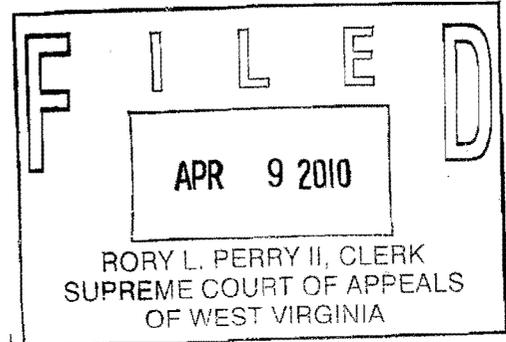


**IN THE WEST VIRGINIA SUPREME COURT OF
APPEALS, CHARLESTON**

**STATE OF WEST VIRGINIA
Appellee**

v.

**DONALD L. LONGERBEAM,
Appellant**



**Case No. *35427 35472*
Circuit Court Case No: 08-F-91
Jefferson County**

BRIEF FOR APPELLANT

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STATEMENT OF THE CASE

Appellant Donald L. Longerbeam ("Appellant") accompanied his wife to the home of her sister where his wife had been asked by her nieces to help catch a hamster that had gotten out of its cage. The State alleged that while the Appellant's wife was upstairs assisting in this hamster catching, Appellant touched his 12 year old niece (by marriage) on the breast through clothing. Although there was no evidence that Appellant was a guardian or custodian within the scope of West Virginia Code 61-8D-5(a), he was convicted of one count of Sexual Abuse by a Guardian and sentenced to 10-20 years in the penitentiary. Appellant is currently incarcerated.

STATEMENT OF FACTS

During the morning of June 8, 2007, Appellant's wife Cindy Longerbeam received a call from her niece Taylor Gonzales asking that she come over and help her catch her loose hamster. (*Reporter's Official Transcript of Proceedings*, March 4, 2009, Charles Town, WV, (hereinafter "*Trial Transcript II*"), pp. 22:24-23:11,) Ms. Longerbeam is the sister of Robin Gonzales, who is the mother of three daughters: Kassandra (Kacy) Hamm, 16 (at the time)¹ the oldest of the three sisters, Marissa G. (12), the child who is at issue in this matter, and Taylor Gonzales, the youngest who made the call. (*Trial Transcript II*, p. 8:13) Appellant and Ms. Longerbeam were at Wal-Mart shopping the morning Taylor called Ms. Longerbeam's cell phone. (*Trial Transcript II*, p. 23:1-11) Ms. Longerbeam said she would be there as soon as possible after they were done shopping. (*Id.*)

¹ Ms. Hamm's DOB is July 30, 1990.

At trial, Marissa G. testified and confirmed that her aunt and Appellant (whom she refers to as her “aunt’s husband”), were at her home to catch a loose hamster but she either did not recall or didn’t know who originally called her aunt for assistance. (*Trial Transcript I*, p. 214-216) Marissa G. further testified that while Ms. Longerbeam was upstairs with Taylor, Appellant touched her breast(s) over her clothes in the living room while they were sitting on the couch. (*Reporter’s Official Transcript of Proceedings*, March 3, 2009, Charles Town, WV, hereinafter (“*Trial Transcript I*”) pp.187:9-190:12) Marissa said that she was in the living room looking through her nail polish before the incident with Ms. Longerbeam, Taylor and Appellant present. (*Id.* at 218:1-15) Soon thereafter, Ms. Longerbeam and Taylor went upstairs. (*Id.*) It appears there was no door to the living room, or that the door was never closed. Appellant was never asked to watch Marissa. Marissa knew that her oldest sister and custodian Kacy (16) was in the house at the time. (*Id.* at 221:13-15)

Marissa and Kacy both testified that Kacy walked in while Appellant’s arm was around her, and that shortly thereafter they went upstairs and she told her that “Donnie has been touching me”. (*Id.* at 221:13 – 222:21; See also *Id.* at 170-174) Soon thereafter, Kacy told Ms. Longerbeam to take Appellant and leave. (*Id.* at 167:8-168:22; see also *Id.* at 181-182) On cross-examination, Kacy testified that whenever she was at home she was the babysitter and “in charge” of her younger sisters and that she was in that capacity on June 8, 2007. (*Id.* at p. 182:18-24) As Kacy testified, “[i]f they needed something they came to me and they knew to stay in

the house and not to go anywhere and if they needed something come and get me.”

(*Id.* at pp. 167-185)

At the close of evidence, Appellant’s trial counsel Don Wrye, promptly moved for an acquittal because 1) there was no evidence presented at trial that Appellant was acting as a “guardian, custodian or person in a position of trust” in relation to the child; or, 2) that they were in his “care, custody or control” as required by West Virginia Code Section 61-D-5(a). Mr. Wrye stated to the Court the importance of the lack of evidence as it related to Count Three:

“ . . . relating to the . . . incident that was a touching of the breast that the testimony of Ms. Hamm (Kacy) was that she was the one who had care, custody and control and not Mr. Longerbeam. . . Her mom was gone and the kids are home and she was the babysitter.”
(*Trial Transcript I* p. 246).

Judge David Sanders of the Circuit Court denied the motion and stated that he believed that the matter should be presented to the jury.²

As a witness in the defense’s case in chief, Ms. Longerbeam told her version of the events including those of June 8, 2009. (*Trial Transcript II*, pp. 22-32) In sum, she testified that when they arrived, the girls had already caught the hamster and she briefly went upstairs with Taylor to check on the animal and Appellant remained downstairs. (*Id.*) Ms. Longerbeam testified she was not there to baby-sit the girls and that she knew when Kacy was at the home, she was in charge of the girls. (*Id.*)

² Specifically, the Circuit Court stated,

“ . . . to the determine whether a child of that age in proximity to an adult relations in that type of domestic context is in their care custody and control even a sort of fleeting thing or a temporary thing, I think I see that as being a factual issue that I think there is a prima facie case made that could support the jury seeing it that way.

I think that it doesn’t behoove the Court to take that away from them as a matter of law but I think that it is an active issue that a jury may decide. I understand your raising it and your arguing it and you are certainly free to urge that view of it on the jury but I don’t think that as a matter of law the Court should substitute its own view of that right now.” (*Trial Transcript I*, p.248: 5-18)

After deliberation the jury acquitted Appellant of all counts except *Count Three*.³ On March 5, 2009, the Court signed an *Order of Conviction* that acknowledged denying Defendant's motion for a "directed verdict" and the jury's finding him guilty of Count Three.

On March 11, 2009, Appellant filed both a "Motion for New Trial" and a "Motion for Judgment of Acquittal" noticed for hearing at the sentencing hearing scheduled for May 5, 2009. On March 20, 2009, Appellant filed his "Memorandum in Support of Motion for Judgment of Acquittal and/or Motion for New Trial" arguing again that there was insufficient evidence to find that Appellant was either the "Custodian" or a "person of trust in relation to the child", or that Marissa G. was under his "care, custody, or control". The hearing and argument took place on May 4, 2009. (See *Reporter's Official Transcript of Proceedings*, May 4, 2009, Charles Town, WV)

Appellant filed and served his "Notice of Intent to Appeal and Designation of Record" on May 12, 2009 and now respectfully appeals his conviction to this Honorable Court.

³ Appellant was originally charged with Five Counts of *Sexual Abuse By A Guardian Of A Child*, Appellant was acquitted by the Jury on all other counts.

AUTHORITIES RELIED UPON

West Virginia Code Section 61-8-D-1 (2009)

West Virginia Code Section 61-8D-5(a) (2009)

State v. Stephens, 206 W. Va. 420 (1999)

State v. Collins, 221 W. Va 229 (2007)

Blakely v. Washington, 542 U.S. 296 (2004)

People v. Johnson, 167 P.3d 207, 210 (Co. 2007)

Williams v. State, 895 N.E. 2d 377, (Ind. 2008)

People v. Madril, 746 P. 2d 1329 (Co. 1987)

ISSUES PRESENTED ON APPEAL

- I. WHETHER THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY DENYING APPELLANT'S MOTION FOR ACQUITTAL AND/OR NEW TRIAL ON BOTH MARCH 4, 2009 AND MAY 5, 2009
- II. WHETHER THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY FAILING TO PUT THE PROPER CHARGE ON THE VERDICT FORM THEREBY CONFUSING THE JURY INTO THINKING APPELLANT WAS THE GUARDIAN OF MARISSA G.

I. APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AND/OR MOTION FOR NEW TRIAL WAS ERRONEOUSLY DENIED BY THE CIRCUIT COURT BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO CONVICT HIM OF "SEXUAL ABUSE BY A GUARDIAN OF A CHILD"

Appellant's "Motion for Judgment of Acquittal and/or Motion for New Trial" was erroneously denied by the Circuit Court on March 4, 2009 and May 5, 2009 for the following reasons: (1) There was insufficient evidence at trial that Appellant was a "Custodian" as defined by *West Virginia Code Section 61-8-D-1(4)* (2009)⁴; (2) There was insufficient evidence at trial that Appellant was a "person in a position of trust" as defined as defined *Section 61-8-D-1(12)*; and, (3) There was insufficient evidence that Appellant was exercising any "care, custody or control" of Marissa G. under Section 61-8D-1 and the applicable case law.

A. Appellant Was Not a Custodian as Defined in Section 61-8D-1(4)

West Virginia Code §61-8D-1(4) defines a "Custodian" as:

(4) "Custodian" means a person over the age of fourteen years who has or shares actual physical possession or care and custody of a child on a full-time or temporary basis, regardless of whether such person has been granted custody of the child by any contract, agreement or legal proceeding. "Custodian" shall also include, but not be limited to, the spouse of a parent, guardian or custodian, or a person cohabiting with a parent, guardian or custodian in the relationship of husband and wife, *where such spouse or other person shares actual physical possession or care and custody of a child with the parent, guardian or custodian.* W.Va. Code §61-8D-1(4) (2009)(italics added)

In the instant case, there was insufficient evidence for the jury to find that Appellant was a custodian for the Gonzales children. First, while not required, it was clear that there was no evidence that Lyla (aka Robin) Gonzales had ever given her

⁴ All further statutory references will be to the West Virginia Code unless otherwise noted.

consent to have Appellant watch Marissa G. either formally or informally. Second, there was insufficient evidence that Appellant had “actual physical possession or care and custody” of Marissa G. “on a full-time or temporary basis” when the alleged incident took place.⁵

Finally, while the legal definition of “Custodian” above includes the “spouse of a parent, guardian or custodian, or a person cohabiting with a parent, guardian or custodian in the relationship of husband and wife. . .” and Appellant was married to Cindy Longerbeam, the definition requires more. Specifically, the definition requires that Appellant in addition to being a spouse, also “shares actual physical possession or care and custody of a child with the parent, guardian or custodian.” *Id.*

Based on the evidence at trial, Appellant and Ms. Longerbeam were not acting as custodians -- they were invitees -- there for the specific incidental purpose of catching a hamster. In contrast, Marissa’s older sister Kacy specifically testified that she was Marissa’s regular baby-sitter and was acting as one and was in charge on June 8, 2009. This court has specifically held that “A baby-sitter may be a custodian” under the provisions of Section 61-8D-5. See *State v. Stephens*, 206 W. Va. 420 (1999); *State v. Collins*, 221 W. Va. 229 (2007).⁶

Under the plain language of the statute and the case law Kacy was Marissa’s custodian on June 9, 2009. As she testified, despite her being asleep just before the

⁵ There was other testimony that Marissa had been alone with the Appellant *in the past* regarding the other Four Counts in the indictment. As mentioned, Appellant was acquitted of those Four Counts.

⁶ While in *Collins, supra*, this court did hold that Appellant’s relationship with Samantha was custodial in nature it did so under facts that were clearly distinguishable from those found in this petition. In particular, Appellant in *Collins* had taken Samantha on a trip four-wheeling (where he had taken her before) to a secluded place and refused to her requests to return until she engaged in oral sex. Under those circumstances, not only was Samantha in Appellant’s custody under the old law, he would have also clearly fell under the 2005 amendments applicable today. In contrast, Appellant in this case, was sitting on a couch in a full house with Marissa’s custodian in the next room and there is no evidence that he used his relationship with Marissa, or any force manipulation or control.

events, she was awake and present and the girls knew that if they needed anything they should come to her. In contrast, Appellant and Ms. Longerbeam were there for a brief period as invitees (after being called on Ms. Longerbeam's cell phone while shopping at Walmart) and she was asked specifically to help capture a hamster. In sum, the undisputed and overwhelming evidence demonstrated that Marissa's older sister Kacy was acting as her babysitter and custodian on June 8, 2009 – not Appellant nor his wife.

B. Appellant Was Not a “person in a position of trust in relation to a child” as Defined in Section 61-8D-1(12)

Tellingly, West Virginia legislature's definition of a “person in a position of trust in relation to a child” provided in the 2005 amendments by adding subsection (12) *is both specific and limited*. West Virginia Code §61-8D-1 (12) defines a “person in a position of trust in relation to a child” as:

(12) A “person in a position of trust in relation to a child” refers to any person who is acting in the place of a parent charged with any of a parent's rights, duties or responsibilities concerning a child or someone responsible for the general supervision of a child's welfare, or any person who by virtue of their occupation or position is charged with any duty or responsibility for the health, education, welfare, or supervision of the child. W.Va. Code §61-8D-1(12) (2009).

Again, there was insufficient evidence at trial that Appellant met the above definition.

First, there was no evidence that Appellant or his wife was acting in the place of Robin Gonzales, or charged with any of her rights, duties or responsibilities regarding Marissa. Second, there was no evidence that he or his wife was responsible for Marissa's general welfare when Kacy was there and he was sitting on the couch waiting for his wife to check on a hamster. Finally, there was insufficient evidence at trial that his “position” by virtue of his marrying Cindy Longerbeam, charged him

with any duty or responsibility for the health, education, welfare, or supervision of Marissa – especially when *she was already under the care custody and control of Kacy.*⁷

C. The Undisputed Evidence at Trial Proved That Marissa G. Was Not Under Appellant’s Care, Custody, or Control At The Time of The Alleged Incident.

West Virginia Code Section 61-8D-5(a) reads, in pertinent part:

(a) In addition to any other offenses set forth in this code, the Legislature hereby declares a separate and distinct offense under this subsection, as follows: If any parent, guardian or custodian of or other person in a position of trust *in relation to a child under his or her care, custody or control*, shall engage in or attempt to engage in sexual exploitation of, or in sexual intercourse, sexual intrusion or sexual contact with, a child under his or her care, custody or control, notwithstanding the fact that the child may have willingly participated in such conduct, or the fact that the child may have consented to such conduct or the fact that the child may have suffered no apparent physical injury or mental or emotional injury as a result of such conduct, then such parent, guardian, custodian or person in a position of trust shall be guilty of a felony and, upon conviction thereof, shall be imprisoned in the penitentiary not less than ten nor more than twenty years, or fined not less than five hundred nor more than five thousand dollars and imprisoned in the penitentiary not less than ten years nor more than twenty years W. Va. Code §61-8D-5(a) (2009)(emphasis added).⁸

West Virginia Code Section 61-8D-5(a) provides harsh and enhanced penalties for sexual contact with minors by a certain class of persons. Obviously, a clear showing that the accused is a member of the class of guardians or custodians intended in the statute is a factual predicate that the State must prove to make out a prima facie case. In this case, the Circuit Court simply abdicated its responsibility to

⁷ Appellant asserts that he needed to be acting in the position of a “custodian” or a “person in a position of trust in relation to the child” at the time of the alleged incident per the definitions (Sections 61-8D-1(4) and (12) in sections I. A and B. supra, but further argues below in Section I. C. that he also needed to be exercising care, custody or control over Marissa at the time of the incident under 61-8D-5(a).

interpret and rule on the law, and instead let the State argue to the jury that, inter alia, any time a child and an adult were together, there was an imbalance of power and the requirements of 61-8D-5 were met. That is not the law and it was plain error by the Circuit Court.

Again, there was insufficient evidence for the Jury to find that Marissa was a child under Appellant's "care, custody or control" as a matter of law. Appellant respectfully asserts that to do so under the evidence in this case would expand the definition far beyond the legislature's intent, to the boundless and unlimited.⁹

Arguably, such a holding would mean that any distant family member or close friend at a family gathering or social event accused of sexual contact with a minor would potentially face a minimum of ten years because even though their parent, guardian, or custodian is in the next room – the child would be under their *care, custody, or control*. This cannot be what the legislature intended.

The current case law in West Virginia does not resolve the issue on appeal definitively. In *State v. Stephens*, 206 W. Va. 420 (1999) this Court held that a "a babysitter may be a custodian under the provisions of W. Va. Code, 61-8D-5 (1998), and whether a babysitter is in fact custodian under this statute is a question for the jury." (*Id.* at Syllabus Point 1) For the purposes of this case, the *Stephens* case *does* confirm that under the law Kacy was the custodian of her younger sisters, but is of no further help since there was no evidence Appellant was a baby-sitter or a custodian.

Moreover, in *State v. Collins*, 654 S.E. 2d 115 (W.Va. 2007) this Court affirmed *Stephens* and found that there was sufficient evidence that under the facts of

⁹ As an alternate argument, while Appellant would respectfully assert that to interpret the statute so broadly under the circumstances would potentially open the statute up to additional constitutional scrutiny as being overbroad, and lacking fair notice

that case Appellant Collins accepted physical possession of the victim *when he agreed to take her (and had previously) on a four wheel ride when she was 11*. In that case, Appellant, who had sole physical possession of the child, told her that he would not take her back home until she performed oral sex. No such facts exist in the instant case. As it concerns these two leading West Virginia cases it is logical that since Appellant was neither a baby-sitter or in physical custody of Marissa he was not exercising any care custody or control as it relates to those two cases.

While Appellant has not found any West Virginia cases specifically holding that the “care, custody, control” is required at the time of any alleged incident, the plain language of Section 61-8D-5(a) requiring that the child be “under his or her care, custody or control” would be rendered superfluous if this court holds that it was either not required or was under the facts of this case. Moreover, in another jurisdiction that his court has relied upon in its interpretation of this statute before¹⁰, the Colorado Court of Appeals upheld a lower court’s dismissal of “position of trust charges” at preliminary hearing because the evidence did “not support the conclusion that defendant was in a position of trust with respect to the victim *at the time of the unlawful acts.*” *People v. Johnson*, 167 P.3d 207, 210 (Co. 2007) (emphasis added)¹¹

While one might argue that the statute in Colorado specifically includes the language “at the time of an unlawful act” in the definition of “position of trust”, similarly, the West Virginia statute requires that any offense be “in relation to a child

¹⁰ In *State v. Stephens* 206 W. Va. 420 (1999) this Court relied in part upon the Colorado Supreme Court’s decision in *People v. Madril*, 746 P. 2d 1329 (Co. 1987) which held that a babysitter is one in a position of trust within the meaning of Colorado’s sexual assault statute, which per the court is similar to West Virginia’s.

¹¹ This case has been cited in this section regarding care custody or control because it is believed that in drafting its legislation, the West Virginia legislature placed its requirement that the control etc is being exercised at the time of the incident

under his or her care, custody, or control” and should have the same effect. (*Id.*) Finally, as further persuasive authority, yet another jurisdiction has also recently held that simply being an uncle as Appellant is here is not tantamount to being in a position of trust. (*See Williams v. State*, 895 N.E. 2d 377, (Ind. 2008) (holding that simply because accused was the aunt of the alleged victim did not allow for the prosecution to use the “position of trust aggravator” and reversing the sentence as a violation of *Blakely v. Washington*, 542 U.S. 296 (2004).

As a result of the Court’s abdication of its duty to not present the jury with a count when there was insufficient evidence of an element as a matter of law, Assistant Prosecutor Brandon Sims was permitted to effectively reinvent the legal standard in her closing argument. Sims urged the jurors to use “common sense”, not the law, and to adopt her legally erroneous interpretation:

Now, I anticipate Mr. Wrye is going to argue to you that Marissa was never under Donald Longerbeam’s care, custody, or control. I don’t know if he expects that her mother signed a permission slip each time she left the house that left him in charge, I don’t know if he expects that she had some sort of legal document that she had to notarize or initial every time she left him in charge, **but use your common sense. I am going to ask you who is in charge when there is an adult and a 12-year-old in the room? The adult.** Who is in charge when a 16 year-old is asleep in a bedroom, a 16-year-old who is asleep? Is it the aunt and uncle who are awake in the house? You know the answer it is the adult who is there who is in charge. In fact, Cindy Longerbeam testified today that she was in charge when the kids were there. Then when Mr. Wrye asked a few more questions, well, Marissa would ask Kacy. **But ask yourselves was the 16-year-old sister in charge or was the adult aunt and adult uncle who are there in charge?** I think you know the answer it is clearly the adult. *Transcript II*, p. 58:9 – 59:3¹²

Further, as Ms. Sims later summed up in her closing rebuttal,

¹² As mentioned above, it was undisputed based on the testimony of Kacy, Marissa and Cindy Longerbeam, that Kacy was in charge. Despite this, the jury apparently used

“Mr. Longerbeam had access to his niece. He was in care custody or control of his niece. He was the adult and she was the 12-year-old child with him alone.” *Transcript II*, p. 79:15-18

Yet, Sims argued this even though it was undisputed based on the testimony of her own witnesses, Kacy and Marissa and confirmed by Ms. Longerbeam, that *Kacy was in charge, was awake at all relevant times, was the baby-sitter and was Marissa’s actual custodian* – not Appellant. Essentially, Ms. Sims argued that the jury forget the evidence and the law and follow her “common sense” and the jury apparently followed.

It is clear from the record that the Circuit Court that committed plain error allowing the jury to consider Count Three. This was further compounded by the Court’s decision to permit the State to urge the Jury to convict the Appellant based on “common sense” rather than the law. Accordingly, the conviction of Appellant must be reversed.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY CONFUSING THE JURY WITH AN ERRONEOUS VERDICT FORM

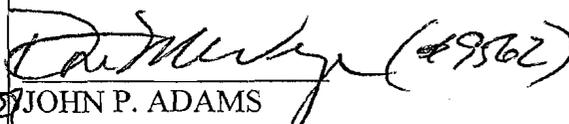
The Circuit Court also committed reversible error by providing the jury with a verdict form that listed “Sexual Abuse By A Guardian Of A Child,” notwithstanding the fact that the Court also instructed the jury “it is not alleged that the defendant was legal guardian of any child relevant to this case.” (*Transcript II*, P. 49:19-20) It is axiomatic that a jury will rely on the Judge to instruct them as to the law and carefully review any instructions or verdict forms provided to them. If they are given a form which permits them to convict a defendant on a certain charge, they will obviously assume that unless all the legal requirements for that charge had been met, they would not have been given the form.

III. CONCLUSION

For the reasons set forth above the circuit court erred when it failed to direct a verdict of acquittal on the charge of Sexual Abuse by a Guardian, Count Three at the close of the State's case-in-chief, and erred in submitting instructions to the jury on that charge. As such, Appellant asserts that under West Virginia Code §61-8D-5(2009) and the evidence presented at his trial there was no sufficient factual basis, as a matter of law, to find that Marissa G. was a "*child under his or her care, custody or control*" or that he was either a "*custodian*" or a "*person in a position of trust in relation to a child*" as defined by 61-8D-1(4) and (12) respectively.

WHEREFORE the Appellant respectfully prays that the Court overturn the verdict and enter an order remanding this case as well as any other relief that the Court deems appropriate.

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CERTIFICATE OF SERVICE

I, John P. Adams, Esquire, Public Defender, hereby certify that I have delivered a copy of the attached BRIEF FOR APPELLANT to Thomas W. Smith, Attorney General's Office, State Capitol, Room E-26, Charleston, WV 25305 and to the West Virginia Supreme Court of Appeals, on this 7th day of April, 2010.


for JOHN P. ADAMS, ESQUIRE