
NO. 35133

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

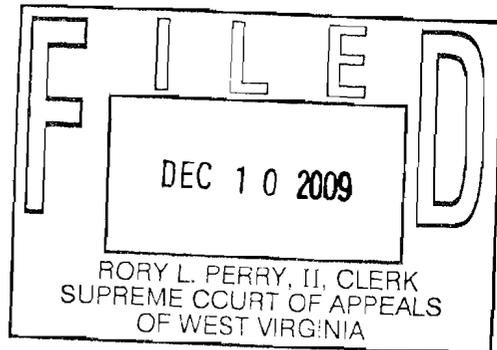
STATE OF WEST VIRGINIA,

Appellee,

v.

DARRELL EUGENE SMITH,

Appellant.



BRIEF OF APPELLEE STATE OF WEST VIRGINIA

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

ROBERT D. GOLDBERG
ASSISTANT ATTORNEY GENERAL
State Bar No. 7370
State Capitol, Room 26-E
Charleston, West Virginia 25305
(304) 558-2021

Counsel for Appellee

TABLE OF CONTENTS

	Page
I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW	1
II. STATEMENT OF FACTS	3
III. ARGUMENT	7
A. APPELLANT WAS NOT ENTITLED, AS A MATTER OF LAW, TO A PRETRIAL TAIN T HEARING	7
1. The Standard of Review	7
2. Discussion	8
B. WEST VIRGINIA DOES NOT RECOGNIZE PRETRIAL TAIN T HEARINGS	11
C. WEST VIRGINIA SHOULD NOT UTILIZE PRETRIAL TAIN T HEARINGS	12
D. SINCE THERE WAS NO MANIFEST NECESSITY THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION FOR A MISTRIAL WAS REASONABLE	15
1. Standard of Review	15
2. Discussion	15
E. THE APPELLANT HAS NOT DEMONSTRATED A MANIFEST NECESSITY FOR A MISTRIAL	17
IV. CONCLUSION	19

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Billingsly v. State</i> , 69 P.3d 390 (Wyo. 2003)	12
<i>In re Cesar L.</i> , 221 W. Va. 249, 654 S.E.2d 373 (2007)	2
<i>Colorado v. Connelly</i> , 479 U.S. 157 (1986)	14
<i>Pendleton v. Commonwealth</i> , 83 S.W.3d 522 (Ky. 2002)	12
<i>Porter v. Ferguson</i> , 174 W. Va. 253, 324 S.E.2d 397 (1984)	17, 18
<i>State ex. rel. Bailes v. Jolliffe</i> , 208 W. Va. 481, 541 S.E.2d 571 (2000)	18
<i>State v. A. Gross</i> , 577 A.2d 806 (N.J. 1990)	9
<i>State v. Cecil</i> , 221 W. Va. 495, 655 S.E.2d 517 (2007)	14
<i>State v. Edward Charles L.</i> , 183 W. Va. 641, 398 S.E.2d 123 (1990)	13, 14, 15
<i>State v. Guthrie</i> , 194 W. Va. 657, 461 S.E.2d 163 (1995)	15
<i>State v. Little</i> , 120 W. Va. 213, 197 S.E. 626 (1938)	17
<i>State v. Lola Mae C.</i> , 185 W. Va. 452, 408 S.E.2d 31 (1991)	14
<i>State v. Michael H.</i> , 970 A.2d 113 (Conn. 2009)	2, 9
<i>State v. Michaels</i> , 642 A.2d 1372 (N.J. 1994)	<i>passim</i>
<i>State v. Williams</i> , 172 W. Va. 295, 305 S.E.2d 251 (1983)	15
STATUTES:	
W. Va. Code § 61-8B-7(a)(1)	1
W. Va. Code § 61-8D-5	1, 14

OTHER:

Myers, John E.B. Myers, *Taint Hearings for Child Witnesses? A Step
in the Wrong Direction*, 46 Baylor L. Rev. 873, 917 (1994) 10, 12, 13

W. Va. R. Evid. 404(b) 17, 18

W. Va. R. Evid. 601 11

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Appellee,

v.

DARRELL EUGENE SMITH,

Appellant.

BRIEF OF APPELLEE STATE OF WEST VIRGINIA

I.

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

Appellant Darrell Eugene Smith, defendant below (hereafter "Appellant"), was convicted of five counts of Sexual Abuse By a Custodian,¹ and two counts of First Degree Sexual Abuse,² following a jury trial occurring between July 22-24, 2008, in the Circuit Court of Kanawha County, West Virginia, the Honorable Jennifer Bailey presiding. By order entered November 1, 2008, the court sentenced the Appellant to 30 to 60 years in the State penitentiary. (R. at 144-49.) Appellant's appeal is predicated upon the trial court's sentencing order.

The Appellant contends that the trial court deprived him of his due process rights when it refused to afford him a procedural mechanism--a pretrial "taint" hearing. This hearing was allegedly

¹W. Va. Code § 61-8D-5.

²W. Va. Code § 61-8B-7(a)(1).

necessary to test the reliability³ of the juvenile victims' testimony. Appellant's position rests on a New Jersey case, *State v. Michaels*, 642 A.2d 1372 (N.J. 1994), rejected by a majority of other jurisdictions. See *State v. Michael H.*, 970 A.2d 113, 121 (Conn. 2009) ("Other jurisdictions have received *Michaels* with mixed results. The majority of jurisdictions have rejected the *Michaels* approach on the ground that existing procedures that address the competency and credibility of witnesses are adequate to deal with concerns regarding child testimony.").

The Appellant also claims that he was entitled to a mistrial when one of the witnesses, B.S.,⁴ testified that the Appellant had abused her sister A.S.:

Q: All right. What about your grandparents, Gene and Lee Ann? Are you close to them now?

A: No, sir.

Q: Why is that? Do you know?

A: Because my grandfather hurt me and my two sisters.

Q: How did your grandfather hurt you? What do you mean?

A: He molested me and my two sisters, N.[S.] and A[.S.]⁵

(Tr. 189, July 22, 2008.)

This one-time exchange took place at the beginning of the trial. Defense counsel moved for a mistrial, and objected to a curative instruction. (Tr. 191, July 22, 2008.) Within its proper context

³Defense counsel was afforded a full and fair opportunity to cross-examine all of the State's witnesses, including the victims, at trial. Defense also called their own child psychologist, Dr. Fred Krieg, who covered all of the issues Appellant intended to explore at the "taint" hearing.

⁴Pursuant to this Court's precedent counsel for the Appellee will use the victim's initials. *In re Cesar L.*, 221 W. Va. 249, 252 n.1, 654 S.E.2d 373, 376 n.1 (2007).

⁵The Appellant was charged with molesting B.S. and N.S., not A.S. A.S. refused to come forward when asked to testify for the State. The defense did not call her.

it is clear that counsel for the State did not deliberately elicit this information from B.S. (*Id.*) The trial court ruled that the testimony could be cured by further limiting questions by the State. (Tr. 192-93, July 22, 2008.) During this questioning, B.S. testified that she had never seen her grandfather abuse either of her sisters. (Tr. 193-94, July 22, 2008.)

II.

STATEMENT OF FACTS

A reasonable jury could have found that the 60-year-old Appellant repeatedly sexually assaulted his two granddaughters, 14-yr-old N.S. and 11-year-old B.S. B.S. testified that the abuse began two years before she reported it and occurred every other weekend. (Tr. 198, July 22, 2008.) When asked why she waited, B.S. said that she was afraid of her grandfather.⁶ (Tr. 199, July 22, 2008.) B.S. testified that the Appellant touched her vagina and breasts with his hand. (Tr. 194, July 22, 2008.) He also placed her hand on his penis.⁷ (Tr. 197, July 22, 2008.) These incidents occurred in Appellant's bedroom. (Tr. 195, July 22, 2008.)

B.S. first told a friend of hers after the friend recounted a similar experience with her father.⁸ (Tr. 207-08, July 22, 2008.) After listening to B.S. her friend told her that she needed to speak with an adult. On November 7, 2005, B.S. approached her school counselor, who, upon hearing about

⁶As a result of her report B.S. was ostracized by her church community. (Tr. 201, July 22, 2008.) Her relationship with her paternal grandmother, the Appellant's wife, also became nonexistent. (*Id.*)

⁷B.S. referred to her vagina and Appellant's penis as private areas. (Tr. 197, July 22, 2008.)

⁸Clearly, B.S. felt she could confide in her friend who had undergone the same traumatic experience.

B.S.'s experiences, set up a meeting with B.S.'s mother, Anita Smith, and the school principal.⁹ (Tr. 199, 203, 243, July 22, 2008.) On November 7, 2005, B.S. and N.S. were interviewed by CPS worker Jeff Sprouse. (Tr. 117, July 23, 2008.) Two months later both she and her sister were interviewed by Dunbar Police Sergeant W.M. Moss. (Tr. 123, July 23, 2008.)

Upon hearing B.S.'s revelations, Ms. Smith approached her older daughter N.S. and asked her if anything had happened between her and her grandfather.¹⁰ (Tr. 153, July 23, 2008.) N.S. told her mother that her grandfather had molested her during weekend sleepovers at his home.¹¹ At trial N.S.¹² testified that the Appellant repeatedly touched her breasts and vagina which he penetrated with his finger. These assaults occurred when she was between 12 and 14. (Tr. 218, 222, July 22, 2008.) The Appellant also forced N.S. to touch his penis with both her hands and her mouth. (Tr. 219-20, July 22, 2008.) The Appellant ejaculated onto her face. (Tr. 220, July 22, 2008.)

Although the Appellant would have this Court believe that B.S. and N.S. lived in a "bizarre and perverse atmosphere" littered with sex toys, and pornography and supervised by parents who demonstrated a penchant for lewdness, the jury found otherwise. (Tr. 258, July 22, 2008.) Their finding was entirely reasonable. Both victims testified that their allegations tore their family apart,

⁹B.S. testified that the last time the Appellant molested her was two weeks before she came forward. She was eleven at the time. (Tr. 203, July 22, 2008.)

¹⁰The Appellant claims that these allegations were made up, in part, when he offered to pay for his son John Smith's divorce from his then-wife Anita. (Tr. 89-90, July 23, 2008.) The State called the Appellant's son as a rebuttal witness. Mr. Smith testified that his father had made the offer years before the allegations. (Tr. 192, July 23, 2008.) He could not recall him making a second offer.

¹¹Taking into account the non-suggestive nature of Anita's question, the Appellant's own expert called the nature of N.S.'s revelations "important." (Tr. 153, July 23, 2008.)

¹²N.S. was 17 at the time of the trial. (Tr. 215, July 22, 2008.) She was 15 when she first came forward. (Tr. 222, July 22, 2008.)

with many of the Appellant's family members and church friends siding with him.¹³ (Tr. 201-02, 222, 246, 248, July 22, 2008.) The majority of defense witnesses were related to the Appellant. Defense witness Staci Kirk visited the victims' household twice. The Appellant was her husband's uncle. (Tr. 31, July 23, 2008.) She claimed that the victims' parents openly discussed adult book stores and sex toys. (Tr. 33-34, July 23, 2008.) On cross-examination she admitted that she had not seen the victims or their parents until after the victims came forward with their allegations.

Yvonne Whitlock, the Appellant's sister-in-law⁴, testified that the only topic of conversation at the victims' home was sex.¹⁵ (Tr. 43, July 23, 2008.) Nancy Saunders,¹⁶ the Appellant's sister,

¹³According to B.S. the Appellant's relatives all sided with him. (Tr. 202, July 22, 2008.)

¹⁴Her sister was the Appellant's wife. (Tr. 48, July 23, 2008.)

¹⁵As was brought out in cross-examination:

Q: Every time you were there?

A: I would have to say probably.

Q: Probably every time it's just talk about –

A: Well, it was a common thing.

Q: – sex, sex, sex?

(Tr. 47, July 23, 2008.)

¹⁶The victim's mother Anita testified that Ms. Saunders was in her home once, and that she never got past the living room. (Tr. 260, July 23, 2008.)

testified that she had been to the victims' home several times.¹⁷ She claimed that the victims' parents cussed and talked sex¹⁸ in front of their children. (Tr. 66-67, July 23, 2008.)

B.S. denied allegations that her home had a sexually charged atmosphere.¹⁹ (Tr. 204, July 22, 2008.) She conceded that her father sometimes made off-color jokes and that sexual talk would go around the house, but she never described her home life as "sex, sex, sex" and emphatically denied that her parents exposed her to pornography or any other type of sexually explicit material. (Tr. 205, July 22, 2008.) Both B.S.'s mother, Anita, and her father, the Appellant's son, also denied that their children were raised in a sexually charged atmosphere. (Tr. 248-49, 258, July 22, 2008; Tr. 189-90, July 23, 2008.)

Nor is there any evidence that the victims were neglected by their parents. Both mother and father worked.²⁰ B.S. testified that she had cancer since she was seven or eight years old. (Tr. 209, July 22, 2008.) Her parents discovered she was seriously ill when, for two weeks, B.S. could only get out of bed to go to the bathroom.²¹ Her mother took her to Thomas Memorial Hospital which transferred her to Women's and Children's where she was diagnosed with Lymphoma. (Tr. 210, July 22, 2008.) There is no evidence that the timing of B.S.'s treatment extended her recovery

¹⁷She could not recall the street name. (Tr. 66, July 23, 2008.)

¹⁸Neither she, nor any of the other witnesses specifically recounted exactly what was allegedly said, or how it resulted in a sexually charged atmosphere.

¹⁹The State never questioned N.S. about this.

²⁰If B.S. had to wake up at 6:30 a.m. to take care of her younger sisters it was because her parents worked, not because they enjoyed their sleep. In fact, the Appellant's own expert claimed that B.S.'s characterization of her home life as a "living nightmare" was irrelevant to the sexual assault charges. (Tr. 118, July 23, 2008.)

²¹There is no evidence that B.S.'s parents neglected her during this two-week period or that they knew she was seriously ill until they took her to the hospital.

period. There is no evidence that her parents neglected her prior to this diagnosis or have failed to take proper care of her since. Indeed, it is the Appellant who, notwithstanding B.S.' cancer, chose to victimize her.

The defense also called child psychologist Fred J. Kreig. (Tr. 112, July 23, 2008.) He testified that both CPS and the Dunbar Police Department used incorrect protocols when questioning the witnesses rendering their testimony inherently unreliable. (Tr. 114, July 23, 2008.) The jury rejected Dr. Kreig's testimony: Their credibility determination was eminently reasonable. Although willing to offer his opinion on the methodologies used by the State, he never took the time or effort to speak with the victims, listen to their in-court testimony, or recordings of their interviews, or review their case histories. Nor did he speak with the victims' parents. His sole point of reference was unofficial transcripts²² of the CPS and Dunbar Police interviews. Dr. Kreig saw what he wanted to see. His testimony regarding the substantive effect of the State's questioning was wholly speculative.

III.

ARGUMENT

A. APPELLANT WAS NOT ENTITLED, AS A MATTER OF LAW, TO A PRETRIAL TAIN T HEARING.

1. The Standard of Review.

The question of competency of a child as a witness in any case is always addressed to the sound discretion of the trial judge. Syl. Pt. 1, in part, *State v. Jones*, 178 W. Va. 519, 362 S.E.2d 330 (1987).

²²Dr. Kreig could not vouch for the authenticity of these transcripts. He had never compared them to the recorded interviews.

2. **Discussion.**

The narrow scope of Appellant's position is significant. He does not claim that he was denied an opportunity to present a defense, or that the court handcuffed his attorneys as they fully explored the efficacy of the State's interviewing procedures. All of the relevant evidence was presented to the jury. The defense is demanding the adoption, statewide, of a single, narrow, procedural mechanism: a pretrial taint hearing. He is asking this Court to interfere in trial management decisions best left to the lower court. His primary weapon: an out-of-state case having no precedent in West Virginia case law or justification in West Virginia criminal procedure.

In *State v. Michaels*, 642 A.2d 1372 (N.J. 1994), the New Jersey Supreme Court ruled that the defense was entitled to a pretrial admissibility hearing to determine if the testimony of child-sex abuse victims should be excluded due to the use of improper questioning techniques by state investigators. The defendant, a nursery school teacher's aide, was convicted of 115 counts of sexual assault.

Although the court began its analysis by unequivocally stating, "that children, as a class, are not to be viewed as inherently suspect witnesses, it found that "children generate special concerns because of their vulnerability, immaturity, and impressionability." *Michaels*, 642 A.2d at 1376. The court was especially concerned with the suggestibility of young children. *Michaels*, 642 A.2d at 1376-79. They took a "somewhat extraordinary step" of mandating a pretrial taint hearing in order to determine whether the testimony of numerous child witnesses was the result of interviewing techniques so improper and suggestive that the resulting answers were inherently unreliable. As one court aptly described it:

The record revealed that the investigators engaged in repeated, incessant interrogations; asked blatantly leading questions; used mild threats; cajoling and

bribery; provided positive reinforcement for inculpatory statements and negative reinforcement for exculpatory statements; vilified the defendant; encouraged the children to “keep [the defendant] in jail”; and provided the cooperative children with replica police badges. [*Michaels*], at 315, 642 A.2d 1372.

State v. Michael H., 970 A.2d 113, 120 (Ct. 2009).

Pointing out the flaws which tainted the investigation the *Michaels* court noted:

The initial investigation giving rise to defendant’s prosecution was sparked by a child volunteering that his teacher, “Kelly” had taken his temperature rectally, and that she had done so to other children. However the overwhelming majority of the interviews and interrogations did not arise from the spontaneous recollections that are generally considered to be most reliable. Few, if any, of the children volunteered information that directly implicated defendant. Further, none of the child victims related incidents of actual sexual abuse to their interviewers using “free recall.” Additionally, few of the children provided any tell-tale details of the alleged abuse although they were repeatedly prompted to do so by the investigators. We note further that the investigators were not trained in interviewing young children. The earliest interviews with the children were not recorded and in some instances the original notes were destroyed. Many of the interviewers demonstrated ineptness in dealing with the challenges presented by pre-schoolers, and displayed their frustration with the children.

Michaels, 642 A.2d at 1379 (citations and footnotes omitted).

Finding that “[c]ompetent and reliable evidence remains at the foundation of a fair trial, which seeks ultimately to determine the truth about criminal culpability[,]” the court adopted a totality of the circumstances test:

The determination of the reliability of pretrial statements must take into account all relevant circumstances. In *Gross*²³, *supra*, we detailed the range of factors that might bear on that reliability of a pretrial statement. Among those are the person or persons to whom the statement was made; physical and mental condition of the declarant, the use of inducements, threats or bribes; and the inherent believability of the statement. 577 A.2d 806.

Michaels, 642 A.2d at 1381.

²³*State v. A. Gross*, 577 A.2d 806 (N.J. 1990).

“The focus of the pretrial hearing investigative methods used during the questioning of each child and whether that questioning, examined in light of all relevant circumstances, gives rise to the substantial likelihood that the child’s recollection of actual events has been irremediably distorted and the statements and testimony concerning those events are unreliable.”

Michaels, 642 A.2d at 1383-84.

A review of the totality of the circumstances of the case-at-bar reveals that they are nowhere near as egregious as those of the *Michaels* case. First, *Michaels*’ complaining witnesses were all preschoolers. B.S., the first granddaughter to come forward was just under twelve.²⁴ N.S. was fifteen.²⁵ (Tr. 116, 128, July 22, 2008.) See *Michaels*, 642 A.2d at 1381 (age of victim factor in determining reliability of complaint). Their statements were spontaneous. B.S. first confided in a friend after this friend told her she had endured a similar traumatic experience. (Tr. 198, July 22, 2008.) She then recounted the same abuse to her school counselor, mother, CPS worker, and Dunbar Police Officer Moss. N.S. did not come forward until her mother asked her whether she had something to say about her grandfather.²⁶ Even defense’s expert called the circumstances surrounding N.S.’s revelation “important.” (Tr. 153, July 23, 2008.) There is no evidence that the complaining witnesses’s statements were the result of bribery or coercion. Unlike the complaining witnesses in *Michaels*, neither were given presents to influence the contents of their statements.

²⁴She was 14 by the time of trial. (Tr. 185, July 22, 2008.) N.S. was 18 by the time of trial.

²⁵“By the time children are 10 or 11, they appear to be no more suggestible than adults. This is not to say, of course, that children approaching adolescence are not suggestible. Psychologists have long documented suggestibility in adults. The point here is that concern about suggestibility of older children does not have to be greater than concern about adults.” John E.B. Myers, *Taint Hearings for Child Witnesses? A Step in the Wrong Direction*, 46 *Baylor L. Rev.* 873, 917 (1994) (footnotes omitted).

²⁶Her mother did not phrase the question in sexual terms and did not reveal B.S.’s allegations against the Appellant until after she heard what N.S. had to say. (Tr. 153, July 23, 2008.)

Both interviews were audiotaped, allowing the jury to make its own decisions about the propriety of the questioning. Although the Appellant blames the victims' mother for the victims' revelations, Ms. Smith played no part in them until after they were made. There is no evidence that Ms. Smith put her daughters up to it, or encouraged them to come forward. The State also produced the corroborative testimony of Robert Love. (Tr. 236, July 22, 2008.) Mr. Love testified that the Appellant complained about having to pay for a lawyer after the victims had allegedly told him that they had forgiven him. (Tr. 237, July 22, 2008.) As for Appellant's allegations that N.S. and B.S. grew up in an over-sexualized atmosphere, if this were true even Dr. Krieg failed to connect it to the victims' complaints.²⁷

B. WEST VIRGINIA DOES NOT RECOGNIZE PRETRIAL TAIN T HEARINGS.

Although West Virginia has never recognized pretrial taint hearings, the Appellant urges this Court to adopt the holding set forth by the New Jersey Supreme Court in *State v. Michaels, supra*. He cites no authority which approves or requires *Michaels*-type taint hearings in West Virginia.²⁸

Rule 601 of the West Virginia Rules of Evidence states "Every person is competent to be a witness except as otherwise provided for by statute or these rules." To testify a witness must have personal knowledge of the subject of the testimony, based on the capacity to perceive and recollect. The capacity to perceive and recollect is a condition for the admissibility of a witness's testimony

²⁷In fact, the defense made every effort to tar the victims' parents, and then to attribute this allegedly shameful lifestyle to B.S. and N.S.'s complaints. The jury did not buy it: neither should this Court.

²⁸Appellant's citation to lower court action is wholly unpersuasive to this Court. This Court, through its rulings and opinions, binds the lower courts, not the other way around.

on a certain matter, rather than a prerequisite of the witness's competency. If there is evidence that the witness has those capabilities, the determination whether she in fact perceived and does recollect is left to the trier of fact.

In the case at bar, the Appellant does not suggest that these witnesses lack the capacity to see and recollect. Instead, he claims that their testimony is the product of suggestive and leading questioning which has planted false memories in their subconscious. This is not a question of admissibility. Such shortcomings, if they do exist, are jury issues. *See Pendleton v. Commonwealth*, 83 S.W.3d 522, 525-26 (Ky. 2002) (trial court properly denied pretrial *Michaels* hearing issue is matter of witness competency, credibility issue for jury); *Billingsly v. State*, 69 P.3d 390 (Wyo. 2003) (existing state of the law on witness competency adequately addresses pretrial taint concerns and a pretrial taint hearing is not necessary).

In the case at bar, the Appellant called child psychologist Dr. Fred Krieg. Dr. Krieg opined that both CPS and the Dunbar Police Department used improper methods of questioning. He claimed that the interviews were too short, the victims' mother was present, the questioners used leading questions, there was a lack of follow up. All of these alleged errors and more were explored during the State's case-in-chief. The jury had an opportunity to hear Dr. Krieg's testimony, and they soundly rejected it.

C. WEST VIRGINIA SHOULD NOT UTILIZE PRETRIAL TAIN T HEARINGS.

"The fundamental disadvantage of taint hearings for child witnesses is that such hearings will undermine society's ability to protect abused children." Myers, *Taint Hearings for Child Witnesses? A Step in the Wrong Direction*, 46 Baylor L. Rev. at 888. In his law review article Professor Myers sets forth five convincing reasons why taint hearings are undesirable:

1. Taint hearings perpetuate “deeply entrenched and unwarranted distrust of children’s testimony, particularly in sexual abuse litigation.” (*Id.* at 889.) See *State v. Edward Charles L.*, 183 W. Va. 641, 650, 398 S.E.2d 123, 132 (1990) (sexual assault of children such aberrant behavior most people find it easier to dismiss the child’s testimony as being coached or made up).

2. Taint hearings will be over-utilized. “There is much to gain and little to lose by requesting a taint hearing. Those who doubt that defense counsel will seek taint hearings where success is unlikely have only to examine that large body of cases where defendants move unsuccessfully to suppress identification testimony.” (Myers at 891.)

Taint hearings would soon become discovery tools, and will bog down the orderly process of cases involving the sexual abuse of children. (*Id.*)

3. Taint hearings create a host of new issues for appeal. Defense counsel’s failure to request a taint hearing may form the basis of an ineffective assistance of counsel claim. The lower court’s decision may also form the basis for new appeals. “There would be no objection to creating new issues for appeal if defense counsel needed taint hearings to challenge defective interviewing. . . . Defense counsel has ample trial weapons to challenge shoddy interviewing. The child can be cross-examined, often to good effect. More to the point, defense counsel can put the interviewer on trial drawing the jury’s attention to shortcomings in the interviewer’s technique. Expert testimony can be offered to highlight shortcomings of interviews.”²⁹ (*Id.* at 893.)

4. Taint hearings may lead to different procedures in similar cases. (*Id.* at 893-94.) If the foundation of appellant’s claim rests on the due process clause, there must be some state action before a violation can be found. Childhood victims of sexual assault are not always interviewed by

²⁹As was done in the case-at-bar.

state actors.³⁰ In the absence of state action there is no legal justification for a taint hearing. Thus, two similarly situated victims, one interviewed by a representative of the State, another interviewed by private therapist, would be treated differently. (*Id.* at 894.)

5. There is no principled basis for confining taint hearings to children. “If taint hearings are required because children are suggestible, vulnerable, and impressionable, then logic dictates that taint hearings should be extended to other witnesses who share these traits.” (*Id.* at 897.)

This Court has repeatedly recognized the State’s compelling interest in protecting sexually abused children. *See, e.g. State v. Edward Charles L.*, 183 W. Va. at 659, 398 S.E.2d at 141 (uncorroborated testimony of childhood victims of sexual abuse sufficient to sustain guilty verdict). *State v. Lola Mae C.*, 185 W. Va. 452, 408 S.E.2d 31 (1991) (“As one of two adult authority figures present, the defendant’s actions not only in preparing the child for the father’s [sexual] intrusion, but also remaining in the room, and giving tacit approval to the sexual assault facilitated and encouraged by the father, demonstrated a shared intent in the enterprise, and were sufficient to make her culpable. These are all factors in determining whether the defendant was guilty of the crime of aider and abettor.”); *State v. Cecil*, 221 W. Va. 495, 655 S.E.2d 517 (2007) (W. Va. Code 61-8D-5 creates a separate and distinct crime from general sexual offenses and may form the basis of a separate conviction).

The Appellant’s proposal is neither good law or sound public policy. The Appellee’s posits that this Court follow the majority of other jurisdictions and reject the New Jersey Supreme Court’s holding in the *Michaels* case.

³⁰Professor Myers reasonably applies the private/state action distinction drawn from *Colorado v. Connelly*, 479 U.S. 157 (1986), a case involving an allegedly coerced confession.

D. SINCE THERE WAS NO MANIFEST NECESSITY THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION FOR A MISTRIAL WAS REASONABLE.

1. Standard of Review.

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).

2. Discussion.

When dealing with the wrongful admission of evidence, we have stated that the appropriate test for harmlessness articulated by this Court is whether we can say with fair assurance, after stripping the erroneous evidence from the whole, that the remaining evidence was independently sufficient to support the verdict and the jury was not substantially swayed by the error.

State v. Guthrie, 194 W. Va. 657, 684, 461 S.E.2d 163, 190 (1995).

In *State v. Edward Charles L.*, 183 W. Va. at 659, 398 S.E.2d at 141, this Court ruled that the uncorroborated testimony of childhood victims of sexual abuse is sufficient to sustain a guilty verdict. In the case at bar both complaining witnesses testified that the Appellant had placed his hand upon their genitals. (Tr. 194, 196-97, 203-04, 218, 219, 220, 221, 226-29, July 22, 2008.) Both testified that the Appellant forced them to touch his penis. (Tr. 197, 226, July 22, 2008.) N.S. testified that the Appellant placed his penis in her mouth and then ejaculated on her face. (Tr. 226, July 22, 2008.) This repeatedly happened during their weekend visits to Appellant's house. (Tr. 198, 219, July 22, 2008.)

The State also called Robert Love. Mr. Love, knew the Appellant from church. (Tr. at 236.) He testified that the Appellant told him:

Q: All right. Can you tell us about the conversation that you had [with the Appellant]?

A: Yes I can. I went up – I go to church early and I like to be there to greet people. And as I went up the drive, Gene and Lee Ann was up there at the top. It was unusual to see them there that early.

But I went ahead and parked, and I got out and I spoke with Gene. I said, “How you doing?” He said, “Not good. I’m broke. I don’t have any money.”

He said “I had to hire a lawyer.” He said, “They told me they forgave me, why am I going through this?”

And he said, “I had to take all the money I had. All the money I could scrape together and somebody even gave me \$100.00. And I even had to use that \$100.00. And I don’t even have money for groceries.”

(Tr. 237, July 22, 2008.)

After B.S. made the statement counsel for the State engaged her in the following colloquy:

Q: Thank you your Honor. [B.S.], first off, you only have actual knowledge of anything happening to you only is that right?

A: Yes, sir.

Q: That’s the only thing you’ve ever witnessed, right?

(Tr. 194, July 22, 2008.)

Stripping a single blurt-out from the first witness of a two-day trial in which both victims testified about extensive sexual abuse at the hands of the Appellant, and whose testimony was corroborated by words coming from the Appellant’s own mouth does not render the trial fundamentally unfair. This is particularly true given the prosecutor’s follow up questions disowning B.S.’s testimony. The Appellant claims that B.S.’s testimony quite likely did not go unnoticed by the jury. His only proof--the fact that a juror asked for permission to question B.S. at the close of her testimony. This evidence is wholly speculative, lacking any persuasive weight.

Appellant also wrongly claims that the admission of uncharged misconduct is the exception, not the rule under the West Virginia Rules of Evidence. Rule 404(b) is a rule of inclusion, not exclusion. *See State v. Edward Charles L.*, 183 W. Va. at 647, 398 S.E.2d at 129. This is particularly true in childhood sexual abuse cases where evidence of collateral crimes is admissible to prove that the Appellant has a lustful disposition towards children generally, or a lustful disposition to specific other children. *Edward Charles L.*, 183 W. Va. at 651, 398 S.E.2d at 133.

Appellant further buttresses his argument by claiming that the trial court removed a potential juror from the venire because he knew of these other acts. The record does not bear this assertion out. In fact the juror's entire statement to the court was as follows:

Mr. Good: My name is Jeff Good. And when I was coming in this morning, I overheard Ms. Panucci telling the guys downstairs at the booth that they got it reduced from 12 to 7 [counts]. *And I have four children. I have no tolerance for sex offenders, so I can't serve the Court with a biased opinion.*

(Tr. 26, July 22, 2008; emphasis added.)

E. THE APPELLANT HAS NOT DEMONSTRATED A MANIFEST NECESSITY FOR A MISTRIAL.

“The determination of whether ‘manifest necessity’ that will justify ordering a mistrial over a defendant’s objection exists is a matter within the discretion of the trial court, to be exercised according to the particular circumstances of each case.” Syl. pt. 3, *Porter v. Ferguson*, 174 W. Va. 253, 324 S.E.2d 397 (1984). “The ‘manifest necessity’ in a criminal case permitting the discharge of a jury without rendering a verdict may arise from various circumstances. Whatever the circumstances, they must be forceful to meet the statutory prescription.” Syl. pt. 2, *State v. Little*, 120 W. Va. 213, 197 S.E. 626 (1938).

Appellant cites this Court to *State ex. rel. Bailes v. Jolliffe*, 208 W. Va. 481, 541 S.E.2d 571 (2000) (*per curiam*). *Jolliffe* is distinguishable. In *Jolliffe*, a case in which the defense was seeking a writ of prohibition, counsel for the defense, contrary to an *in limine* order, asked a 404(b) witness if his client had been convicted of the collateral crime.³¹ The trial court ruled the question improper, and after several attempts to rectify the situation declared a mistrial. *Jolliffe*, 208 W. Va. at 483, 541 S.E.2d at 573.

This Court found defense counsel's improper conduct prejudiced the State's case, and pursuant to Syl. pt. 4, *Porter v. Ferguson, supra*, denied defense's motion for a writ of prohibition stating:

We denied the requested writ in *Porter* because defense counsel directly violated an *in limine* ruling. . . . In the case, *sub judice*, defense counsel knew the prior trial was admissible solely for identity purposes and the outcome of the trial was inadmissible. He nonetheless persisted in asking his question and, thereby caused a mistrial.

After the jury was sent to the jury room and again after each recess the court conducted lengthy discussions about the possible remedies and the ramifications to each side of each of the potential remedies. After careful consideration, the court determined that manifest necessity existed to declare a mistrial. We cannot say the court abused its discretion or acted precipitately. Under those circumstances, we defer to the trial court's finding of manifest necessity and find no bar to the appellant's retrial.

Jolliffe, 208 W. Va. at 486, 541 S.E.2d at 576.

Unlike the *Jolliffe* case there is no evidence of prosecutorial overreaching. In fact, after a bench conference, the prosecutor cured the witness's statement by clarifying that she had no knowledge of any abuse perpetrated by the Appellant, other than her own. Given the flexibility

³¹Under Rule 404(b) the underlying conduct need only be proven by a preponderance of the evidence.

afforded trial judges in this area, there is no evidence that its solution constituted a violation of discretion.

IV.

CONCLUSION

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

Respectfully submitted,

STATE OF WEST VIRGINIA,
Appellee,

By counsel,

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

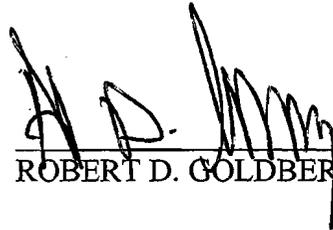


ROBERT D. GOLDBERG, State Bar No. 7370
ASSISTANT ATTORNEY GENERAL
State Capitol, Room 26-E
Charleston, West Virginia 25305
(304) 558-2021

CERTIFICATE OF SERVICE

I, ROBERT D. GOLDBERG, Assistant Attorney General and counsel for the Appellee, do hereby verify that I have served a true copy of the Brief of Appellee upon counsel for the Appellant by depositing said copy in the United States mail, with first-class postage prepaid, on this 10th day of December, 2009, addressed as follows:

To: Greg Ayres
Deputy Public Defender
Kanawha County Public Defender's Office
P.O. Box 2827
Charleston, West Virginia 25330



ROBERT D. GOLDBERG