

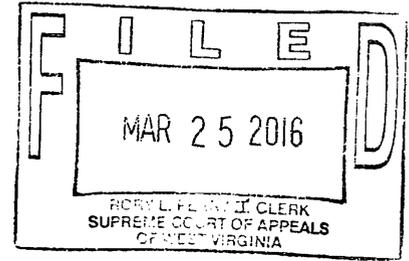
**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**Docket No. 15-1017**

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

**vs.) No. 15-1017**

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



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

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**REPLY BRIEF OF ADAM DEREK BOWERS**

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## 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.**

The Respondent supports its argument that the Trial Court correctly precluded the admission of guilty pleas and/or conduct of Joseph Buffey in two ways: First, the Respondent states unequivocally that the "...Petitioner's involvement in the crimes perpetrated against the victim was proven not beyond a reasonable doubt but beyond any doubt. As a result, it is impossible for Petitioner to demonstrate that the guilt of Joseph Buffey is inconsistent with the guilt of the Petitioner." Second, the Respondent relies upon the testimony of one witness- the victim's son, Joseph L.<sup>1</sup>, to support its theory that this was a multiple perpetrator crime.

In addressing the Respondent's blanket statement that the Petitioner was guilty beyond all doubt, the Respondent relies upon a lengthy recitation of the forensic testing which was performed in this matter. The forensic testing is not an issue in the instant appeal. Rather, the Petitioner takes issue with the pretrial ruling of the Trial Court which precluded the introduction of any evidence pertaining to the conduct, guilty plea and conviction of Joseph Buffey. Thus, the Respondent's reliance upon the forensic testing results introduced at trial is misplaced. Because the Petitioner was ultimately convicted, the Respondent simply relies upon that conviction and states that there was obviously enough evidence to convict the Petitioner, so it must then follow that any reference to Buffey would have caused confusion in the minds of the jurors.

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<sup>1</sup> The last name of the victim's son is not being utilized to protect the privacy of the victim.

The Petitioner's primary basis for objecting to the pretrial relief sought by the Respondent was 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 the 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 admission of guilt by Mr. Buffey- in 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.

The Respondent relies upon the statements of the victim's son, a retired police officer, to bolster its argument that the victim stated that more than one person had committed this crime. However, if we look at the testimony of both the investigating officer and the SANE nurse, we hear something altogether different from the testimony of Mr. L. In fact, Dori Josimovich, the Sexual Assault Nurse Examiner, testified as follows:

MR. WILSON: In both the triage assessment and all of the nursing notes, isn't it true that Ms. L.<sup>2</sup> referred to a single assailant?  
WITNESS: She - - yes. She had a great deal of excited utterances and she was pretty upset.  
MR. WILSON: And everything that she said referred to he as opposed to they or them, correct?  
WITNESS: Yes.  
MR. WILSON: Okay. And, in fact, in some of the nursing notes, in each entry, the word "he" is used multiple times, correct?  
WITNESS: Yes.

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<sup>2</sup> For privacy reasons, the victim will only be identified by the first letter of her last name.

MR. WILSON: You noted in your assessment of Ms. L that her account of the event remained consistent throughout your dealing with her; is that correct?

WITNESS: Yes.

(A.R., Vol. VI, Pg. 337 Ln. 20 – Pg. 338 Ln. 17).

Ms. Josimovich further testified that she did not, at any point during her examination of the victim, believe that the victim was breaking from reality in any way. She noted that the victim exhibited no signs of noticeable confusion. (A.R., Vol. VI, Pg. 339). Ultimately, Ms. Josimovich ended her testimony with this exchange:

MR. WILSON: Okay. Under the numbered question – and, again, you said that these are questions that you specifically when [sic] through with Ms. L, correct?

WITNESS: Yes.

MR. WILSON: The very first numbered question that you asked her was “Were there multiple assailants” is that correct?

WITNESS: Yes.

MR. WILSON: And Ms. L said, “No.”

WITNESS: That’s correct.

(A.R., Vol. VI, Pg. 340)

In addition to the testimony offered by Ms. Josimovich, Detective Matheny, the lead investigator, was also told by the victim that she had been assaulted by one person:

MR. WILSON: Okay. And then you began to interview Mrs. L?

WITNESS: A cursory interview, yeah, just a one-on-one to get her accounts of what happened.

MR. WILSON: Okay. Can you tell us how in depth that cursory interview went at that point?

WITNESS: It went into depth as much that she would tell me that she was awakened from sleep and that she – an individual at knife point robbed her. I believe the amount of money was nine dollars and then ordered her upstairs and sexually assaulted her in her bedroom.

MR. WILSON: But she told you an individual had done that?

WITNESS: Well, yes. She said that she was sexually assaulted.

(A.R., Vol. V, Pg. 267, Ln. 21 – Pg. 268, Ln 8).

After an objection by the State and a sidebar in which defense counsel was cautioned to tread lightly in questioning the detective as to the course of his investigation because of the Court's pretrial ruling (see A.R., Vol. V, Pgs. 269-272), Detective Matheny was asked about the contents of his investigative report. In particular, the detective was asked about the number of suspects:

MR. WILSON: And without speaking to any of the names or information concerned in there, I specifically wanted to address under the heading of "suspects." I believe that's on the second page.

WITNESS: Yes.

MR. WILSON: And it says none other than the accused, correct?

WITNESS: It does, yes.

MR. WILSON: Okay. And for purposes of this narrative report, was that one person?

WITNESS: (No response).

MR. WILSON: The accused in this case, was it one person when you wrote that report?

WITNESS: Yes.

(A.R. Vol. V, Pg. 273, Ln. 14 – Pg. 274, Ln. 2).

It is imperative to note that, as a result of the Court's instruction to defense counsel- both in its pretrial ruling and in the sidebar that had just occurred, counsel was precluded from asking any further questions as to the identity of the accused in the investigative report.

As reflected by the foregoing testimony- and in contrast with the testimony of Joseph L. referenced by the Respondent, the only witness who testified that the victim had ever indicated more than one assailant was Mr. L., the victim's son who obviously had an interest in the outcome of the defendant's trial. As a result, this case involved a report of a single assailant, an investigation that ensued based upon a single perpetrator theory, and the entry of a guilty plea and subsequent conviction of Joseph Buffey for the crimes with which the defendant was being tried in the underlying matter. It is within that framework that the Petitioner objected to the pretrial relief sought by the State to preclude reference to Joseph Buffey.

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- 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.

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.

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

The Respondent argues that, while there was no direct evidence presented at trial that linked the Petitioner with either a breaking and entering at the home of the victim or with the possession of a knife during the incident, it could have properly been inferred by the jury in considering the totality of the evidence. To that end, the Respondent brings home the point that this very issue is intertwined with the preclusion of the Joseph Buffey matters because, had the Petitioner been able to introduce evidence regarding Mr. Buffey's breaking and entering of the Salvation Army near the victim's home on the night in question, his possession of a knife similar to that described by the victim- as well as his subsequent guilty plea and conviction- the jury would

not have been so inclined to make such an inference. For that very reason, the Petitioner, in his Motion for Judgment of Acquittal or, Alternatively, Motion for New Trial, renewed his prior objection to Trial Court's pretrial ruling prohibiting references to the aforementioned issues.

Assuming *arguendo* that the Buffey matters were properly precluded, the fact remains that the State failed to introduce evidence which was necessary to establish the *prima facie* elements of the crimes charged in Counts I, II, III & IV of the Indictment. Quite simply, convictions for the offenses of First Degree Sexual Assault as alleged in Counts I and II, and First Degree Robbery as alleged in Count IV, require the use of a deadly weapon. Again, there was absolutely no evidence produced at trial which, in any way, connected the Petitioner to a knife as was alleged to have been used according to the victim. More profoundly, the Petitioner was precluded from introducing evidence that a knife matching the description of the victim had been recovered from an individual who had broken and entered an establishment near the victim's home in the hours leading up to the attack on the victim.

Count III of the indictment charged the Petitioner with Burglary. An essential element of that crime is the intentional breaking and entering of a dwelling. Once again, there was absolutely no evidence presented at trial to indicate that a breaking and entering had occurred at the victim's home. In fact, both the investigating officer and the victim's son testified that they examine the doors and windows and could not find any indication of a breaking and entering.

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.

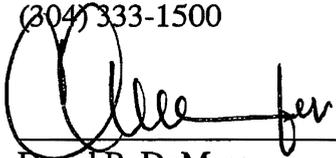
## CONCLUSION

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 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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**CERTIFICATE OF SERVICE**

I, Christopher M. Wilson, Counsel for the Petitioner, do hereby certify that a true and actual copy of the foregoing "Reply Brief" was served upon the following via U.S. Mail, First Class, postage prepaid, on the 23rd day of March, 2016:

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