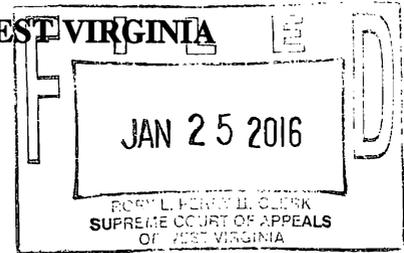


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 15-1017



**STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent**

vs.) No. 15-1017

**ADAM DEREK BOWERS,
Defendant Below, Petitioner**

**FROM THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA
CASE NO. 14-F-5-2
HON. THOMAS A. BEDELL**

PETITION FOR APPEAL OF ADAM DEREK BOWERS

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I. ASSIGNMENTS OF ERROR

- I. The Trial Court erred in precluding the Defendant's admission of certain evidence pursuant to its Order Granting State's Motion, as Amended, to Preclude Reference to Any Admission of Guilty Pleas or Particular Conduct or Court Proceedings of Joseph Buffey and Prohibiting any Reference, Introduction or Use at Trial herein of any Admission of Guilty Pleas or Particular Conduct or Court Proceedings of Joseph Buffey entered May 5, 2015.**

- II. The Trial Court erred in denying the Defendant's Motion for Judgment of Acquittal or, Alternatively, Motion for New Trial.**

STATEMENT OF THE CASE

During the early morning hours of November 30, 2001, Mrs. L.L.¹ was sexually assaulted during a burglary and robbery committed in her home. Subsequent to an investigation by the Clarksburg Police Department, a suspect, namely Joseph A. Buffey, was identified and arrested in connection with the crime. At all times during the investigation of this crime and throughout the period in which Joseph Buffey was identified and held in connection with the crime, the State operated under a single perpetrator theory. The single perpetrator theory was consistent with the statements of Mrs. L.L. given to both law enforcement and medical personnel following the incident. As a result, Joseph Buffey was charged with the robbery and sexual assault of Mrs. L.L.

On February 11, 2002, Joseph Buffey appeared before the Circuit Court of Harrison County and entered guilty pleas to two (2) counts of First Degree Sexual Assault and one (1) count of Robbery in respect to the charges against him. Joseph Buffey allocuted to the crimes and at no point during the investigation or the process of entering his pleas, did Mr. Buffey make reference to another individual being part of the burglary, robbery or sexual assault. Subsequent to the entry of his pleas, Joseph Buffey was sentenced and remanded to the custody of the Department of Corrections where he remains to this day².

Approximately ten years after the commission of the crimes referenced herein, based upon test results that should have been available shortly after the crimes occurred in 2001, the State altered its position to set forth a multiple perpetrator theory- despite the fact that multiple perpetrators had never been considered, nor was such a theory consistent with the statements of the victim.

¹ Due to the nature of the crimes alleged in this matter, the Petitioner is using the victim's initials for purposes of identification.

² This Honorable Court recently addressed the conviction of Joseph Buffey in its Opinion filed November 10, 2015, in Case No. 14-0642.

In fact, immediately following the assault, Mrs. L.L. informed both lead investigator Robert Matheny and Sexual Assault Nurse Examiner (SANE) Dori Josimovich that she had been attacked by only one individual³. (A.R., Vol. V, Pg. 268, 2-6), (A.R., Vol. V., Pg. 273, Ln. 2 – Pg. 274, Ln. 9), (A.R., Vol. VI, Pg. 337, Ln. 16 – Pg. 340, Ln. 17).

During the January 2014 Term of Court, the Defendant/Petitioner herein was indicted by the Grand Jury of Harrison County for perpetrating the aforementioned crimes against Mrs. L.L. during the early morning hours of November 30, 2001. (A.R., Vol. I, 1).

During the pretrial motion stage of this proceeding, the State moved the Court to preclude reference to and admission of the guilty pleas of Joseph Buffey. (A.R., Vol. I, 3). Simultaneously therewith, the State filed a Memorandum in Support of its motion. (A.R., Vol. I, 7). The State's motion was addressed briefly at a pretrial hearing held on October 31, 2014. (A.R., Vol. II, Pg. 7, Ln. 23 – Pg. 16, Ln. 8). The Defendant filed a Memorandum in Opposition to the State's motion on November 20, 2014. (A.R., Vol. I, 18). During the October 31, 2014, hearing the Court noted that the State appeared to also be seeking to preclude reference to and admission of the conduct of Joseph Buffey. As a result, the State filed a Memorandum in Support of Request to Preclude Reference to and Admission of Conduct of and Proceedings Respecting Joseph Buffey at Defendant's Trial. (A.R., Vol. I, 13). The Defendant filed a Memorandum in Opposition to the State's position (A.R., Vol. I, 30) and the Court subsequently issued its ruling granting the State's motion on May 5, 2015. (A.R., Vol. I, 37). The effect of the Court's ruling was to prohibit the Defendant from making any reference to, introduction or use of any admission of Joseph Buffey

³ Based upon the pretrial ruling of the Circuit Court at issue in this appeal, the Defendant was prohibited from fully questioning Detective Matheny about the victim's statements. It is also imperative to note that the victim, Mrs. L.L., was ninety-seven (97) years old at the time of the trial in this matter and unable to testify due to failing mental health.

and/or particular conduct and court proceedings of Joseph Buffey during the course of the Defendant's trial. (A.R., Vol. I, 46).

As a result of the trial Court's pretrial ruling, the Defendant was precluded from exploring a number of potential lines of questioning in the cross-examination of lead investigator Matheny. As previously referenced, one such line of questioning involved the single perpetrator theory under which the investigation operated for nearly a decade. In attempting to question Detective Matheny about the single perpetrator theory and the basis upon which it was formulated and pursued, counsel for the Defendant was cautioned about the possibility of encroaching on the Court's prior pretrial ruling. (A.R., Vol. V, Pg. 269, Ln. 3 – Pg. 272, Ln. 9). Indeed, the State's position was put forth as follows: "My only concern is you can put – trap him into a corner where he is thinking his answer is supposed to be something that the Court has already ruled doesn't come in this trial." (A.R., Vol. V, Pg. 269, 20-23). The Court, at the end of the sidebar, noted that "I guess my concern is that at some point it is going to encroach upon the Court's prior ruling concerning the Buffy [sic] matter. And if that's the case, you know, I don't want to get that far." (A.R., Vol. V, Pg. 271, 13-16).

During the course of the initial investigation of this crime, the Clarksburg Police Department was also investigating the break-in of the Salvation Army, located within blocks of the victim's residence, in the hours preceding the attack on Mrs. L.L. It was, in fact, the break-in of the Salvation Army which led the investigators in the direction of Joseph Buffey in this matter. Again, because the crime against Mrs. L.L. was investigated and initially prosecuted as a single perpetrator offense, the Defendant believed the investigation of the break-in at the Salvation Army, which was essentially incorporated into the investigation of the crime against Mrs. L.L., to be

directly relevant to the prosecution of the Defendant. However, the Defendant was precluded from questioning Detective Matheny regarding that issue:

Q. Okay. At any point in time during your investigation of this matter, did you become aware of another breaking and entering having occurred in the general vicinity on that same night?

MR. ARMSTRONG: May we approach, Your Honor?

THE COURT: Yes, sir, please

(Sidebar)

MR. ARMSTRONG: One, relevance, Two, he's going back down the road to the stuff that the Court's already ruled that's not going to enter this case.

THE COURT: Mr. Wilson?

MR. WILSON: Again, we can do without any reference to Mr. Buffy [sic] or anything. It's part of the investigative file that they did go down that road during the course of the investigation. I think –

THE COURT: What's the relevance of showing the guilt or innocence of this Defendant?

MR. WILSON: I think there's relevance when you look at the fact that there was another suspect in that other breaking and entering and it wasn't Mr. Bowers. There was also a knife and a cap found that belonged to that other individual that was not Mr. Bowers. So I believe that's directly related to it.

THE COURT: Okay. I think you're trying to go through not the back door but the front door on the Court's prior ruling of Buffy [sic]. So let me sustain the objection and have you move to a different area, please.

MR. WILSON. Okay.

THE COURT: And I'll grant your continuing objection.

MR. WILSON: Okay. And just so I'm clear, I can't ask anything about the Salvation Army break-in?

THE COURT: Correct.

(A.R., Vol. V, Pg. 278, Ln. 9 – Pg. 279, Ln. 17).

As referenced in the foregoing sidebar, there was also an issue pertaining to the victim's report of a knife having been used during the commission of the crime. Detective Matheny had previously testified that the victim had reported the use of a knife. (A.R., Vol. V, Pg. 268, 2-6), (A.R., Vol. V, Pg. 278, 1-5). Having already been cautioned twice by the Court about encroaching into areas covered by the Court's pretrial ruling, counsel for the Defendant sought clarification

from the Court during the cross-examination of Detective Matheny as to whether it would be permissible to question the Detective further about the knife. (A.R., Vol. V, Pg. 283, Ln. 7 – Pg. 285, Ln. 18). The examination was permitted under very strict parameters, but once again, the substance of the sidebar is a prime example of how the Defendant was limited in his ability to elicit evidence that would indicate the guilt of another with respect to the crime with which he was charged. The limits seemed to be acknowledged by the State- along with the frustration of the Defendant in the following exchange:

MR. ARMSTRONG: I guess I don't have an issue with that. The only issue I guess I have was I kind of get hamstrung because the knife that they got (inaudible) it was the other gentleman's. I mean, it looks similar. I mean, that the whole basis of the other crap – the other case. You know what I'm saying? So I kind of get hamstrung about probing that.

MR. WILSON: And I kind of feel the same way on my end, so....

(A.R., Vol. V, Pg. 283, Ln. 22 – Pg. 284, Ln. 3).

As previously referenced herein, the First Degree Sexual Assault charges and the First Degree Robbery charge were premised upon- and indeed required, the use of a weapon by the Defendant.

Detective Matheny was likewise questioned during the course of the trial as to how the assailant gained access to the victim's home. Detective Matheny testified that he did not recall any door jams or windows having been broken to force entry into the victim's home. (A.R., Vol. V, Pg. 267, 4-17). Indeed, the victim's son- who was, at the time, a Clarksburg police officer, stated that he walked through the home on at least two occasions in the hours following the attack and did not see any signs of forced entry or any other indication of something amiss with either a window or door. (A.R., Vol. V, Pg. 206, Ln. 24 – Pg. 207, Ln. 12), (A.R., Vol. V, Pg. 208, Ln. 12-15).

At the conclusion of a three-day trial, the Petitioner was convicted of two counts of First Degree Sexual Assault (Counts I and II), one count of Burglary (Count III) and one count of First Degree Robbery (Count IV). (A.R., Vol. I, 48). Subsequent to the sentencing hearing held on September 14, 2015, the Defendant was committed to the custody of the Commissioner of the West Virginia Division of Corrections for not less than fifteen (15) nor more than thirty-five (35) years for counts I and II, to be served consecutively; not less than one (1) year nor more than fifteen (15) years for Count III, to run concurrently with Count II; and for a term of forty (40) years for Count IV, to run consecutive to Counts II and III. (A.R., Vol. I, 85). The Petitioner's sentence was entered by Judgment and Commitment Order and Sentencing Order/Order Committing Defendant to Custody of Commissioner of the West Virginia Division of Corrections, each entered on September 22, 2015. (A.R., Vol. I, 98).

The Petitioner now appeals his conviction based upon grounds more fully set forth herein.

SUMMARY OF ARGUMENT

I. The Circuit Court abused its discretion in precluding the reference to or introduction of evidence pertaining to the conduct and/or guilty pleas of Joseph Buffey at the trial of this matter. In a situation where the victim identified a single assailant and an individual other than the Defendant has previously pleaded guilty to the very crimes with which the Defendant is charged, evidence regarding the investigation and conviction of that other individual is crucial to the ability of the Defendant to present a complete defense. The trial Court's pretrial ruling limited the ability of the Defendant to present his defense and to meaningfully cross-examine the State's witnesses.

II. The Circuit Court abused its discretion in denying the Defendant's Motion for Judgment of Acquittal or, Alternatively, Motion for New Trial. The State of West Virginia failed to present evidence at trial which established the prima facie elements of the crimes with which the Defendant was charged in this matter. More specifically, the State failed to establish any link between the Defendant and the weapon which was alleged by the victim to have been used during the commission of the crime against her. Moreover, the State failed to introduce evidence that the victim's home had been broken and entered by anyone- let alone the Defendant- as was necessary to establish the guilt of the Defendant.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to West Virginia Rules of Appellate Procedure 18(a)(4), the Petitioner submits that the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

ARGUMENT

I. The Trial Court erred in precluding the Defendant's admission of certain evidence pursuant to its Order Granting State's Motion, as Amended, to Preclude Reference to Any Admission of Guilty Pleas or Particular Conduct or Court Proceedings of Joseph Buffey and Prohibiting any Reference, Introduction or Use at Trial herein of any Admission of Guilty Pleas or Particular Conduct or Court Proceedings of Joseph Buffey entered May 5, 2015.

On May 15, 2014, the State of West Virginia filed a Motion to Preclude Reference To and Admission of Guilty Pleas of Joseph Buffey. A hearing upon the motion was held before the Court on October 31, 2014, during which the Court noted that the State's motion addressed only the admissibility of Mr. Buffey's guilty pleas and not the admissibility of his particular conduct. The State subsequently filed a Memorandum in Support of Request to Preclude Reference To and Admission of Conduct of and Proceedings Respecting Joseph Buffey at Defendant's Trial. The matter was briefed by the parties and submitted to the Court for consideration.

In essence, the State argued that the conduct and guilty pleas of Joseph A. Buffey were irrelevant to the issue of whether the Defendant/Petitioner herein, Adam D. Bowers, was a perpetrator of the offenses alleged in counts one through four of the Indictment in this matter. Accordingly, the State sought to preclude any reference, introduction of evidence or other use of information pertaining to the conduct or guilty plea of Joseph A. Buffey at the trial of Mr. Bowers. The State averred that "Buffey's conduct and court proceedings in regard thereto are inadmissible at the trial of Bowers as such evidence is barred, in part, by the Rules of Evidence and also because such evidence does not constitute an alternative perpetrator defense and is not inconsistent with Bowers' guilt." (A.R., Vol. I, 14).

In response, the Petitioner argued that the information pertaining to Mr. Buffey was both directly relevant and admissible at the trial of Mr. Bowers to show that the investigation of the offense(s) in this case inexplicably shifted from a single perpetrator theory to a multiple perpetrator

theory- despite the fact that such a shift was contradicted by the statements of the victim herself. The Petitioner argued that he should be permitted the opportunity to offer evidence to show that another person committed the crime for which he was being accused. The Petitioner likewise sought the opportunity to address at trial the inconsistencies in the evidence developed by the investigation of the crimes alleged to have been committed by the Petitioner. In order to do so, the Defendant asserted that it would be necessary to reference, introduce or otherwise utilize the guilty pleas previously entered by Joseph Buffey.

It was the contention of the State that the conduct of Joseph Buffey- as well as proceedings associated with his guilty plea, accepted by the Circuit Court of Harrison County, with the Honorable Thomas A. Bedell presiding, and offered by Mr. Buffey as a direct result of the investigation of the crime for which the Defendant was indicted, was not relevant to the issue of whether the Defendant was a perpetrator in the crimes committed against the victim. However, during the initial discovery disclosures made subsequent to the indictment in this matter, the State identified all materials in the files of the underlying felony case involving Joseph Buffey (Case No. 02-F-10-2)- as well as the files generated as a result of the multiple habeas proceedings involving Mr. Buffey- (hereinafter referred to as “the Buffey materials”) as potentially exculpatory material as required by Brady vs. Maryland, 383 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963). As this Court is well aware, Brady requires that the non-disclosure by the prosecution of information directly relevant to a Defendant’s guilt or punishment is a violation of the Defendant’s due process rights. In the instant case, the State correctly identified the Joseph Buffey materials as matters directly relevant to the guilt of the Defendant.

The United States Supreme Court has held that “[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation

Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” Holmes v. South Carolina, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) citing Crane v. Kentucky, 476 U.S. 683, 690 (1986). The Holmes Court provided the following rationale in reversing the decision of the lower court to preclude evidence pertaining to the guilt of a third-party: “[j]ust because the prosecution’s evidence, if credited, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case.” Holmes, at 547 U.S. 330.

It is imperative to note that, in the instant matter, the trial Court was uniquely situated to consider the relevance of the evidence pertaining to Joseph Buffey by virtue of the fact that the same Court had entertained and accepted Mr. Buffey’s guilty plea, and presided over multiple lengthy *habeas corpus* proceedings involving Mr. Buffey⁴. In addressing the admissibility of the Buffey materials, the trial Court erred by undertaking a flawed analysis in its evidentiary gatekeeping role pursuant to Rules 401 and 403 of the West Virginia Rules of Evidence and, as a result, abridged the fundamental right of the Defendant to present a complete defense at trial.

Rule 401 of the West Virginia Rules of Evidence provides that “relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probably than it would be without the evidence.” Rule 402 of the West Virginia Rules of Evidence provides that “[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the State of West Virginia, by these rules, or by other rules adopted by the Supreme Court of Appeals. Evidence which is not relevant is not admissible.” Lastly, Rule 403 of the West Virginia Rules of Evidence provides

⁴ The trial Court’s ruling in the most recent habeas proceeding filed by Mr. Buffey was entered on June 3, 2014.

“[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of the unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.”

In beginning the Rule 401 analysis, we must return to the fact that, for nearly a decade, the State operated under a single perpetrator theory with regard to the crime committed against the victim in this matter. The State’s theory was consistent with the statements of the victim to the investigating officers⁵, the statements of the victim offered to medical providers directly after the crime⁶, and the allocution of Joseph Buffey during his guilty plea to the crimes now alleged to have been committed by the Defendant. Certainly, evidence pertaining to the conduct of Mr. Buffey is consequential to the determination of whether the allegations now asserted against the Defendant are more probably or less probable in light of the substance of the Buffey materials, and as such, is relevant to this proceeding.

Moving on to the 402 portion of the analysis, the State offered no argument under Rule 402 which would indicate that anything under the Constitution of the State of West Virginia, the W.Va. Rules of Evidence, or other rules in any way excluded the Buffey materials from the instant case. Under the 403 analysis, the Court must weigh the probative value of the relevant evidence with the danger of unfair prejudice, confusion of the issues, the potential of misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence. Again the State made no argument that any of the aforementioned factors outweighed the probative value of the evidence in the case against the Defendant. Rather, the State’s argument rested upon several cases which can be distinguished from the instant matter and which, in fact, provide support

⁵ Made even more relevant by virtue of the victim’s current mental status which renders her unable to testify in this proceeding.

⁶ Again, made even more relevant by virtue of the victim’s current mental status which renders her unable to testify in this proceeding.

for the Defendant's contention that the Buffey materials are directly relevant- and admissible- in this case.

In State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43 (1980), this Honorable Court addressed a situation in which the Defendant was charged with embezzlement. During the trial of the matter, the trial court precluded the Defendant from questioning one of the State's witnesses with regard to the involvement of another person in the embezzlement scheme. In reviewing the trial court's ruling, this Court found that, "even if the other employee had been called, his testimony would not have been inconsistent with defendant's guilt, since his admissions related to a different transaction than the one involve in the indictment." Id. at 52.

In the instant case, it is again imperative to note that the State operated under a single perpetrator theory for nearly a decade. During that time, the State's theory was consistent with the statements of the victim as well as the allocution of Mr. Buffey during his plea proceeding. The Frasher Court notes that "for evidence of the guilt of someone other than the accused to be admissible, it must tend to demonstrate that the guilt of the other party is inconsistent with that of the defendant." Id., citing U.S. v. Pannell, 178 F.2d 98 (3d Cir. 1949), *cert. dismissed*, 339 U.S. 927, 70 S.Ct. 626, 94 L.Ed. 1348 (1950). Despite the State's argument to the contrary in this matter, this is, in fact, a situation in which the conduct of Mr. Buffey as well as the proceedings instituted against him- as the result of an investigation which was undoubtedly carried out and concluded under a single perpetrator theory- tends to demonstrate that Mr. Buffey's guilt is inconsistent with that of the Defendant.

In this case, the admission of evidence pertaining to the conduct of Mr. Buffey was as relevant as any other aspect of the investigation which has now resulted in the indictment, prosecution and conviction of the Defendant. To have precluded the introduction of evidence in

that regard was reversible error. In State v. Malick, 457 S.E.2d 482, 193 W.Va. 545 (1995), this Court held that “[i]n a criminal case, the admissibility of testimony implicating another party as having committed the crime hinges on a determination of whether the testimony tends to directly link such party to the crime, or whether it is instead purely speculative. Consequently, where the testimony is merely that another person had a motive or opportunity or prior record of criminal behavior, the inference is too slight to be probative, and the evidence is therefore inadmissible. Where, on the other hand, the testimony provides a direct link to someone other than the defendant, its exclusion constitutes reversible error.” Id., at Syl. Pt. 2, citing Syl. Pt. 1, State v. Harman, 165 W.Va. 494, 270 S.E.2d 146 (1980).

The previously referenced Order entered May 5, 2015, reflects the ruling of the Trial Court that the introduction of the evidence sought to be precluded by the State would “unnecessarily confuse the issues and improperly mislead the jury.” (A.R., Vol. I, Pg. 44, Paragraph 15.) This, despite the fact that the State had operated on a single perpetrator theory for more than a decade following the commission of the crime(s) in this matter. This, despite the fact that guilty pleas had previously been entered by another individual some ten years prior to the Petitioner being charged in this matter. This, despite the fact that the victim, who is now unfortunately unavailable due to advanced age and altered mental status, repeatedly made statements immediately following the crime in which reference was made to only one assailant.

At trial, the Defendant was precluded from fully cross-examining several of the State’s witnesses based upon the pretrial ruling of the Trial Court. Thus, the pretrial ruling of the Court and its subsequent restriction of the Defendant at trial constitute an abuse of discretion and reversible error.

II. The Trial Court erred in denying the Defendant's Motion for Judgment of Acquittal or, Alternatively, Motion for New Trial.

At the close of the State's case-in-chief during the trial of this matter, the Defendant moved this Honorable Court for Judgment of Acquittal pursuant to Rule 29 of the West Virginia Rules of Criminal Procedure. The Defendant's motion was denied and subsequent to the deliberations of the jury, the Defendant was convicted on May 28, 2015, of two counts of First Degree Sexual Assault as charged in Counts I and II of the Indictment, Burglary as charged in Count III of the Indictment and First Degree Robbery as charged in Count IV of the Indictment. By Motion timely filed following the entry of the Trial Order, the Defendant renewed his Motion for Judgment of Acquittal.

"A motion for judgment of acquittal challenges the sufficiency of the evidence." State v. Houston, 197 W.Va. 215, 229, 475 S.E.2d 307, 321 (1996) (citing Franklin D. Cleckley, 2 Handbook on West Virginia Criminal Procedure 292 (2d ed. 1993)). Once the trial Court has ruled upon any such motion brought under Rule 29, this Court has previously held that "[t]he Court applies a de novo standard of review to the denial of a motion for judgment of acquittal based upon the sufficiency of the evidence." State v. Juntilla, 227 W.Va. 492, 497, 711 S.E.2d 562, 567 (2011) (citing State v. LaRock, 196 W.Va. 294, 304, 470 S.E.2d 613, 623 (1996)).

Counts I and II of the Indictment allege that the Defendant "committed the offense of First Degree Sexual Assault by unlawfully, intentionally and feloniously engaging in sexual intercourse with another person, namely Mrs. L.L., while employing a deadly weapon in the commission of the act, to wit: Adam Derek Bowers inserted his penis into the vagina of Mrs. L.L. while Adam Derek Bowers was not married to Mrs. L.L. and said act was done for the sexual gratification of Adam Derek Bowers without the consent of Mrs. L.L., the lack of consent resulting from forcible

compulsion as a result of Adam Derek Bowers threatening Mrs. L.L. with a knife, against the peace and dignity of the State.” (A.R., Vol. I, 1, 2).

In its charge to the jury, the Court instructed as follows: “Before the Defendant, Adam Derek Bowers, can be convicted of the offense of First Degree Sexual Assault as contained in Count One of the Indictment of this matter, the State of West Virginia must prove to the satisfaction of the jury, beyond a reasonable doubt, that: (1) The Defendant, Adam Derek Bowers; (2) on or about the 30th day of November, 2001; (3) in Harrison County, West Virginia; (4) did intentionally engage in sexual intercourse with Mrs. L.L.; (5) by inserting his penis into the vagina of Mrs. L.L.; (6) while employing a deadly weapon, namely a knife.” (A.R., Vol. VII, Pgs. 563-564).

The same instruction was given as to Count II of the Indictment with the exception of the substitution of “Count Two of the Indictment” for “Count One of the Indictment.” (A.R., Vol. VII, Pg. 564-566). At no point in time during the trial did the State establish that the Defendant was ever in possession of a knife on November 30, 2001, or at any point thereafter. Indeed, the State offered no evidence whatsoever regarding the knife allegedly used to perpetrate the crime in this matter.

There was neither any witness testimony nor any documentary evidence introduced at trial that linked the Defendant with any knife alleged to have been used in the crime. Indeed, the only testimony offered was that of the investigating officer and former detective Robert Matheny, who testified on cross-examination that a knife matching the description given by the victim was ultimately recovered and it was not in the possession of the Defendant⁷. (A.R., Vol. V, Pg. 268, 2-6), (A.R., Vol. V, Pg. 278, 1-5). As a result, the State failed to introduce evidence linking the

⁷ As reflected in the transcript of the sidebar that occurred during the cross-examination of Detective Matheny, counsel for the Defendant was limited in what he could address in connection with the knife. Because of the trial Court’s pretrial ruling, counsel was prohibited from eliciting from Detective Matheny the fact that a knife matching the description given by the victim had been found with possessions belonging to Joseph Buffey.

Defendant to a key element of the crime and, thus, failed to meet its burden of establishing the *prima facie* elements necessary for a conviction on the charge(s) of First Degree Sexual Assault as outlined in Counts I and II of the Indictment.

Count III of the Indictment alleges that the Defendant “committed the offense of Burglary by willfully, intentionally, feloniously and burglariously breaking and entering a dwelling house belong to Mrs. L.L. located at 309 “Blank⁸” Street, Clarksburg, West Virginia, with the intent to commit a crime therein, against the peace and dignity of the State.” (A.R., Vol. I, 2).

The Court instructed the jury that in order to convict the Defendant of Burglary, “the State of West Virginia must prove to the satisfaction of the jury, beyond a reasonable doubt, that: (1) The Defendant, Adam Derek Bowers; (2) on or about the 30th day of November, 2001; (3) in Harrison County, West Virginia; (4) did intentionally break and enter; (5) a dwelling house belonging to Mrs. L.L. and located at 309 “Blank” Street, Clarksburg, West Virginia; (6) with the intent to commit a crime therein.” (A.R., Vol. VII, Pgs. 566-567).

At no point in time during the trial did the State establish that a breaking and entering occurred at 309 “Blank” Street on November 30, 2001, or at any point thereafter. Indeed, the State offered no evidence whatsoever regarding the breaking of any entrance or access device located in the home. Indeed, the testimony offered by the investigating officer and former detective Robert Matheny, was that they were unable to determine how entry was made into the residence. (A.R., Vol. V. Pg. 267, 4-17). Detective Matheny further testified that there was no evidence of a breaking and entering having occurred. (A.R., Vol. V, Pg. 267, 4-17). Moreover, the victim’s son, an officer with the Clarksburg Police Department, testified that a door was unlocked when he arrived at his mother’s home at approximately 6:30 a.m. (A.R., Vol. V. Pg. 203, 5-9). He, too, testified

⁸ The address of the victim has been changed to protect her privacy.

that there was no evidence of a breaking and entering. (A.R., Vol. V. Pg. 206, Ln. 24 – Pg. 207, Ln. 12). As a result, the State failed to meet its burden of establishing the *prima facie* elements necessary for a conviction on the charge of Burglary as outlined in Count III of the Indictment.

Count IV of the Indictment alleges that the Defendant “committed the offense of First Degree Robbery by unlawfully, intentionally and feloniously taking and carrying away property belonging to Mrs. L.L., 309 “Blank” Street, Clarksburg, West Virginia, to-wit: approximately Nine Dollars (\$9.00) in United States currency; and Adam Derek Bowers did then and there take said currency in the presence of Mrs. L.L. against her will by placing the victim in fear of bodily injury by threat of deadly force by brandishing a deadly weapon, namely a knife, with the intent to permanently deprive Mrs. L.L. of said money, against the peace and dignity of the State.” (A.R., Vol. I, 2).

The Court instructed the jury that in order to convict the Defendant of First Degree Robbery, “the State of West Virginia must prove to the satisfaction of the jury, beyond a reasonable doubt, that: (1) The Defendant, Adam Derek Bowers; (2) on or about the 30th day of November, 2001; (3) in Harrison County, West Virginia; (4) did intentionally take and carry away property, namely approximately Nine Dollars (\$9.00) in United States currency; (5) belonging to Mrs. L.L. and against the will of Mrs. L.L.; (6) by placing Mrs. L.L. in fear of bodily injury by use of threat of deadly force; (7) by presentment of a deadly weapon, namely a knife; (8) with the intent to permanently deprive Mrs. L.L. of said property.” (A.R., Vol. VII, Pgs. 567-568).

In order to convict the Defendant of this offense, it was necessary for the jury to find that the Defendant employed the use of a deadly weapon, in this case a knife, while attempting to deprive her of property. At no point in time during the trial did the State establish that the Defendant was ever in possession of a knife on November 30, 2001, or at any point thereafter.

Indeed, the State offered no evidence whatsoever regarding the knife allegedly used to perpetrate the crime in this matter. There was neither any witness testimony nor any documentary evidence introduced at trial that linked the Defendant with any knife alleged to have been used in the crime. Once again, the only testimony offered was that of the investigating officer and former detective Robert Matheny, who testified on cross-examination that a knife matching the description given by the victim was ultimately recovered and it was not in the possession of the Defendant. (A.R., Vol. V, Pg. 278, 1-5)⁹.

The State failed to meet its burden of establishing the *prima facie* elements necessary for a conviction on the charge of First Degree Robbery as outlined in Count IV of the Indictment.

Lastly, the Defendant re-asserted his objection, previously placed upon the record, regarding the Court's Order entered May 5, 2015, prohibiting any reference, introduction or use at trial herein of any admission of guilty pleas or particular conduct or court proceedings of Joseph Buffey. The Defendant re-asserted that the prohibition against offering such evidence was in error and constituted alternative grounds upon which the trial Court should have granted the requested relief. The verdicts rendered by the jury in this matter as to Counts I, II, III and IV were contrary to the evidence adduced at trial and contrary to the administration of justice. Accordingly, the denial by the Trial Court of the Defendant's Motion for Judgment of Acquittal or, Alternatively, Motion for New Trial, constituted an abuse of discretion and is reversible error.

CONCLUSION

The trial Court, by precluding the introduction of evidence regarding the investigation and conviction of Joseph Buffey, infringed upon the Constitutional right of the Defendant to mount and present a complete defense at the trial of this matter. Additionally, the trial Court erroneously

⁹ See footnote 7, *supra*.

denied the Defendant's Rule 29 motion where it was abundantly clear that the State had failed to establish the elements necessary to sustain a conviction. The foregoing rulings constitute an abuse of discretion and should, therefore, be reversed by this Honorable Court.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 15-1017

**STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent**

vs.) No. 15-1017

**ADAM DEREK BOWERS,
Defendant Below, Petitioner**

CERTIFICATE OF SERVICE

I, Christopher M. Wilson, Counsel for the Petitioner, do hereby certify that a true and actual copy of the foregoing "Petition for Appeal" was served upon the following via hand delivery, on the 25th day of January, 2016:

James F. Armstrong, APA
Office of the Prosecuting Attorney
300 W. Main Street
Clarksburg, WV 26301



CHRISTOPHER M. WILSON
Counsel for Petitioner