Middle School have the responsibility of monitoring the hallways between classes, both to the right and to the left of the classroom. (Tr. August 30, 2007 at 115.) Lauren L.'s locker was within the appellant's area of responsibility. (Tr. August 30, 2007 at 129-30.) No witness testified that they ever saw the appellant engage in any inappropriate conduct with Lauren L. during the time period between classes or at any time. In fact, teacher Richard Pratt whose classroom was four doors down from that of the appellant and who monitored the same area as the appellant testified that he never saw the appellant interacting with Lauren L., that he never saw him following her, and that he never saw him speak to her. (Tr. August 30, 2007 at 136-7.)

It is clear from the evidence presented that the appellant's presence at or near the locker of Lauren L. was due to its location near the appellant's classroom and within the appellant's area of responsibility. The appellant did not follow Lauren L. and he did not seek her out at her locker. Although he may have "approached" Lauren L.'s locker by standing near it, it cannot reasonably be concluded within the factual context that the appellant's actions towards Lauren L. were any different than his actions with respect to the other students, and the State did not present any evidence to the contrary. In fact, Lauren L.'s best friend Chelsey E. testified that the appellant did not treat Lauren L. any different than the other students, (Tr. August 30, 2007 at 80) and it did not appear to her as though Lauren L. was being harassed. Further, best friend Natalie L. testified that Lauren L. was more friendly with the appellant than with the other teachers (Tr. August

30, 2007 at 201,) and that she never saw any inappropriate conduct. (Tr. August 30, 2007 at 208.)

With respect to the conduct alleged to have occurred in the lunchroom, teacher Jim Richter, who was one of the two lunchroom supervisors, testified that although the appellant did not eat in the lunchroom, he often walked through on his way to Subway or for a walk (Tr. August 30, 2007 at 156), and that he had seen the appellant stop by the lunchroom table in which Lauren L., as well as others, were seated on a couple of occasions. (Tr. August 30, 2007 at 158.) During those times, the appellant would not speak with anyone in particular (Tr. August 30, 2007 at 158), and it did not appear to him that the appellant favored the female students over the male students and he had never seen the appellant flirting with any of the female students. (Tr. August 30, 2007 at 157.) Further there had been no complaints or concerns voiced to him by any of the students, teachers or parents. (Tr. August 30, 2007 at 159.)

It was clearly erroneous for the court to find that the appellant “approached” Lauren L. at her locker and in the lunchroom, that he initiated the conduct, that he had no legitimate reason for having contact and that it was inappropriate to discuss non-academic matter.<sup>2</sup>

With respect to the findings in paragraphs 21, 26, 30, 31, and 33, all of which refer to the photographs found to be on display in the appellant’s classroom, the appellant believes that these facts are taken out of the context and must be viewed by the court within the context and setting of Bridgeport Middle School. Mrs. Crawford, the principal at Bridgeport Middle School testified that it was common for teachers to have pictures of the students on the board in their rooms and that students often gave pictures to the

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<sup>2</sup> As found by the court in paragraph numbers 7, 8, 9, 10, 12, 14, 15, 17, and 18.

teachers which they expected would be put up in the classroom. (Tr. August 30, 2007 at 122.) The photographs at issue were given to the appellant by a friend of Lauren L. (Tr. August 30, 2007 at 62), and the appellant did not put the pictures up in his classroom.<sup>3</sup> The photographs were ultimately taken down by Natalie L. (Tr. August 30, 2007 at 206), because Lauren L. did not like her picture, and so she did not want the photographs displayed in the classroom. (Tr. August 30, 2007 at 206.) It was clearly erroneous for the court to make these factual findings within the context of all of the evidence.

The court's factual findings 21 and 26 (that the appellant had taken photographs of the victim which were displayed in his classroom), are also clearly erroneous. It was undisputed that the appellant did not take any photographs of Lauren L. (Tr. August 30, 2007 at 188.) Student Taylor L. used the appellant's disposable camera to take approximately four photographs during a gathering of football players and cheerleaders at Damon's restaurant. Lauren L. was not in any of the photographs. (Tr. August 30, 2007 at 187.)

With respect to findings number 37, 40, and 41, (that the appellant did not have permission to put his arm around Lauren L., play with her hair, or rub her shoulders), Chelsey E. testified that the appellant put his arm around Lauren L. **and** Chelsey E., and school principal Carol Crawford testified that it was not unusual for teachers to put their arms around students. (Tr. August 30, 2007 at 117.) There was no requirement or need to "ask permission" and there was no allegation that the appellant did any of these acts in private. The appellant put his arm around Lauren L. in front of the other students and teachers and his act was no different than that of other teachers and students. (Tr. August 30, 2007 at 117.) It is unreasonable to assume that any teacher would need "permission"

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<sup>3</sup> The photographs were put up by a friend of Lauren L.

under the circumstances and within a school setting. Likewise, although there was conflicting evidence with respect to whether or not the appellant rubbed Lauren L.'s shoulders and played with her hair, which the appellant denied, there was no requirement that the appellant ask for permission.

Lastly, with respect to finding number 47 (that the appellant spoke with Lauren L.'s brother about using a football), the best evidence of the circumstances underlying the phone call would be the testimony of Michael L., the younger brother of Lauren L. Michael L. testified that on April 2, 2006, he was with some of his friends at Bridgeport Middle School walking around. (Tr. August 30, 2007 at 68.) The appellant was working at the concession stand. (Tr. August 30, 2007 at 69.) The appellant had been told that Lauren L. had a crush on a fellow student named Derek G., and it was common knowledge that she had a crush on him. (Tr. August 30, 2007 at 72.) The appellant asked Michael L. for Lauren L.'s cell phone number "because [of] something about Derek [G.]" which he gave him. (Tr. August 30, 2007 at 69.) Although Michael L. originally testified that the appellant wanted Lauren L.'s phone number because of something to do with Derek G., he changed his testimony and said that the purpose was to ask for a football. (Tr. August 30, 2007 at 70.) The appellant made the phone call, but didn't reach Lauren L., so he left a message that Derek G. was at the gym. The appellant did not secretly make this call or attempt to hide it in any way.<sup>4</sup> These findings by the circuit court were clearly erroneous.

This Court has held that the findings of fact by a circuit court are reviewed using a clearly erroneous standard. Syl. Pt. 1, *Burnside v. Burnside*, 194 W.Va. 263, 460 S.E.2d

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<sup>4</sup> The appellant testified that it was poor judgment to make the phone call and that he regretted making it. (Tr. August 30, 2007 at 199.)

264 (1995). When viewing all of the evidence and the entire record there can be no doubt that the findings of the circuit court were clearly erroneous and that a mistake has been committed.

**B. THE CIRCUIT COURT ERRED IN APPLYING THE LAW TO THE FACTS.**

Although the appellant would respectfully contend that findings of fact made by the circuit court were clearly erroneous under the standard set by this Court and by the United States Supreme Court, even if the findings of fact were found by this Court to not be clearly erroneous, and to be an accurate statement of fact, the State of West Virginia did not establish all elements of the crime of stalking/harassment beyond a reasonable doubt.

The circuit court erred in making the following conclusions of law:

73. That the conduct of the Defendant directed towards the victim was not accidental and was willful;
74. That the Defendant's conduct of having frequent and regular contact with the victim at her locker was willful and intentional and that such proposition is supported by the fact that the defendant was the individual who initiated such contact;
85. That the Defendant "followed" the victim by regularly going to locations where the victim was present to have contact with the victim and that this proposition is supported by the fact that the defendant did not have the victim in any of his classes (i.e. there was no reason for the Defendant to have such regular contact with the victim).
86. That the Defendant "followed" the victim by calling the victim's cell phone and leaving a message that could reasonably be construed as an enticement to the victim to come to the location where the Defendant was present.
89. That the Defendant's conduct was designed to facilitate a social and personal relationship with the victim as demonstrated by the Defendant's frequent contact with the victim, the Defendant's physical contact with the victim, the Defendant's discussion with the victim of personal non-school related matters, and the Defendant's actions of obtaining and using the victim's cell phone

number for the purpose of leaving a message on the victim's cell phone which can reasonably be construed as an enticement for the victim to come to the location where the Defendant was present.

90. That the victim did not engage in conduct that evidences that she reciprocated the Defendant's attempts to establish a social and personal relationship with the Defendant.

91. That the victim did not give the Defendant permission to have physical contact with her and she attempted to discourage the Defendant from continuing to do so by way of physical gestures and body language.

92. That the victim did not give the Defendant permission to come to her locker on an almost daily basis.

The essential elements of the crime of stalking/harassment as set forth in *West Virginia Code* §61-2-9a(a.) can be summarized as being that the defendant-appellant (1) willfully and repeatedly follows **and** harasses a person; and (2) the appellant must seek to establish a personal or social relationship with such person.

#### **1. THE APPELLANT DID NOT "FOLLOW" LAUREN L.**

The lower court found that the appellant willfully "followed" Lauren L. by his acts in regularly going to locations where she was present in order to have contact with her (¶85, November 5, 2007 order) and by calling Lauren L.'s cell phone and leaving a message (¶86 November 5, 2007). It was error of the court to find as a matter of law that the appellant "followed" Lauren L.

It goes without saying that during the school day, the appellant was present at locations where Lauren L. was present, such as at or near her locker, and in the lunchroom. However, the appellant did not "follow" her to these locations. The appellant was present in those locations solely and exclusively due to his employment as a teacher at Bridgeport Middle School and the nature of his responsibilities as such, in

particular his responsibility to monitor the area around his classroom which resulted in him being near and/or at Lauren L.'s locker and his presence in the lunchroom, during lunch, when he would occasionally pass through the lunchroom. The evidence was undisputed that he did not single out Lauren L. at any time, but spoke with other students in the same area.

It is difficult to understand the court's reasoning in its further conclusion that the appellant "followed" Lauren L. by calling her and leaving her a message on her cell phone. The appellant did not make the call in any attempt to entice her to come to the school or to come see him, but rather called her in the presence of her own brother, only to tease her about Derek G. (Tr. August 30, 2007 at 195.) The court's conclusion, as a matter of law, would seem to defy the basic principles of deductive reasoning.

The application of law by the circuit court to the facts testified to by the witnesses was clearly erroneous because the appellant could not have been found to "follow" Lauren L. under the facts in evidence, and therefore the State did not prove all of the essential elements of stalking/harassment.

## **2. THE APPELLANT DID NOT "HARASS" LAUREN L.**

Further, the State did not establish that the appellant "harassed" Lauren L. *West Virginia Code* §61-2-9a(g)(1) defines the term "harasses" as "willful conduct directed at a specific person or person which would cause a reasonable person mental injury or emotional distress".

### **a. The conduct of the appellant was not willful conduct directed at Lauren L.**

The circuit court concluded as a matter of law that the appellant's conduct directed at Lauren L. was not accidental but was willful. (¶73 November 5, 2007 order.)

If taken in the context of all of the testimony and evidence before the court, the conduct of the appellant was not willful and it was not directed at Lauren L.

There was no evidence that the actions of the appellant were **directed at Lauren L.**, or that his actions were any different in regard to Lauren L. than they were with other students. In fact, the testimony before the court was that the appellant did not treat Lauren L. any differently than the other students and that he did seek or single her out.<sup>5</sup> (Tr. August 30, 2007 at 80.) Although the appellant would concede that his act in calling her on her cell phone and saving her phone number for a period of time was directed at her, as was his act in placing his hand on her shoulder and flipping her hair back, these few isolated instances were the **only** times when his conduct was directed specifically at Lauren L., and **even then** they were not done for the purpose of harassing her. The court failed to view these acts within the context in which they were performed.<sup>6</sup> Likewise, the appellant's acts in speaking with Lauren L. at the locker, in speaking with her in the lunchroom, in putting photographs up in his classroom and in putting his arm around her (as well as her friend Chelsey E.) was not conduct directed specifically at Lauren L. but was conduct engaged in generally, with all of the students, and it was **no different** than that of other teachers with their students.

b. The actions of the appellant would not cause a reasonable person mental injury or emotional distress.

The circuit court found that the evidence established that Lauren L. had suffered mental injury and emotional harm based on the testimony of Lauren L., her father, and

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<sup>5</sup> The investigating officer, Detective Mike Lemley of the Bridgeport Police Department admitted that the only difference between how Richard Malfregeot treated Lauren L. and how he treated Chelsey E. was that he didn't call Chelsey E. (Tr. August 30, 2007 at 108.)

<sup>6</sup> Teacher Alice Osborne testified that she sometimes will put her hand on a students back or shoulder when leaning over them to show them something or to point to something. (Tr. August 30, 2007 at 145.)

her friends. (¶88 November 5, 2007 order.) However, the State failed to present any evidence whatsoever as to whether or not a “reasonable” person would have suffered mental injury or emotional distress under the circumstances alleged by the State. The appellant would respectfully submit that a reasonable person would not have suffered mental injury or emotional distress<sup>7</sup> and in any event, the State of West Virginia failed to prove beyond a reasonable doubt this essential element of the crime. Further, contrary to the court’s finding as a matter of law that Lauren L. suffered mental injury and emotional harm, Principal Carol Crawford testified that one or two days after Lauren L.’s father contacted her about the phone call made by the appellant, Laura L. and Chelsey E. came to her office to tell her that “it’s okay you don’t have to do anything.” (Tr. August 30, 2007 at 123.) Under those circumstances it is not reasonable to conclude that Lauren L. had suffered from any mental injury or emotional distress. The court’s conclusion as a matter of law that the appellant harassed Lauren L. is clearly erroneous.

c. The appellant did not seek to establish a personal relationship with Lauren L.

The State did not present any evidence to show that the appellant sought to establish a personal or social relationship with Lauren L. in excess of the teacher/student relationship or in excess of the relationships between the other teachers who testified at trial and their students. In fact, the evidence before the court was that all of the actions of the appellant were no different than the actions of other teachers at Bridgeport Middle School, and that the appellant did not treat Lauren L. any differently than he treated the other students.

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<sup>7</sup> Detective Mike Lemley testified that the appellant treated Chelsey E. in the same way and manner as he treated Lauren L. Chelsey E. did not suffer emotional distress or mental injury.

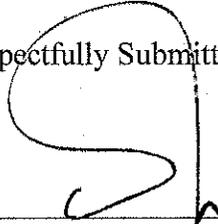
The circuit court failed to properly apply the law to the facts of this case in finding that the acts of the appellant constituted the elements of the crime of stalking/harassment and in particular the elements of "follows," and "harasses".

**V. CONCLUSION**

For the foregoing reasons, the appellant, Richard Malfregeot, respectfully requests that the verdict of the circuit court be overturned, that judgment be entered in his favor and such other and further relief as the Supreme Court of Appeals deems appropriate.

Dated this 19<sup>th</sup> day of December, 2008.

Respectfully Submitted,

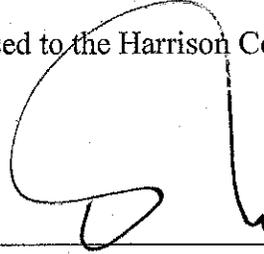


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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of December, 2008, I served the foregoing Brief on Behalf of the Appellant, Richard Malfregeot upon James Armstrong, Assistant Prosecuting Attorney for Harrison County by depositing a true copy thereof in the United States mail, postage prepaid, in envelopes addressed to the Harrison County Courthouse, Clarksburg, West Virginia, 26301.



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