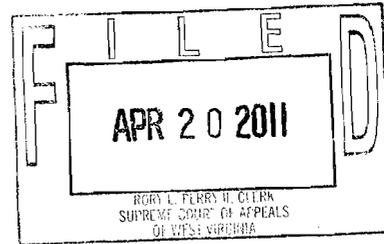

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 35680



STATE OF WEST VIRGINIA,

*Plaintiff Below,
Respondent,*

v.

TRACY L. HAID,

*Defendant Below,
Petitioner.*

RESPONSE TO PETITION FOR APPEAL

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RESPONSE TO PETITION FOR APPEAL

I.

STATEMENT OF THE CASE

On February 20, 2007, Tracy L. Haid, the Petitioner in the instant case (hereinafter “the Petitioner”), then a 39-year-old computer professional and a divorced father of two, resided alone in a rural cabin in Jackson County, West Virginia. (Trial Tr., 65-66, Sept. 9, 2009.)

Ms. Sadie S. (hereinafter “Ms. S.”),¹ then a 15-year-old high school student, resided with her parents and brother in a trailer court in Hartford, West Virginia. (Trial Tr., 22-23, Sept. 8, 2009.)

After a two-day trial that occurred on September 8 and 9, 2009, a Jackson County, West Virginia, jury found that on February 20, 2007, the Petitioner had engaged in two sexual acts with

¹This brief will use Ms. S.’s last name initial because the instant case involves sensitive matters.

Ms. S. at his residence—acts that constituted sexual assault in the third degree (or “statutory rape”) as defined by West Virginia Code § 61-8B-5 [2000]. (R. at 229-32.) Statutory rape occurs when there is sexual intercourse or sexual intrusion between an accused and a person under the age of 16, and there is more than four years’ difference in their ages.²

The jury acquitted the Petitioner of a third charge of statutory rape, and also acquitted him of three counts of forcible sexual assault. (*Id.*) The Honorable Thomas Evans of the Circuit Court of Jackson County, who presided over the trial, sentenced the Petitioner to two concurrent terms of imprisonment of one to five years. (R. at 272-74.)

II.

SUMMARY OF ARGUMENT

The jury’s verdict should not be reversed on the grounds that the trial judge prohibited the Petitioner’s trial counsel from asking Ms. S. whether she had previously engaged in anal intercourse. Additionally, the jury’s verdict should not be reversed on the grounds that the trial judge should have directed a verdict of acquittal. Lastly, the jury’s verdict should not be reversed on the grounds that the trial judge did not instruct the jury that they did not need to find the victim’s testimony inherently incredible to convict the Petitioner.

²West Virginia Code § 61-8B-5 [2000] defines “sexual assault in the third degree” as follows:

(a) A person is guilty of sexual assault in the third degree when:

....

(2) The person, being sixteen years old or more, engages in sexual intercourse or sexual intrusion with another person who is less than sixteen years old and who is at least four years younger than the defendant and is not married to the defendant.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent State of West Virginia does not believe that oral argument is required for this Court to decide the instant case.

IV.

STATEMENT OF FACTS

For approximately six months prior to February 20, 2007, Ms. S. and the Petitioner exchanged electronic messages in an “adult-romance” internet chat room. (Trial Tr., 23-25, Sept. 8, 2009.)³ The Petitioner initiated the message exchange with Ms. S. when he saw on the internet that Ms. S. lived about 15 miles from where he lived. (Trial Tr., 78-79, Sept. 9, 2009.) The Petitioner testified that during their exchange of messages he had believed that Ms. S. was 18, which was the age she had put on her chat room profile; and that on February 20, 2007, the Petitioner believed that Ms. S. had just turned 19. (*Id.* at 79, 108.)

Ms. S. testified that she had told the Petitioner during their exchanges that her age was 15. (Trial Tr., 23, Sept. 8, 2009.) She acknowledged that her chat room profile said she was 18; and she explained, without contradiction, that it was necessary to give a stated age of at least 18 to participate in the chat room. (*Id.* at 44.)

The Petitioner testified that during their exchanges he had revealed to Ms. S. both his true age and the fact that he had children. (Trial Tr., 80-81, Sept. 9, 2009.) In support of this testimony

³The Petitioner’s brief asserts that Ms. S. engaged in sexual electronic message conversations with strangers. (Petitioner’s Brief, 2.) However, the record pages to which the Petitioner cites for this assertion show that Ms. S. denied this suggestion, and stated that she had only engaged in a sexual conversation with one individual—her former boyfriend D. (Trial Tr., 48-49, Sept. 8, 2009.)

the Petitioner put into evidence a photograph of himself and his children that had been taken about four years before the time of trial. (R. at 196.) He testified that this photograph and his true age were part of the chat room profile that he had in place when his exchange of messages with Ms. S. was going on. (Trial Tr., 69, Sept. 9, 2009.)

However, the Petitioner acknowledged on cross-examination that the photograph was printed on a later date, and he could not offer any evidence showing that the photograph was, in fact, on the internet prior to February 20, 2007—or that it was viewed by Ms. S. (Trial Tr., 72-76, Sept. 9, 2009.) Moreover, the Petitioner, an experienced computer specialist, also acknowledged on cross-examination that after he was first interviewed by the police on June 28, 2007, about the charges against him, and for some time thereafter, he could have obtained and preserved any computer evidence showing the information that was allegedly on his profile at the time of the exchanges. (*Id.* at 104-08.) The Petitioner also acknowledged on cross-examination that he was aware at the time that obtaining such information could be beneficial to his defense; and that he nevertheless chose not to obtain and preserve that information—despite having obtained and preserved similar age information that was given on Ms. S.’s chat room profile. (*Id.* at 104-08, 122.) The Petitioner did not offer any explanation for that choice. *Id.*

Ms. S. testified that the Petitioner had told her in their exchanges that he was 18 years old, and that the Petitioner did not disclose in those exchanges that he had children; and she denied having ever seen the alleged profile picture depicting the Petitioner and his children. (Trial Tr., 54, Sept. 8, 2009.) The Petitioner’s trial counsel did not cross-examine Ms. S. about this testimony.

The report of an investigating state trooper corroborates Ms. S.’s testimony at trial that prior to February 20, 2007, the Petitioner had told Ms. S. that he was 18. (R. at 83-84.) In support of an

unsuccessful motion to dismiss the charges against the Petitioner at the close of the prosecution's evidence, the Petitioner's counsel cited to Ms. S.'s additional statement to the trooper that she had seen a (later removed) statement that the Petitioner's age was 35 on his internet profile. (Trial Tr., 56-57, Sept. 9, 2009.) However, the trial judge pointed out that:

THE COURT: *it wasn't developed when she looked at the profile, whether it was before the incident or significantly later. You never asked [Ms. S.] that question, . . . whether or not she looked at the profile.*

MR. COSENZA: I not sure I did. I not sure I did. [sic].

THE COURT: So that is a little equivocal to me. I started to ask that, and I thought the better of it. Let the lawyers try the case, the judge needs to stay out of it. But that question did - - you know, when did she look at the profile? I mean, she didn't talk to the trooper until about a month - -

MR. COSENZA: A month later.

THE COURT: - - after the event.

MR. COSENZA: That's right.

THE COURT: So.

(*Id.*; emphasis added.)

Ms. S. testified that after sending her a number of sexually suggestive messages, asking for Ms. S.'s "bra size," etc., the Petitioner said in a message that he wanted to meet Ms. S. personally, to "get to know her more"; and that she agreed to meet him; and that the Petitioner called Ms. S. on her cell phone to find out where to meet her; and that she told him to pick her up down the road from her residence where she lived with her parents. (Trial Tr., 23-28, Sept. 8, 2009.) Ms. S. testified that she met the Petitioner along the road at about 5:30 p.m., got into his vehicle, and he immediately drove away. (Trial Tr., 28-30, Sept. 8, 2009.) Ms. S. testified that her first thought when she looked

closely at the Petitioner as they drove away was that “[h]e was really old.” (Trial Tr., 29, Sept. 8, 2009.)⁴ Ms. S. testified that the Petitioner drove for a “long time,” and they ended up at his residence, a cabin in Jackson County. (*Id.* at 30-31.) The Petitioner agreed that the sequence of events to which Ms. S. testified, leading up to their arrival at his cabin, was accurate. (Trial Tr., 113, Sept. 9, 2009.)

The Petitioner testified that his purpose for going to his cabin with Ms. S. was to get his guitar, because his plan for the evening with Ms. S. was that she and the Petitioner were going to go to a rehearsal of a band in which the Petitioner played, at the home of the Petitioner’s friend Todd Winters in a nearby town. (Trial Tr., 83-84, Sept. 9, 2009.) The Petitioner did not call Mr. Winters or any other band members as witnesses to testify at his trial. He did not explain why he brought Ms. S. into the cabin.

The Petitioner testified that after Ms. S. was in his cabin, he asked her age, and she told him she was 16. (Trial Tr., 85-86, Sept. 9, 2009.) The Petitioner testified that he immediately told Ms. S. to get back in the car, and he drove her back home and let her off near her residence. (*Id.*) He denied any sort of sexual contact with Ms. S. at his residence. (*Id.*)

West Virginia Code § 61-8B-12(a) [1984] provides that lack of knowledge of the age of the victim is an affirmative defense to a charge of statutory rape. *See State v. Hottinger* 194 W. Va. 716, 724, 461 S.E.2d 462, 470 (1995). When a defendant raises this affirmative defense, the jury must be instructed that the prosecution has the burden of proving the defendant’s knowledge of the

⁴The Petitioner’s brief misstates the record when it says that “when [Ms. S.] opened the car door, it was apparent that Mr. Haid was significantly older.” (Petitioner’s Brief, 2.) Ms. S. testified that she could not clearly see the Petitioner until after she was seated in his car. (Trial Tr., 61-62, Sept. 8, 2009.)

other person's age beyond a reasonable doubt. (*Id.*) In the instant case, the Petitioner did not raise this affirmative defense or request such an instruction. (*See* Jury Charge, Trial Tr., 135-67, Sept. 9, 2009.) Instead, the Petitioner relied entirely upon his contention there had not been any sexual contact between himself and Ms. S.

Ms. S. testified that when she and the Petitioner were in his cabin, the Petitioner asked Ms. S. to remove her coat, and she did so; that the Petitioner turned on the television, and that she sat on the couch in the living room with him watching TV; and that he repeatedly offered her beer that she refused; and that the Petitioner then tried to "fondle me and touch me and stuff, and I told him, No." (Trial Tr., 31-32, Sept. 8, 2009.) She testified that the Petitioner then led her by the arm into the bedroom. (*Id.*) Ms. Smith testified that in the bedroom, the Petitioner fondled her; and partially disrobed her by pulling down her pants; and laid her on the bed, placed his mouth on her vagina, and licked her. (Trial Tr., 33, Sept. 8, 2009.) Then, she testified:

MS. S.: He picked me up, and he told me, to do him in the same way [oral sex], and I told him, "No," and then he -- he threw me around so I was facing the bed and he - - he stuck his penis in - in

PROSECUTOR: In where [Ms. S.]?

MS. S.: In my butt, and he had anal sex with me.

PROSECUTOR: Did he ejaculate?

MS. S.: He pulled it out, and he did it on me.

. . . .

MS. S.: He hurt me.

PROSECUTOR: He did what?

MS. S.: He hurt me.

(*Id.* at 34).

Ms. S. testified that after the Petitioner ejaculated, he “went into the hallway and got a towel and told me to clean up,” (*id.*); and that then he drove Ms. S. to her boyfriend’s house near her home. (Trial Tr., 14-15, Sept. 9, 2009.) Ms. Smith testified that she did not disclose the alleged incident to anyone for about a month, because she was ashamed and embarrassed. (Trial Tr., 35, Sept. 8, 2009.)

On the issues of consent, earnest resistance, and/or forcible compulsion (which related to the three counts of second degree sexual assault for which the Petitioner was acquitted), Ms. S. testified that she felt frightened, did not know where she was or how she could leave, and that she told the Petitioner “No” several times. (Trial Tr., 31-34, 73-74, Sept. 8, 2009.) Ms. S. acknowledged on cross-examination that the Petitioner had not used threats or “full force” when they went into the bedroom, or when he manipulated or held her body into position during the sexual contacts. (*Id.* at 73-74.) She denied willing participation in any sexual contact. (*Id.*).

Ms. S. first reported the incident to a youth pastor at her church about a month after the incident occurred; and, soon thereafter, to the police. (R. at 83.) When questioned by the police, the Petitioner first denied the incident entirely (Trial Tr., 33-34, Sept. 9, 2009);⁵ then he admitted that Ms. S. had been in his cabin but denied that he had any sexual contact with Ms. S. (*Id.* at 32-33.)

⁵The Petitioner’s brief thus misstates the record when it asserts that the the Petitioner “fully cooperated” with the investigation. (Petitioner’s Brief, 4.)

The Petitioner's trial counsel, in his opening statement, told the jury that the Petitioner would show certain facts that explained why Ms. S. had "made up" and falsely reported the evening's events to her pastor and to the police. The Petitioner's counsel told the jury:

[Ms. S.] starts calling him on the phone, and continues to call him. She calls him on different occasions, wanting to meet up with him, wanting to see him, wanting to - - her to - - and, of course, you know, [the Petitioner] is having none of it, you know. But she continues to contact him after February the 20th. And, you know, [the Petitioner] makes it very clear to her, "What, are you nuts? I want nothing to do with you."

Almost one month to the date, right around March the 23rd - - keep in mind that their meeting was on February the 20th - - on March the 23rd, about one month after this supposedly takes place, [Ms. S.] decides to tell someone that [the Petitioner] raped her.

(Petitioner's Trial Counsel's Opening Statement, 9-10, Sept. 8, 2009.)

However, the Petitioner's counsel's attempt to explain Ms. S.'s report—as the vengeful act of a spurned young woman whose phone calls had been rejected by the Petitioner—suffered a fatal setback at trial. The Petitioner, who was apparently unable to "keep his story straight," took the stand and told the jury that the alleged "I want you" phone calls from Ms. S. had occurred *after* the Petitioner reported the incident to the police:

TRIAL COUNSEL: Okay. After you dropped her off, did you start getting phone calls from her?

PETITIONER: Yes, I did.

TRIAL COUNSEL: Tell the jury about that.

PETITIONER: Those phone calls did not happen until after August of 2007, after the legal process started.

....

PETITIONER: Well, at first it was, like, you know, "I'm so sorry. I'm sorry I lied. I love you. Please don't ignore me," and all that kind of stuff and I hung up on her.

.....

I have a list of the dates and times that-- you know, she would always call at a private number when I-- you know, if it was midnight, and private call come in, you could bet it was [Ms. S.].

.....

I have a list over there and I am thinking it is probably 10 times.

.....

If it would have been her number, and I would have recognized that, you know, I would never answered the call. [Apparently speaking to Ms. S.'s parents, seated in the courtroom:]

I would never have picked up your daughter, if I knew she was underage.

PROSECUTOR: Your Honor, I would ask you to instruct the witness not to freaking talk to - -

PETITIONER: I figured I - -

PROSECUTOR: - - or address the victims like that.

PETITIONER: - - owed them that.

(Trial Tr., 87-89, Sept. 9, 2009.)

The Petitioner's "spurned/vengeful teenager/phone calls" explanation for Ms. S.'s report of the February 20, 2007, incident was further undermined when the Petitioner testified on cross-examination that even though he knew he was under investigation for alleged sex crimes involving Ms. S., he did not report the alleged calls from Ms. S. to law enforcement. (Trial Tr., 114, Sept. 9, 2009.) The Petitioner somewhat mysteriously claimed that he did report the alleged calls to his attorney and "was instructed what to do with that." (*Id.*)

Apparently recognizing that the Petitioner's story had fallen apart in front of the jury, the Petitioner's trial counsel did not offer the purported "list" of alleged calls into evidence. Nor did counsel provide any other information relating to the alleged calls, or question Ms. S. or any law enforcement personnel about the alleged calls. The alleged calls were also not mentioned in Petitioner's trial counsel's closing argument. Instead, the jury was offered a new and entirely speculative "motive" for Ms. S. to have made up her report to her pastor and the police:

TRIAL COUNSEL: [The Prosecutor] argues to you that, well, she [Ms. S] doesn't want anything, you know, she's never asked him [the Petitioner] for money, she's never tried to threaten him. Well, of course not, could you imagine her coming into court and me having information that she is trying to get money out of [the Petitioner]? How do you think that would play to the jury? But she is 18 years old. She has two years two (sic) file something against [the Petitioner]. Two years. **And [I] guarantee, you convict him of one of these crimes, and she is going to head to the courthouse and that will be her opportunity to look for money.**

(Petitioner's Trial Counsel's Closing Argument, 15, Sept. 9, 2009; emphasis added.)⁶

⁶Such argument is not uncommon. *See, e.g.*, Tom Lininger, "Is It Wrong to Sue for Rape?," 57 Duke L.J. 1557, 1594-95 (April 2008):

A few examples from published opinions illustrate the tenor of typical cross-examination . . . :

"And you sued [the accused] trying to get money through this rape story of yours, haven't you?"

"[H]ow much money are you going to make . . .?"

"Ma'am, do you expect to get any money out of this case?"

"[Y]ou are going to take [the accused] for all he's worth?" Defense attorneys sound similar themes in their summations and arguments:

"[The accusers] fabricated their testimony as part of a devious plot to generate a lawsuit."

"[I]f [the accused] were convicted, these lawyers could bring a lawsuit on behalf of [the accuser] that stands to make her a very wealthy woman."

(continued...)

In summary, the Petitioner’s version of his intentions and actions on the evening of February 20, 2007—his problematic rendezvous with a much younger person; his obviously untenable “spurned teenager tells vicious story after rejected phone calls” story; his uncorroborated “band visit” story; and his “I sent her my kids’ pictures but I chose not to prove it when I could have” story—to mention just a few examples—were incredible. Ms. S., on the other hand, told a consistent version of events. Her version established that there had indeed been sexual contact between the two on the evening of February 20, 2007—contact that clearly constituted the offense of statutory rape.

An appellate court should ordinarily view the facts of a case on review as being the factual assertions contained in the admissible evidence and reasonable inferences therefrom that are consistent with the jury's verdict. *See, e.g., State v. Bull*, 204 W. Va. 255, 258 n.1, 512 S.E.2d 177, 180 n.1 (1998) (“in light of the jury’s guilty verdict, we view factual conflicts in the evidence as having been resolved by the jury in a fashion consistent with the jury’s verdict.”). *See also State v. Atkins*, 163 W. Va. 502, 515, 261 S.E.2d 55, 62-63 (1979) (“the jury’s verdict of guilty is taken

⁶(...continued)

“[T]he rape allegation was part of [the accuser's] plan to extort money from [the Seattle Housing Authority]”

“[The accuser showed] greed and unsavory motives in filing a civil suit.”

“[T]he complaining witness and her mother were lying because of the pendency of a civil lawsuit.”

“[The accuser] believed it would be easy to obtain money from him through a civil lawsuit”

“[The accusers’] claims are fabricated and their motive for fabricating these claims is to sue the State and to get rich quick.”

“[The rape prosecution] was about money, [and] . . . money was what she’s after.”

(Alterations in original; footnotes omitted.)

to have resolved factual conflicts in favor of the State”); *State v. Kirk N.*, 214 W. Va. 730, 735, 591 S.E.2d 288, 293 (2003) (“We set forth in a footnote a summary statement of facts taken from the evidence at trial, assuming that the jury believed those pieces of evidence consistent with their verdict.”).

The trial judge, who heard all of the testimony, expressed his view of the Petitioner’s version of events at the Petitioner’s sentencing. The judge said:

[T]he [Petitioner] portrays this whole situation and his view of this victim as one where he was -- before the event, was interested in a relationship with this girl. He indicated that he’d spoken to his parents about her and to friends.

But yet, when he picks her up, it is not at her home. When he drops her off, it is not at her home. . . . [S]he left her home . . . in the nighttime, walked down the street, and the [Petitioner] . . . picked her up in the nighttime, dropped her off in the nighttime. . . .

. . . .

. . . the profile presented to me is a manipulative person

. . . .

. . . [T]he defendant is bright, unremorseful, manipulative, the jury rejected [the Petitioner’s story], and the Court rejects it also.

(Sentencing Hr’g, 14-17, Nov. 9, 2009; R. at 314.)

Following Ms. S.’s direct testimony, the Petitioner’s counsel cross-examined her on two consecutive days. At the end of the first day’s cross-examination, the Petitioner’s counsel made an oral motion asking the trial judge for permission to “inquire of this witness about her past experience with anal intercourse :

TRIAL COUNSEL: I understand that the rape shield statute⁷ does not allow me to ask a victim about prior sexual experiences, unless they were with the [Petitioner]. However, I would like permission to inquire of this witness about her past experience with anal intercourse, since I believe -- you know, it's -- since I believe that it should be an issue for the jury that might be physically impossible to have this kind of intercourse with her, with her jeans wrapped around her legs.

....

If you have your pants down around your ankles, the jury can infer -- and there is no lubrication -- that jury, I think, can infer that, yeah, that is not possible.

Now, if she's had experience with anal intercourse before, I would imagine that it might be.

THE COURT: Oh, Counsel, I think you are leaping to some significant factual assumptions. And I'll read your case, but I'm not inclined to accept your argument at this point. . . . What says the State about it?

PROSECUTOR: . . . Absent some sort of Dr. Ruth medical evidence that could or could not happen, the jury can infer from her testimony what credibility they want to do. We don't need to go out on a fishing expedition that concerns a 16-year-old's sex habits.

THE COURT: . . . I don't think it's been established in the evidence that at the time of the incident involving anal intercourse her jeans and underpants were around her ankles . . . And even if the testimony is that, seems like that is going to open up a whole

⁷Counsel was referring to West Virginia Code § 61-8B-11 [1986], which states, in pertinent part:

(b) 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.

lot in this trial that really is not necessary to present an adequate defense. But . . . I will consider it.

(Trial Tr., 84-87, Sept. 8, 2009.)

On the following day, before Ms. S.'s cross-examination resumed, the trial judge denied the Petitioner's counsel's pending request for permission to ask Ms. S. if she had past experience with anal intercourse; the judge stated that "the premise for it is entirely speculative . . . I just don't think the evidentiary predicate for the exception is met by the evidence in this case." (Trial Tr., 5, Sept. 9, 2009.) Thereafter, in Ms. S.'s resumed cross-examination, the Petitioner's counsel elicited Ms. S.'s testimony that her pants had remained around her ankles during the entire time that the anal sex had allegedly occurred, and that the Petitioner did not use any kind of lubrication. (Trial Tr., 13-14, Sept. 9, 2009.) However, the Petitioner's counsel did not, based on this testimony, renew his motion to ask Ms. S. about her past experience with anal intercourse.

The Petitioner's counsel stated the following objection to the language of the trial judge's proposed jury charge, and the judge responded as follows:

TRIAL COUNSEL: [The charge states that] "a conviction for the crimes charged by the indictment may be obtained or rest on the uncorroborated testimony of the alleged victim, unless you determine that such testimony is inherently incredible. The term 'inherently incredible' means more than a contradiction, inconsistency, or lack of corroboration. For the jury to decide that testimony is inherently incredible, you must decide that there has been a showing of complete untrustworthiness. In this regard, you should scrutinize her testimony with care [and] caution."

And then I would like to add, "However, you do not need to find [Ms. S.'s] testimony inherently incredible to find the Petitioner not guilty."

....

THE COURT: I think the charge adequately describes the State's burden of proof, over and over and over again. This instruction is kind of textbook instruction.

TRIAL COUNSEL: Okay.

THE COURT: Surely you've seen this before. Have you not seen this before?

TRIAL COUNSEL: I've seen it before.

THE COURT: Okay. All right. I understand your argument. But I think you are reading too much into that –

TRIAL COUNSEL: Okay.

THE COURT: -- because --

TRIAL COUNSEL: Lawyers sometimes do.

THE COURT: Because, I mean, throughout this charge, the jury is continually reminded that they cannot find this man guilty unless they're convinced of his guilt beyond a reasonable doubt. So, I'm not going to change the charge.

(Trial Tr., 92-94, Sept. 9, 2009.)

V.

ARGUMENT

A. **THE JURY'S VERDICT SHOULD NOT BE REVERSED ON THE GROUNDS THAT THE TRIAL JUDGE PROHIBITED THE PETITIONER'S TRIAL COUNSEL FROM ASKING MS. S. WHETHER SHE HAD PREVIOUSLY ENGAGED IN ANAL INTERCOURSE.**

The trial judge relied upon the provisions of West Virginia Code § 61-8B-11 [1986] in refusing to accede to Petitioner's trial counsel's request to ask Ms. S. whether she had engaged in prior anal sexual intercourse. This statute states, in pertinent part:

(b) 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.

The Petitioner's brief argues that if Ms. S., as expected, would deny prior anal sexual intercourse, then her "no" answer to this question would have allowed the jury to "infer that [Ms. S.'s] testimony about . . . anal intercourse [with the Petitioner] was not credible." (Petitioner's Brief, 6.)

The general law governing this issue is found at Syllabus Point 6 of *State v. Guthrie*, 205 W. Va. 326, 518 S.E.2d 83 (1999):

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.

Additionally, *State v. Wears*, 222 W. Va. 439, 665 S.E.2d 273 (2008), states:

A defendant seeking to introduce evidence of a victim's sexual history must offer **an evidentiary proffer which affords that trial court a meaningful opportunity to balance the interests of the state, as embodied in the rape shield statute, against the interests of the defendant.** "The good faith basis does not have to be admissible evidence, but it must be something that persuades the trial judge the question is proper, such as an affidavit, a reliable record, or a potential live witness." *Cleckley's Handbook on Evidence for West Virginia Lawyers* § 6-8(B)(2)© (4th Ed. 2000). A proffer requiring the court to speculate is insufficient.

222 W. Va. at 447, 665 S.E.2d at 281 (emphasis added).

In the instant case, the Petitioner's trial counsel did not provide any evidentiary proffer that supported the arguable relevance of a presumed lack of prior anal intercourse by Ms. S. on the issue of her credibility. The trial judge stated, in making his ruling: "the premise for it is entirely

speculative . . . I just don't think the evidentiary predicate for the exception is met by the evidence in this case." (Trial Tr., 5, Sept. 9, 2009.) This statement by the trial judge echoed this Court's statement in *State v. Wears*, 222 W. Va. at 449-50, 665 S.E.2d at 283-84:

[T]he Appellant simply did not provide sufficient evidence for the court to conduct the balancing test enunciated in syllabus point 6 of *State v. Guthrie*.

....

A defendant's right to confront witnesses is not absolute. . . . Trial courts "retain wide latitude . . . to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant."

....

. . . [B]ecause an inadequate proffer was presented, we find no abuse of discretion below. The circuit court correctly excluded such evidence.

(Citations omitted.)

In a similar case from another jurisdiction, *Agard v. Portuondo*, 117 F.3d 696 (2d Cir. 1997), the court stated:

Agard's first assertion of constitutional error relates to the trial court's limitation of defense counsel's attempt to cross-examine Winder on whether she had ever engaged in anal intercourse with persons other than Agard. At a sidebar, the defense asserted that the testimony was not being sought for "promiscuity purposes or anything of that nature." The argument was that the prosecution had attempted to overcome the medical evidence showing no anal trauma, by eliciting on direct examination Winder's testimony that she did not struggle during the incident; this, Agard's counsel asserted, "opened the door" to sexual history testimony probative of what the medical record ought to reflect. The trial court ruled that the defense's inquiry about prior sexual history was forbidden by the state rules of evidence, and that any probative value was far exceeded by the prejudice. It also rejected the defense's suggestion that the testimony be allowed with a limiting instruction to the jury.

....

Petitioner argues to this court that the questions he intended to ask Winder are not the kind that rape shield statutes such as New York's are intended to prevent. The interrogation of Winder was, he asserts, not an attempt to harass her or soil her name with intrusive questions and innuendo about promiscuity. Nor did he wish to show that she had a propensity to consent to anal intercourse which was demonstrated by her past behavior. In this appeal, he avows that he sought a negative answer to his questions.

....

We disagree with petitioner that his counsel's questioning of Winder was obviously outside the usual application of the rape shield laws. Rape shield laws serve the broad purpose of protecting the victims of rape from harassment and embarrassment in court, and by doing so seek to lessen women's historical unwillingness to report these crimes. Yet they also serve a second purpose: they reinforce the trial judge's traditional power to keep inflammatory and distracting evidence from the jury. In this respect, rape shield laws are an example of the court's traditional power to exclude evidence the prejudicial character of which far exceeds probative value. Evidence of past sexual conduct and particularly of, perhaps, more unusual activities such as anal intercourse, is likely to distract a jury from the contemporaneous evidence it is asked to consider. And as for the probative side of the equation, it is far from clear what bearing prior consensual experience with a particular sexual practice has on the probability of trauma occurring during a subsequent non-consensual act. For this reason, we believe that this second purpose of rape shield laws is well-served by excluding defense counsel's proposed questions to Winder. We find that the New York rape shield law is a restriction that both facially and as applied in Agard's case was neither arbitrary nor "disproportionate to the purposes [it was] designed to serve," and therefore does not violate any constitutional prohibition.

117 F.3d at 702-03 (citations omitted).

As this Court has stated, "[such questioning about a child's other sexual conduct has] huge potential for diverting the attention of jurors onto side-issues which could result in great unfair prejudice to the prosecution in child sexual cases." *State v. Quinn*, 200 W. Va. 432, 445-45, 490 S.E.2d 34, 46-47 (1997).

In sum, the trial judge in the instant case did not abuse his discretion in prohibiting the Petitioner's counsel from questioning Ms. S. about her prior sexual history. The Petitioner's first assignment of error is therefore without merit.

B. THE JURY'S VERDICT SHOULD NOT BE REVERSED ON THE GROUNDS THAT THE TRIAL JUDGE SHOULD HAVE DIRECTED A VERDICT OF ACQUITTAL.

The Petitioner concedes that the instant case was one where "credibility of the witnesses was the key." (Petitioner's Brief, 9.) The evidence described *supra* in Section III., the Statement of Facts, shows ample evidence that, if found credible by the jury, supported the conviction of the Petitioner on two counts of statutory rape. The fact that the jury was left unconvinced beyond a reasonable doubt by the proof of one of the three counts of statutory rape, and as to the charges of forcible rape, does not undermine their verdict on the charges on which the Petitioner was convicted. *See e.g., State v. Cecil*, 221 W. Va. 495, 502, 655 S.E.2d 517, 524 (2007) (jury acquittal on some sex offense charges did not impair conviction on other charges.). The argument in this section of the Petitioner's Brief is nothing more than a jury argument. In a similar case, this Court stated:

Recently, the Fourth Circuit was faced with a case of highly conflicting evidence, and noted that "[w]hile appellant's exhaustive argument on this subject advances many reasons why a jury could have, and, in appellant's view, should have found themselves not convinced beyond a reasonable doubt, that is not the question before this Court in reviewing the sufficiency of the evidence." All the necessary elements for the crime were established, therefore, the "[d]efendant's argument as to why the jury should be unconvinced is just what it appears, a jury argument." *U.S. v. Stevens*, 817 F.2d 254, 255 (4th Cir.1987).

State v. McPherson, 179 W. Va. 612, 618, 371 S.E.2d 333, 339 (1988).

For the foregoing reasons, the Petitioner's second assignment of error is without merit.

C. THE JURY'S VERDICT SHOULD NOT BE REVERSED ON THE GROUNDS THAT THE TRIAL JUDGE DID NOT INSTRUCT THE JURY THAT THEY DID NOT NEED TO FIND THE VICTIM'S TESTIMONY INHERENTLY INCREDIBLE TO CONVICT THE PETITIONER.

Syllabus Point 4 of *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995), states:

A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.

The instructional language to which the Petitioner's counsel took exception and suggested a modification was approved in the case of *State v. McPherson*, 179 W. Va. at 616, 371 S.E.2d at 337:

The trial judge denied the motion, but included an instruction on scrutinizing the testimony of the prosecutrix:

However, the Court instructs the jury that if you believe from the evidence in this case that the crime charged against the defendant rests alone on the testimony of the prosecuting witness, E[...] M[...], then you should scrutinize her testimony with care and caution; although a conviction of a sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible.

In declining to add the language suggested by the Petitioner's trial counsel in the instant case, the trial judge stated:

THE COURT: I think the charge adequately describes the State's burden of proof, over and over and over again. This instruction is kind of textbook instruction.

TRIAL COUNSEL: Okay.

THE COURT: Surely you've seen this before. Have you not seen this before?

TRIAL COUNSEL: I've seen it before.

THE COURT: Okay. All right. I understand your argument. But I think you are reading too much into that --

THE COURT: -- because --

TRIAL COUNSEL: Lawyers sometimes do.

THE COURT: Because, I mean, throughout this charge, the jury is continually reminded that they cannot find this man guilty unless they're convinced of his guilt beyond a reasonable doubt. So, I'm not going to change the charge.

(Trial Tr., 93-94, Sept. 9, 2009.)

In a similar case from another jurisdiction, *Mency v. State*, 492 S.E.2d 692, 699-700 (Ga. 1997), the court rejected an argument that the "trial court erred in charging the jury that the uncorroborated testimony of the victims was sufficient to convict the defendant of child molestation and aggravated child molestation." *Id.* The court stated:

The record shows that the trial court instructed the jury: "the uncorroborated testimony of the victim is sufficient to sustain a conviction of the charges of child molestation and aggravated child molestation as contained within this bill of indictment if that testimony is sufficient to convince you of the defendant's guilt beyond a reasonable doubt." Although *Mency* concedes that this is a correct statement of law, he argues that this legal principle is not appropriate as a jury charge, because if applicable to the facts, the charge demands a guilty verdict. According to *Mency*, "there is a reasonable likelihood that the jury applied a standard of proof less stringent than that required by the state and federal due process clauses."

We approved a similar jury charge in *Harris v. State*, 189 Ga. App. 49(2), 375 S.E.2d 122 (1988). In that case, the court charged that in a child molestation case the uncorroborated testimony of the victim is sufficient to sustain a conviction. *Id.* *Mency* correctly argues that a correct statement of law embodied in a reviewing court's opinion is not necessarily appropriate as a jury charge. Nevertheless, on this record we hold that the charge, which was coupled with instructions regarding the

burden of proof, was an appropriate statement of relevant law to give to the jury. Therefore we find no error.

Id. (citations omitted).

As in *Mency*, the challenged instructional language in the instant case was “coupled with instructions regarding the burden of proof,” which prevented any confusion by the jury.

For the foregoing reasons, the trial judge did not abuse his discretion in declining to add the language proposed by the Petitioner’s counsel. The Petitioner’s third assignment of error is without merit.

VI.

SUMMARY

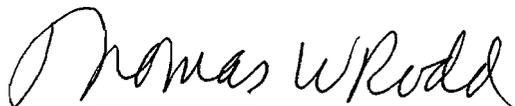
For the foregoing reasons, the Petitioner’s convictions and the jury’s verdicts should be upheld.

Respectfully submitted,

STATE OF WEST VIRGINIA,
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By counsel,

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CERTIFICATE OF SERVICE

I, THOMAS W. RODD, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the Response to Petition for Appeal upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 20th day of April, 2011, addressed as follows:

To: George Cosenza, Esquire
P.O. Box 4
Parkersburg, West Virginia 26101



THOMAS W. RODD