

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

At Charleston

STATE OF WEST VIRGINIA,

Plaintiff below, Appellee,

v.

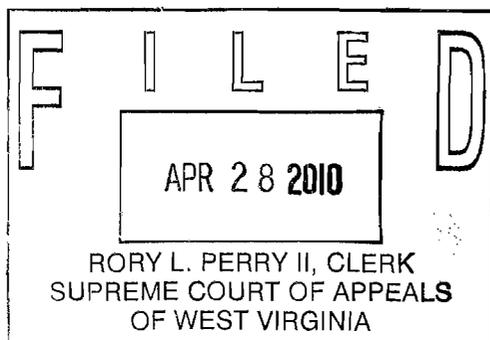
No. **35464**

JAMES ROBERT HARRIS,

Defendant below, Appellant.

BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

On Appeal from the
Circuit Court of Ohio County, West Virginia,
The Honorable Arthur M. Recht, presiding
Ohio County Case Number 08-F-54



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BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

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

This is an appeal by James Harris (hereinafter sometimes referred to as “Appellant”) from the January 7, 2009 Order of the Circuit Court of Ohio County, West Virginia (Recht, J.) sentencing him to serve not less than thirty-one (31) nor more than eighty (80) years following his convictions for one (1) count of “Conspiracy” in violation of Code §61-10-31; one (1) count of “Sexual Assault in the Second Degree” in violation of Code §61-8B-4; and two (2) counts of “Aiding and Abetting Sexual Assault in the Second Degree” in violation of Code §§61-11-6 and 61-8B-4. See R. at 610. The sentences were ordered (1) consecutive to one another; and (2) consecutive to the Appellant’s life sentence imposed for his conviction for the felony offense of “Abduction with Intent to Defile”, the triggering offense which gave rise to the filing of a recidivist Information and a jury trial which

resulted in a finding that the Appellant had been previously convicted of two felonies. See W.Va. Code §61-11-18(c).

Appellant filed no post-trial motions for relief, nor did he file a “Notice of Intent to Appeal” as required by Rule 37(b) of the West Virginia Rules of Criminal Procedure. Notwithstanding, on appeal, Appellant claims that the circuit court committed various errors, and requests that his convictions be set aside and the case be remanded for a new trial and/or that this case be remanded for sentencing.

II.

STATEMENT OF FACTS

Appellant James Harris, Johnny Ray Boykin, O’Dell Morgan and Dondie Williams were jointly indicted for multiple counts of the felony offenses of “Kidnapping,” “Abduction with Intent to Defile”, “Conspiracy”, “Sexual Assault, Second Degree” and “Aiding and Abetting Sexual Assault, Second Degree”. See Indictment, R. at 1. The crimes were committed against two victims, D.M¹. and J.L. on two separate occasions: the kidnapping and sexual assault of D.M. occurring in June, 2007 and the kidnapping and sexual assault of J.L. in September, 2007. Id. Prior to trial, the Circuit Court severed each defendant’s case from his co-defendants and granted separate trials for all four defendants. See July 31, 2008 Order, R. at 409

On June 16, 2007², at a time when she was separated from her husband, D.M met James

¹In accordance with State v. Wears, 222 W.Va. 439, 441 n. 1, 665 S.E.2d 273, 275 n. 1 (2008), Appellee will refer to each of the victims in this case by only her initials.

²D.M. was able to specifically recall the date that she met Mr. Harris, as she went to a music concert after work on that particular date. See R. at 622 (Trial Transcript, Vol. II, at pp. 888-890).

Harris, the appellant, while working. As the two were becoming friends, D.M. had hoped to have a relationship with Mr. Harris. One evening³ in the latter part of June, 2007, D.M. made plans to meet up with Mr. Harris and go to a local bar/restaurant known as The Alpha. Upon Mr. Harris' suggestion, D.M. met him at the Dairy Queen before they went to The Alpha. D.M. arrived at the Dairy Queen first and awaited Mr. Harris' arrival. When Mr. Harris arrived, he instructed her to leave her car there and ride with him. With Mr. Harris at that time was another man, whom D.M. knew only as "Corey".⁴ See R. at 622 (Trial Transcript, Vol. II, at 886 - 931).

D.M. went to The Alpha with Mr. Harris and "Corey" where they were joined by two more males known as "Old School"⁵ and "Sweetness"⁶. While at The Alpha, Mr. Harris bought and brought to D.M. shots and/or drinks, and possibly was the source of the cocaine that she had admitted to snorting in the restroom⁷. The group remained until closing. When Mr. Harris, with purchased carry-out beer in hand, asked her to leave, he told D.M. that they would be dropping the

³D.M. testified that she could not recall the date of the sexual assault but estimated it to have occurred not later than two weeks of having met Mr. Harris. See R. at 622 (Trial Transcript, Vol. II, at 902).

⁴"Corey" was later identified in the investigation as Johnny Ray Boykin, II. Mr. Boykin was tried and convicted of multiple counts, *inter alia*, of Sexual Assault, Second Degree, Conspiracy, and Aiding and Abetting Sexual Assault, Second Degree of both D.M. and J.L.

⁵"Old School", to this day, has yet to be identified. At trial, the appellant testified and refused to identify "Old School". See R. at 622 (Trial Transcript, Vol. II, at 1234).

⁶"Sweetness" was later identified in the investigation as O'Dell Morgan. Mr. Morgan was tried and convicted of multiple counts, *inter alia*, of Sexual Assault, Second Degree, Conspiracy, and Aiding and Abetting Sexual Assault, Second Degree of both D.M. and J.L.

⁷D.M. testified that Mr. Harris had given her cocaine on several occasions but could not recall if he was the one who had given it to her on the night of the sexual assault. See R. at 622 (Trial Transcript, Vol. II, at 901).

others off so that they -Mr. Harris and D.M. - could be alone. Relying upon his deceit, D.M. left with Mr. Harris and his cohorts. See R. at 622 (Trial Transcript, Vol. II, at 906-910).

Once in the backseat of Mr. Harris' two-door car, with all four of these men (the appellant Mr. Harris, Corey, Sweetness and Old School), D.M. became increasingly uncomfortable and eventually stated several times to all of them that she had no intention of having sex with all of them. Various responses from all of the male occupants in the car were given, reassuring D.M. that she was not going to be forced to do anything that she didn't want to do. After a stop at Sheetz, Mr. Harris drove them all to the Comfort Inn hotel in the Dallas Pike area of Ohio County, West Virginia. D.M. got out of the car, again restating her anxiety about these men thinking that she wanted to have sex with all of them. Again, her would-be assailants, allayed her fears. The Comfort Inn had no available rooms, and as such, Mr. Harris drove D.M. and the three others to the Valley Grove Motel. Upon getting out of the car, D.M. asked Mr. Harris what was going on, and he assured her that they were going to just go drink a beer in a room he had procured and then he and D.M. would leave. See R. at 622 (Trial Transcript, Vol. II, at 906-917).

D.M. was the last person to walk into the room at the Valley Grove Motel. Immediately upon her entry, Mr. Harris locked the door behind her, while "Corey" moved to the bed and "Sweetness" began to undress. Mr. Harris ordered her to take off her clothes. D.M. once again voiced her lack of consent, this time pleading with Mr. Harris, to which he again ordered her to remove her clothes, a command with which she ultimately complied out of fear. From there, D.M. was "gang raped" to-wit, she was sexually assaulted multiple ways and multiple times, by Mr. Harris, "Corey" and "Sweetness". Id. (Trial Transcript, Vol. II, at 918-923).

D.M. did not immediately report the sexual assault to law enforcement⁸ but rather waited until early August, 2007. Upon her report, an investigation was commenced by Sgt. Joseph Sipos of the Ohio County Sheriff's Department.

As the summer of 2007 came to a close, and fall having just arrived, one evening, on September 24, 2007, victim number two, J.L., was with a friend of hers, Megan Mangino, hanging out. The two met up with another female, Tasha Bundy, and ultimately either Megan Mangino or Tasha Bundy called Dondie Williams⁹. It was agreed that they would meet Mr. Williams at the McDonald's in the Elm Grove section of Wheeling, where ultimately Megan Mangino left her car. J.L. and the two other females got into Mr. Williams' car and went back to Mr. Williams' residence to switch vehicles. They proceeded to CVS to purchase liquor and at some point, two additional males joined their group. These two males were identified to J.L. and her girl friends as "Corey" and "Sweetness". Ultimately, J.L. and her two girl friends, along with Mr. Williams, "Corey" and "Sweetness" ended up at a bar named Capone's in north Wheeling. Before arriving, however, a stop was made along the way to purchase some Ecstasy pills. See R. at 621 (Trial Transcript, Vol. I, at pp.444-450 and pp.535-545).

At Capone's, the original group met Mr. Harris who proceeded to "feed" large quantities of alcohol to J.L. Id. (Trial Transcript, Vol. I, at pp. 543-544). The last thing J.L. remembered was leaving Capone's and getting into a vehicle. Her next recollection was waking up in a hospital bed.

⁸D.M. confided immediately to two of her co-workers within hours of the rape. One friend, Abbey Becca, testified to this at trial. See R. at 622 (Trial Transcript, Vol. II, at 925 and 874).

⁹Mr. Williams was charged in the Indictment herein, as well. Ultimately, in November, 2008, Mr. Williams plead guilty under Kennedy v. Frazier to two counts of "Conspiracy" and was sentenced to not less than two nor more than ten years in the penitentiary.

Id. (Trial Transcript, Vol. I, at pp.453-454). Hospital personnel notified law enforcement, and Sgt. M. Scott Adams of the West Virginia State Police, Wheeling Detachment, commenced the investigation upon his arrival at the hospital during the morning hours of September 25, 2007.

Although J.L. had no recollection of the brutal sexual assault upon her at the hands of Mr. Harris and “Corey” and “Sweetness”, Megan Mangino and Tasha Bundy were able to relate to Sgt. Adams, and ultimately to the jury in their trial testimony, what happened when they left Capone’s.

When the group left Capone’s, they divided up and got into two cars. Mr. Harris drove the first car, proceeded onto the Interstate and lead them to the Comfort Inn hotel. Ms. Mangino had no idea that the Comfort Inn was their destination. J.L. was undoubtedly intoxicated when she left Capone’s but by the time they arrived at the hotel, her condition had further deteriorated to the point where she had difficulty walking or standing without assistance. Id. (Trial, Transcript, Vol. I, at pp. 545-550 and pp. 498-500).

Using Donnie Williams’ money, Ms. Mangino, Mr. Williams and Mr. Harris procured two adjoining hotel rooms, numbers 250 and 252, which were registered in Megan Mangino’s name. When Ms. Mangino and Ms. Bundy got to the hotel rooms, they became quite concerned about J.L.’s condition and thus put her in a cold shower in an attempt to sober her up. Ms. Mangino and Ms. Bundy undressed J.L., showered her and dressed her again thereafter, as J.L. could do none of these things. In the shower, neither Ms. Mangino, nor Ms. Bundy saw any injuries, marks or abrasions on J.L.’s body. After the shower, the two completely re-dressed J.L. and laid her in one of the beds and proceeded to the adjoining room where Mr. Harris, “Corey”, “Sweetness”, Mr. Williams and another man¹⁰ on crutches were. When they last saw J.L., she was fully clothed, passed out and alone in

¹⁰This man was identified at trial as Jamal Darby.

Room 250 with the door between the two rooms open. R. at 621 (Trial Transcript, Vol. I, at pp. 500-501 and pp. 547-553).

The entire group excluding J.L. began to “party”¹¹ in the Room 252. At some point during the partying, the door adjoining the two hotel rooms was closed and locked, and Ms. Bundy realized that Mr. Harris, “Corey” and “Sweetness” were in the other room where J.L. had passed out. She began to pound on the door adjoining the two rooms and was later joined in her efforts by Megan Mangino. From time to time, the adjoining room door to Room 252¹² would partially open, and Mr. Harris, would tell Ms. Mangino and Ms. Bundy that J.L. “was fine” and shut the door again. They were finally able to get to J.L. twenty to thirty minutes later when Mr. Harris opened up the door and Ms. Mangino was able to push the door open to get through. See R. at 621, (Trial Transcript, Vol. I, at pp. 501-506 and pp. 555-557).

When they got to J.L. in Room 252, Ms. Mangino and Ms. Bundy found her naked except for her bra, lying half off of the opposite bed in which they had put her. “Sweetness” was just pulling up his pants and getting off the bed when they went to aid J.L. Condom wrappers lay about on the floor. J.L. was still not conscious, appeared beaten up and had a bite mark on her abdomen.¹³ Once they were able to get J.L. dressed and out to Mr. Williams’ car, Mr. Williams drove the three girls

¹¹Alcohol and marijuana were consumed by all in the room.

¹²Ms. Mangino testified that in the process of helping J.L. shower and put her to bed, she had left the card keys to both rooms in Room 252 such that she could not open it up from the outside to get to J.L. See R. at 621 (Trial Transcript at pp. 556-557). Additionally, this fact was corroborated by a photograph taken by law enforcement wherein the electronic card keys to the rooms were found lying on the dresser in Room 252. Id. (Trial Transcript at pp. 563-564); see also State’s Exhibit 8.

¹³Photographs of J.L.’s injuries were admitted into evidence. See State’s Exhibits 36 through and including 39.

back to McDonald's where Ms. Mangino's car had been left. Id. (Trial Transcript, Vol. I., at pp. 503-508 and pp. 557-568). From there, the two girls took J.L. to the emergency room where a rape kit was performed by Nancy Davis, R.N. and law enforcement was notified. Id. (Trial Transcript, Vol., I at pp. 591-626).

While responding to the hospital, Sgt. Adams requested that another law enforcement agency secure the hotel rooms where the sexual assault was alleged to have occurred. As it would turn out, Sgt. Sipos, who was investigating the June, 2007 gang rape case pertaining to D.M., responded to the Comfort Inn to secure two rooms. Ultimately, Sgt. Sipos and Sgt. Adams were able to compare notes and realized that each of their respective cases had two immediately salient features in common: (a) a gang rape and (b) the three mutual suspects - Mr. Harris, "Corey" and "Sweetness". Working together, the two were able to identify "Corey" and "Sweetness" by their real names and ultimately conducted interviews of these two. See R. at 621 (Trial Transcript, Vol. I, at pp. 302-304); see also R. at 622 (Trial Transcript, Vol. II, at pp. 739-745).

During each of their interviews, both Mr. Boykin ("Corey") and Mr. Morgan ("Sweetness") claimed that they each had consensual sexual intercourse with both D.M. and J.L. on the two evenings at issue, and further contended that both D.M. and J.L. had consensual intercourse with the other men present during both occasions. During his trial, videotapes of the interviews of both Mr. Boykin and Mr. Morgan, were admitted into evidence and published to the jury. See R. at 621 (Trial Transcript, Vol.I, at p. 311 and p. 338)¹⁴.

Three experts from the West Virginia State Police Crime Lab testified at trial in this matter

¹⁴It appears that the Circuit Clerk of Ohio County did not produce these videotapes as part of the entire record that was designated. Thus, counsel cites to those portions of the record confirming this fact.

regarding their analysis of the biological evidence submitted from both the rape kit taken at the hospital, as well as the items recovered from the hotel rooms. Id. (Trial Transcript, Vol. I, at pp. 629-710). DNA evidence confirmed the presence of Mr. Morgan's sperm in J.L.'s rectum and on the comforter taken from the hotel room. Low levels of male, non-sperm DNA which could not exclude Mr. Harris¹⁵ or Mr. Morgan were also identified from J.L.'s rectal swab. Id. (Trial Transcript, Vol. I, at pp. 673-681 and at p. 704).

Surveillance video footage from the night J.L. was raped was recovered from the Comfort Inn and admitted at trial. Id. (Trial Transcript, Vol. I, at pp. 245-257).¹⁶ From that surveillance, the jury was able to confirm the presence of Mr. Harris, Mr. Boykin, Mr. Morgan, and Mr. Willaims at the Comfort Inn. Id. The surveillance also depicted J.L.'s highly intoxicated state upon arrival as she was taken up steps to the second floor and her subsequent departure, both times being greatly assisted by other individuals. Id. Finally, the jury saw footage where J.L. - presumably *before* she was raped based upon the fact that she was still fully clothed - attempted to run down the hallway before she was grabbed by Mr. Morgan and drug back to Room 250 where Mr. Harris stood and held the door for Mr. Morgan. Id.

¹⁵Mr. Harris testified at trial and admitted to having sex with J.L. using a condom See R. at 622 (Trial Transcript, Vol. II, at p. 1177).

¹⁶It does not appear that the Circuit Clerk of Ohio County submitted State's Exhibit 2 which was the disc containing the hotel surveillance as part of the record herein. Thus, counsel cites to that page in the trial transcript confirming its admission and publication.

III.

ARGUMENT

A. **The Trial Court Properly Excluded Evidence Under The Rape Shield Law.**

STANDARD OF REVIEW

The applicable standard of review regarding rape shield evidence is well settled. "The test used to determine whether a trial court's exclusion of proffered evidence under our rape shield law violated a defendant's due process right to a fair trial is 1) whether that testimony was relevant; 2) whether the probative value of the evidence outweighed its prejudicial effect; and 3) whether the State's compelling interests in excluding the evidence outweighed the defendant's right to present relevant evidence supportive of his or her defense. Under this test, we will reverse a trial court's ruling only if there has been a clear abuse of discretion." State v. Wears, 222 W.Va. 439, 665 S.E.2d 273 (2008) (quoting Syllabus Point 6, State v. Guthrie, 205 W.Va. 326, 518 S.E.2d 83 (1999)).

DISCUSSION

The Appellant cites no error committed by the lower court pertaining to rape shield evidence. Instead, in both his Petition and Brief¹⁷ in support thereof, counsel for Appellant quotes *ad infinitum* and *ad nauseam* two cases which have absolutely no applicability to the case at bar: Barbe v.

¹⁷Counsel for the State watched the entire webcast of the oral argument in this matter on January 26, 2010 when this case was presented as the third case on the Court's Motion Docket and wishes to remind this Honorable Court of Appellant counsel's representations to the Court during argument to have this Petition accepted. Counsel for Appellant contended at argument that there were "three or four" affidavits from witnesses for Appellant who would have testified that each of them had sex with "the victim" after the alleged rape and the victim admitted to these "three or four" individuals that she had recently had sex with James Harris but did not describe it as a rape. He further contended to this Honorable Court that the lower court reviewed the affidavits and summarily refused to admit that evidence. The entire record was designated on this appeal and has been produced. A review of the entire record makes it absolutely clear that these representations are in fact blatant fabrications about facts that never occurred.

McBride, 521 F.3d 444 (4th Cir. 2008) and State v. Quinn, 200 W.Va. 432, 490 S.E.2d 34 (1997).

As argued below and by a review of the only rape shield evidence at issue relative to J.L., it is evident that these cases are completely inapplicable.

In its various pre-trial motions, the State filed a motion in limine seeking to preclude certain rape shield evidence. See R. at 317. The **only** rape shield evidence that the State sought to preclude as it pertained to victim J.L.¹⁸ was the fact that she was pregnant without her knowledge at the time of the rape and subsequently delivered a baby in June, 2008. At the time the State's Motion in Limine re: Rape Shield Evidence was filed, the paternity testing was not complete. On September 4, 2008, the State filed its Twelfth Supplemental Response to Defendant's Request for Discovery, indicating, without filing the report itself, that the DNA paternity report was provided to Appellant's counsel. See R. at 624. The testing revealed that neither the Appellant nor any of his co-defendants was the father of the baby.

The applicable provision of the Rape Shield Act provides:

In any prosecution under this article evidence of specific instances of the victim's sexual conduct with persons other than the defendant, opinion evidence of the victim's sexual conduct and reputation evidence of the victim's sexual conduct shall not be admissible: Provided, That such evidence shall be admissible solely for the purpose of impeaching credibility, if the victim first makes his or her previous sexual conduct an issue in the trial by introducing evidence with respect thereto.

See W.Va. Code §61-8B-11(b). Obviously, the fact that J.L. was pregnant at the time of the events at issue and was a mother at the time of trial necessarily implies sexual activity with someone other than Appellant and his co-Defendants, and is evidence clearly barred by the W.Va. Code §61-8B-

¹⁸Appellant was found not guilty of all charges pertaining to D.M. See R. at 570 and November 10, 2008 Verdict Order, R. at 598.

11(b).

On the morning of trial, prior to jury selection, a final pre-trial conference was held to review any and all outstanding issues. See R. at 621 (Trial Transcript, Vol. I, at pp. 9-42). During the final pre-trial conference, a lengthy discussion was held regarding all rape shield evidence, but, primarily as it pertained evidence related to the first victim, D.M. Id. (Trial Transcript, Vol. I, at pp. 12 to 22). Based upon the discussion in chambers during the pre-trial conference, the only objection or issue raised by Appellant's counsel concerning J.L. was his desire to offer evidence of J.L.'s alleged provocative conduct at the bar before going to the Comfort Inn on the night in question, which the lower court permitted. Id. (Trial Transcript, Vol. I, at pp. 12-16).

For purposes of trying to respond to an argument that Appellant fails to articulate whatsoever, one can only logically conclude that the only evidentiary issue on appeal is evidence that J.L. was pregnant on the night she was raped and subsequently gave birth, the father of whom was not the Appellant or his co-Defendants. Counsel for the Appellant did not even object to precluding this evidence and quite frankly, the lower court never specifically ordered that it was barred by the Rape Shield Act. Id. (Trial Transcript, Vol. I, at pp. 12-16). Notwithstanding, the issue was never raised during the trial by either party.

Appellant's brief, therefore, begs the question of the applicability of Barbe v. McBride, 521 F.3d 444 (4th Cir. 2008) and State v. Quinn, 200 W.Va. 432, 490 S.E.2d 34 (1997). These cases address the admissibility of evidence of false allegations made by a sexual assault victim regarding sexual misconduct *of others* as an exception to the Rape Shield Act. The record herein is devoid of

any evidence that J.L. falsely accused others of sexual assault¹⁹. Therefore, it is abundantly clear that neither Barbe, supra, nor Quinn, supra, are relevant to the instant case.

Undeniably, the lower court committed no abuse of discretion in precluding evidence at trial of J.L.'s pregnancy the night she was raped and subsequent birth. Applying the analysis in State v. Wears, 222 W.Va. 439, 665 S.E.2d 273 (2008), initially, it is axiomatic that this evidence is clearly not relevant as it has no bearing on whether Appellant sexually assaulted J.L. and aided and abetted his co-defendants in doing the same. The second factor - whether the probative value of the evidence outweighed its prejudicial effect - is moot, as the evidence is not probative of any issue. Finally, the third factor - whether the State's compelling interests in excluding the evidence outweighed the defendant's right to present relevant evidence supportive of his or her defense - is likewise moot. The disputed evidence²⁰ in no way presents evidence supportive of Appellant's defense.

Accordingly, the lower court appropriately exercised its discretion in precluding this very personal and irrelevant evidence pertaining to J.L. Therefore, the State respectfully urges this Honorable Court to affirm the lower court's ruling on the applicable Rape Shield Evidence.

B. The Trial Court Properly Exercised its Discretion in Sentencing the Appellant to Life on His Recidivist Proceeding to Run Consecutive to the Sentence for the Remainder of His Convictions in the Underlying Case.

Prior to sentencing for the offenses of which Appellant was convicted, the State filed an

¹⁹Appellant's discovery filed with the Court included a notarized statement by a witness Jennifer Harrison wherein she alleged one of the State's *witnesses* falsely accused another of rape. This irrelevant evidence, however, has no applicability to the victim, J.L.

²⁰Again, inasmuch as the State has painstakingly gone through the record to identify what *could be* the issue raised in Error One in his Brief, this quite simply is the State's best guess and the only logical conclusion, as it is the only rape shield evidence pertinent to J.L.

Information alleging that the Appellant was previously convicted of two felonies. A jury trial was conducted, and Appellant was indeed found to have been twice previously convicted of felony offenses²¹. Thus, at the sentencing hearing, the lower court sentenced Appellant to life pursuant to West Virginia Code §61-11-18(c) for the triggering offense of “Abduction with Intent to Defile”.

The life sentence language of West Virginia Code §61-11-18 is mandatory. In Syllabus Point 3 of State ex rel. Cobb v. Boles, 149 W.Va. 365, 141 S.E.2d 59 (1965), this Court held:

Where an accused is convicted of an offense punishable by confinement in the penitentiary and, after conviction but before sentencing, an information is filed against him setting forth one or more previous felony convictions, if the jury find or, after being duly cautioned, the accused acknowledges in open court that he is the same person named in the conviction or convictions set forth in the information, *the court is without authority to impose any sentence other than as prescribed in Code, 61-11-18, as amended.*

(Emphasis in original) See also Syllabus Point 5 of State ex rel. Combs v. Boles, 151 W.Va. 194, 151 S.E.2d 115 (1966). Thus, any sentence imposed, after the successful completion of the procedures prescribed in West Virginia Code § 61-11-19, which does not comport with West Virginia Code § 61-11-18 is an illegal sentence. See State ex rel. Daye v. McBride, 222 W.Va. 17, 658 S.E.2d 547 (2007). The lower court, therefore, correctly sentenced Appellant to life for “Abduction with Intent to Defile”.

The lower court is obligated to sentence the recidivist enhancement as part of the sentencing for the underlying conviction. In State v. Pratt, 161 W.Va. 530, 244 S.E.2d 227 (1978) at Syllabus Point 9, the Supreme Court stated that West Virginia “Code, 61-11-18, 19 require that the additional

²¹This Court refused Appellant’s Petition in the recidivist proceeding. See October 8, 2009 Order, Case No. 091129.

sentence of a recidivist by a trial court shall be included in the sentence imposed for the main conviction.” Id. (emphasis added). Thus, in addition to sentencing the Appellant to life as a result of his conviction for “Abduction with Intent to Defile”, the lower court had to sentence the Defendant for the other four felony offenses of which he was convicted, to-wit: one count of “Conspiracy”; one count of “Sexual Assault, Second Degree”; and two counts of “Aiding and Abetting Sexual Assault, Second Degree”.

The sentencing court has discretion in running sentences consecutive or concurrent or any combination of the two. The lower court sentenced the Appellant consecutive on all counts which resulted in a life sentence consecutive to not less than thirty-one (31) nor more than eighty (80) years. It was well within its discretion to sentence the Appellant, who stood before it as a convicted rapist and third time convicted felon, to life followed by not less than thirty-one years (31) nor more than eighty (80) years. See e.g. State v. Cooper, 172 W. Va. 266, 271, 304 S.E.2d 851, 856 (1983).

Appellant falsely believes that the sentence eliminates his eligibility for parole on his life sentence. It does not. What it means, however, is that once Appellant is paroled on his life sentence, he will begin serving the remainder of his sentence of not less than thirty-one (31) nor more than eighty (80).

C. The Appellant’s Argument That He Did Not Receive Complete Transcripts Prior to the Filing of His Petition Is Rendered Moot by His Receipt of Said Transcripts as Part of the Entire Record and Subsequent Failure to Raise Any New Issue.

A quick review and comparison of the “Third Error” as contained in the Appellant’s Brief in Support of Petition for Appeal reveals that it is identical and verbatim to the “Fourth Error” in the

Appellant's Petition. This is significant in that the crux of the complaint raised initially as the "Fourth Error" and now as the "Third Error" in Appellant's Brief is that the Appellant did not have all of the transcripts from the Court Reporter prior to filing the Petition. The entire record was designated by the parties and has been reproduced, including the remaining transcripts counsel did not have at the time the Petition was filed.

The fact that the "Fourth Error" in the Petition is now simply converted to the "Third Error" with a regurgitation of claimed error that Appellant is missing transcripts is now not an accurate statement. Appellant's counsel received these transcripts on or about thirty days prior to the filing of his Brief. Yet, Appellant has raised no new issues in his Brief despite having received the transcripts as part of the entire record. Thus, there is no issue before this Honorable Court. The entire reproduced record has rendered this whole argument moot.

D. The Trial Court Properly Denied the Appellant's Motion to Sever When the Evidence of Each Victim's Sexual Assault Was Properly Admitted as 404(b) Evidence in the Sexual Assault of the Other Victim.

STANDARD OF REVIEW

The Court has well established that "the decision whether to grant a motion for separate trials pursuant to Rule 14(a) [of the West Virginia Rules of Criminal Procedure] rest in the sound discretion of the trial court." See State v. Hatfield, 181 W.Va 106, 110, 380 S.E.2d 670 (1988); State v. Ladd, 210 W.Va 413, 437, 557 S.E.2d 820 (2001). Accordingly, a well considered determination by the trial court for a joint trial of offenses should stand absent an abuse of discretion.

DISCUSSION

Although unclear in the Fourth Error of the Petition for Appeal, it appears that the Appellant asserts that the trial court abused its discretion in not granting the Appellant's request for a severance of the charges against the Appellant relative to the victim identified as D.M. from those charges pertaining to the victim identified as J.L. This Court has consistently held that "joinder of offenses promotes judicial efficiency and economy by avoiding needless multiple trials and concluded that joinder is a generally appropriate legal procedure." Id. Regardless, as was the case in this matter, "[e]ven where joinder is proper.... a defendant may move for a severance of counts pursuant to Rule 14(a)." Id.

In the instant case, the appellant moved to sever the charges involving D.M. from those involving J.L., and vice versa. In response thereto, the State filed its Response to Defendant's Motion to Sever Charges (James Harris) and as well, for its Notice of Intent to Utilize 404(b) Evidence at Trial. See R. at 311. In addition to opposing the request to sever each victim's trial from the other, the State sought to have the evidence of the sexual assault of D.M. offered as direct evidence of said charged sexual assault, and as 404(b) evidence of the sexual assault of J.L. and vice versa. Id.

A pre-trial *McGinnis* hearing was held, wherein the State presented the testimony of Megan Mangino and D.M. Thereafter, the Court made the requisite findings under State v. McGinnis, 193 W.Va. 147, 455 S.E.2d 516 (1994), finding by a preponderance of the evidence that the acts occurred; that the evidence was proffered for a proper purpose; that the evidence was relevant under Rules 401 and 402 of the West Virginia Rules of Evidence; and that its relevance was not outweighed substantially by prejudice to the Appellant, Mr. Harris under Rule 403 of the West Virginia Rules of Evidence. Thus, the Circuit Court permitted the evidence of each victim's sexual

assault admissible in its own right and as 404(b) evidence in the case of the sexual assault of the other victim. See October 10, 2008 Order, R. at 466. Given the Court's proper rulings on the 404(b) evidence following the McGinnis hearing, even had severance been granted as to each victim, the evidence of charged sexual assaults against D.M. would have been presented and admitted in the trial of the defendant for the sexual assaults of J.L.

Starting with Syllabus Point 2 of State v. Milburn, 204 W.Va 203, 511 S.E.2d 828 (1998), this Court has ruled that “[a] defendant is not entitled to relief from prejudicial joinder pursuant to Rule 14 of the West Virginia Rules of Criminal Procedure when evidence of each of the crimes charged would be admissible in a separate trial for the other.” Id.; see also State v. Ladd, 210 W.Va 413, 437, 557 S.E. 2d 820 (2001) and State ex rel. Games-Neely v. Sanders, 211 W.Va 297, 565 S.E.2d 419 (2002). The Milburn ruling was again reiterated by this Court in State v. Ladd, 210 W.Va 413, 437, 557 S.E. 2d 820 (2001), where the Court specifically addressed evidence admissible under West Virginia Rule of Evidence 404(b) and its effects on the severance of a 1st degree murder charge from a charge of conspiracy to murder.

In Ladd, the defendant (Ladd) was charged with murdering her husband, and in the same light conspiring to murder her husband with co-defendant Mitchell, with whom she was also alleged to have had a sexual relationship. The defendant sought to have the charges of murder severed from the charges of conspiracy, a request that was denied by the trial court. Thereafter, this Court found that the defendant's sexual relationship with Mitchell would have been admissible in her trial for murder under rule 404(b) to show Ladd's motive for killing her husband, and further that the charge of conspiracy, and its attendant facts, were admissible under 404(b) to show a common plan or scheme. Accordingly, this Court held that because the evidence of the sexual relationship and

related conspiracy would have been admissible in the trial of Ladd for murder under rule 404(b), regardless of whether the charges were severed, that a severance would not have been warranted.

Similarly in the matter at bar, evidence of the sexual assault of D.M. would have been admitted in the trial of the Defendant for charges against J.L., regardless of a severance of the charges, under West Virginia Rule of Evidence 404(b) for the purposes of establishing the Defendant's motive, intent, preparation, common plan and absence of mistake or accident. Likewise, the evidence of the sexual assault of J.L. would have been admitted in the trial of the Defendant for charges against D.M..²² Accordingly, as the evidence of each charged crime would have been admissible in a separate trial for the other, the Defendant was not entitled to relief from the asserted prejudicial joinder of these offenses, and the trial court did not abuse its discretion in denying the Appellant's request for severance.

Additionally, the Appellant presents a circular argument regarding the prejudicial effect of the trial of both victim's charges together, asserting that the jury's guilty finding regarding the charges involving J.L. could only have been obtained as a result of the prejudicial effect of the presentation of the facts involving D.M.. Regardless of the Appellant's nonsensical argument to the contrary, the jury's finding in this matter clearly shows that, notwithstanding the propriety of trying both sets of charges together, no prejudice to the Appellant occurred.

Upon the conclusion of the presentation of the evidence in this case, the jury returned a not guilty verdict against the Appellant regarding all counts involving the victim D.M. Moreover, the

²² Although objected to at the McGinnis Hearing, the Appellant has not attacked the propriety of the trial court's ruling regarding the 404(b) evidence or its admissibility for the purposes asserted in the Petition for Appeal. Accordingly, for the purposes of this discussion and argument, the Appellee assumes the legal validity of the trial court's ruling and findings.

jury found the Appellant not guilty of the offenses of kidnaping J.L. as charged in counts twenty (20) and twenty-one (21), thereafter, convicting him of counts twenty-two (22) a charge of “Abduction with the Intent to Defile” J.L., twenty-three (23) a charge of “Conspiracy to Abduct with the Intent to Defile “J.L., twenty-five (25) a charge of “Aiding and Abetting Sexual Assault in the Second Degree” of J.L”, twenty-eight (28) a charge of “Sexual Assault in the Second Degree” of J.L., and thirty-five (35) “Aiding and Abetting Sexual Assault in the Second Degree” of J.L”.²³ The Appellant argues in one breath that trying both sets of charges together had the prejudicial effect of leading to a conviction on the counts involving J.L. under the “where there is smoke there is fire” theory. However, in the next breath, the Appellant acknowledges that the jury appropriately distinguished the incidents enough to return not guilty verdicts in D.M. case, upon which he then can argue that there was not a common scheme to justify a joint trial. This is a circular argument wherein no matter the outcome of the trial, absent total acquittal, the Appellant claims prejudice: first, by claiming that any convictions could only be obtained because of the 404(b) evidence; secondly, claiming that any acquittals *ex post facto* shows insufficient grounds to try the matters together.

Notwithstanding the fact that as a result of the admission of the 404(b) evidence in both sets of charges severance was not warranted, the acquittals on the charges regarding D.M. does not bolster the argument that there was not sufficient grounds to jointly try the matter, but clearly shows no prejudice to the defendant as a result of the joint trial. The standard for the admissibility of 404(b) evidence is a “preponderance of the evidence” standard, while in order to return a guilty verdict on the same facts at trial, a jury obviously must make a finding “beyond a reasonable doubt.”

²³ The numerical counts against the Appellant are not chronological, as the additional counts not listed were charges pending against co-defendants stemming from the same two sexual assaults.

A jury determination that a charge is not proved beyond a reasonable doubt does not negate the trial court's appropriate determination of admissibility based on a "preponderance" standard as per McGinnis, but more likely shows the jury's deliberate and considered consideration of the facts and the law as to each charged offense.

Moreover, the jury's finding of not guilty on the majority of the charges against the Appellant, including all of the counts involving D.M., clearly shows that the jury was able to follow the law, evaluate each case and facts independently and reach a verdict based solely on the admissible evidence, or in other words the complete opposite of a "where there is smoke there is fire" verdict. Accordingly, even if severance was warranted in this matter, the jury's verdict demonstrates clearly that a joint trial produced no prejudice to the Appellant.

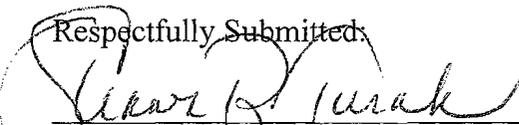
Therefore, the State respectfully submits that the trial court's denial of severance as to the two victims was not only proper, but moreover, the joint trial was not prejudicial. As such, the State requests that this Court affirm the lower court's denial of severance in the trial of these matters.

IV.

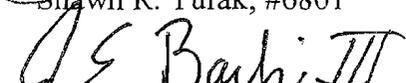
CONCLUSION AND RELIEF REQUESTED

Based upon the forgoing, the State submits that the Appellant's assignments of error are without merit. Accordingly, the State respectfully requests that this Honorable Court deny the Appellant's petition for appeal and affirm the underlying convictions and subsequent sentences.

Respectfully Submitted:



Shawn R. Turak, #6801



Joseph E. Barki, III, # 8510