No.:_____

IN THE SUPREME COURT OF THE UNITED STATES

Wilfred Doyle Hinchman, II, *Petitioner*,

v.

State of West Virginia, *Respondent.*

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 17-0170 (Randolph County 14-F-117)

Wilfred H.,
Defendant Below, Petitioner

FILED
June 15, 2018
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Wilfred H.[1], by counsel Jeremy B. Cooper, appeals his August 3, 2016, conviction on five counts of first degree sexual assault, one count of display of obscene matter to a minor, and two counts of third degree sexual assault. Respondent State of West Virginia, ("State") by counsel Sarah B. Massey, filed a response in support of the circuit court's order. Petitioner filed a reply and, by leave of this Court, respondent filed a sur-reply.[2]

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standards of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

In October of 2014, petitioner was indicted by a Randolph County Grand Jury on thirty-seven counts of first degree sexual assault; twenty-three counts of third degree sexual assault; and two counts of display of obscene matter to a minor. The indictment alleged that over the course of four years, petitioner committed a "series of sexual acts" upon M.A.H., beginning when M.A.H. was nine years old. In 2012, when M.A.H. was thirteen years old, she disclosed the alleged abuse in a note directed to a classmate that was intercepted by school personnel. During the investigation into M.A.H.'s allegations, she identified petitioner as her abuser.

[1] Consistent with our long-standing practice in cases with sensitive facts, we use initials where necessary to protect the identities of those involved in this case. See *In re K.H.*, 235 W. Va. 254, 773 S.E.2d 20 (2015); *Melinda H. v. William R. II*, 230 W. Va. 731, 742 S.E.2d 419 (2013); *State v. Brandon B.*, 218 W. Va. 324, 624 S.E.2d 761 (2005); *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990).

[2] By order entered March 5, 2018, this Court granted respondent's motion to file a sur-reply.

Petitioner was interviewed and, at the request of law enforcement officers, provided several of his electronic devices, including his cellular telephone, for analysis. Subsequently, petitioner's electronic devices were sent to the State Police Crime Lab, where two grainy photographs, both depicting a different young nude female, one of which was believed to be M.A.H., were discovered.

During pre-trial proceedings, petitioner sought leave of court to cross-examine M.A.H. as to her sexual history, in exception to the rape shield law. Petitioner reasoned that given the physical evidence that M.A.H.'s hymen was not intact, he was permitted to cross-examine her on the subject of whether she had engaged in sexual activity with other persons, which could provide an alternate explanation for her hymen that did not involve petitioner. Further, petitioner noted that the victim had made a statement on social media regarding the age of her oldest sexual partner and identified that partner as being seventeen years of age. Petitioner alleged that this statement was a party admission and demonstrated that the victim was untruthful in her statements that she had sex with petitioner, who was well over the age of sixteen.

Following a September 30, 2015, hearing, the court allowed petitioner additional time to gather relevant evidence in support of his motion. At the second hearing, on January 15, 2016, petitioner indicated that he did not have any additional evidence or arguments. Thereafter, the court determined that evidence establishing that M.A.H.'s hymen was not intact was not tantamount to evidence that M.A.H. had sex with other individuals, nor was it evidence that M.A.H. had sex with petitioner. By order dated February 10, 2016, the circuit court denied petitioner's motion to permit cross-examination of M.A.H. regarding this issue.

On February 23, 2016, the State filed a supplemental witness disclosure identifying Corporal Loudin, a veteran West Virginia State Police officer and member of the Crimes Against Children Unit, as an expert witness on the issue of protocol and interviewing techniques of child assault victims. In response to this supplemental disclosure, petitioner moved the court, in limine, to determine the admissibility of such testimony. On May 23, 2016, the circuit court held a hearing on petitioner's motion and ruled that Corporal Loudin could provide the anticipated expert testimony. However, the court noted that Corporal Loudin was specifically "precluded from offering testimony as to the truth of M.A.H's responses."

During the course of discovery, the State filed a notice of intent to use evidence pursuant to Rule 404(b) of the West Virginia Rules of Evidence. Specifically, the State sought to introduce both the testimony of E.W., a prior alleged victim of petitioner, and a photograph found on petitioner's cellular telephone depicting another young nude female who was not the victim herein. A hearing was held on the State's notice on March 24, 2016, during which, E.W., a childhood friend of petitioner's eldest daughter, testified that petitioner "had touched her inappropriately [upon the breasts] one time when she was around the age of ten or eleven." E.W. testified that petitioner advised her that in payment for picking her up and transporting her to his home to play with his daughter, he was permitted to touch her breasts. In response to E.W.'s testimony, petitioner called his daughter and another individual as rebuttal witnesses. After hearing the evidence and the arguments of counsel, the court found, by a preponderance of the evidence, that petitioner committed acts against E.W. and that the relevancy of her anticipated testimony outweighed the prejudicial effect. By order dated April 1, 2016, the court granted, in

part, and denied, in part, the State's notice of intent by permitting the testimony of E.W. and prohibiting the introduction of the photograph.

The trial of petitioner's case began on January 28, 2016. Following jury deliberations, the foreman advised the circuit court that the jury was unable to reach a unanimous verdict and was deadlocked. The court declared a mistrial and scheduled jury selection for a second trial to begin on April 12, 2016. The second trial began on August 1, 2016. Under direct examination, M.A.H. testified that from ages nine through thirteen, she spent most weekends at petitioner's home and was close to petitioner's daughter. M.A.H. provided explicit details regarding petitioner's actions and testified that petitioner took photos of her in the nude. M.A.H. was then shown a photograph of a nude child and identified herself as the child in the photograph. Over petitioner's objection, the photograph was published to the jury, but was not admitted as evidence.

During the presentation of its case-in-chief, the State called Trooper Hevener of the West Virginia State Police to testify regarding the electronic devices removed from petitioner's home. Under cross-examination, Trooper Hevener acknowledged that the electronic devices were returned to him from the State Police Crime Lab after testing and sat unguarded on his desk for a period of approximately five months. The State then rested its case-in-chief. The court subsequently sequestered the jury and counsel for petitioner made a motion for a mistrial, arguing that the two photographs discovered on petitioner's electronic device were not "charged in the indictment" and the chain of custody for petitioner's electronic devices, on which the photographs were discovered, could not be established. The circuit court denied petitioner's motion and reasoned that the victim identified one of the photographs in her testimony; however, the court acknowledged that the chain of custody for the electronic devices had not been established. Accordingly, the court advised the parties that the jury would be instructed to disregard the photo.

Petitioner then presented three motions for judgment of acquittal. The motions were based on petitioner's "incredible" testimony, insufficient evidence as to elements of obscenity, and insufficient evidence as to all counts based on the State's failure to prove petitioner's age. The court found that the victim testified that there had been sexual intercourse during the times alleged in the indictment and several of the State's witnesses had testified as to petitioner's age. As to the claims that the State offered insufficient evidence to sustain the obscene matter charge, the court found that the victim's description of the photograph was sufficient evidence. Accordingly, the court denied each of petitioner's motions for judgment of acquittal.

The jury returned to the courtroom and a curative instruction was read by the court. In that instruction, the court advised the jury that the chain of custody "was not met" with respect to the photograph and instructed the jury to "totally disregard anything concerning the cell or the picture of the cell phone or her identity of this picture. That is no longer part of this case."[3]

[3] The court specifically instructed the jury as follows:

> Ladies and Gentlemen, the State has rested now, and it's now time that the defendant … will have the opportunity to present evidence, if he so desires. Now… you'll know that there's been arguments about picture or the chip on the

(continued . . .)

Immediately prior to the jury's deliberation, the court again instructed the jury to "[d]isregard entirely questions and exhibits to which an objection was sustained and answers or exhibits stricken out of evidence. Do not draw any inferences therefrom or speculate as to the matters hereby hinted."

On August 3, 2016, petitioner was convicted of five counts of first degree sexual assault, one count of display of obscene matter to a minor, and two counts of third degree sexual assault. The jury was unable to reach a unanimous verdict as to the remaining forty-nine counts of the indictment. On August 13, 2016, petitioner filed post-trial motions, including a renewed motion for mistrial. On November 10, 2016, the court held a hearing on post-trial motions, and by subsequent order, dated March 17, 2017, all post-trial motions were denied by the court. The court found that petitioner "received a fair trial" and noted that the court did "not believe that the [post-trial] motions raise issues which would cause the court to grant the relief requested." It is from his August 3, 2016, conviction that petitioner now appeals.

On appeal, petitioner asserts ten assignments of error, which we will address in turn. However, we generally note that

> [i]n reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the

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> cell phone and its chain of custody and things of that nature. And you've heard at the end of the first part of the trial that the trooper had, unfortunately, left the phone on his desk for five months.
>
> Now, chain of custody is not one of these technicalities that doesn't mean anything. It is a serious factor. … It's why each trooper has the trooper's temporary evidence locker that only he can enter, so that there can only be a chain of custody from the left hand to the right hand to your hand to your hand and on down. That was not done in this case.
>
> Now … that in and of itself is not charged as a crime in this case. There is no count that says that this [the taking of the photo] was a crime. That was submitted into evidence as corroborative or supportive evidence, but it's not itself a crime. So based upon this deficiency of failure to maintain the chain of custody, this court cannot dismiss a count or something, because there is no count that specifically deals with it. But, as you recall, the witness identified that picture as being a picture of her.
>
> Now, since we don't know because of the lack of chain of custody whether that was in fact the cell phone, the picture, all of these other things, what I'm going to do is instruct you to totally disregard her identification of that picture, totally disregard anything concerning the cell phone or the picture of the cell phone or her identity of this picture. That is no longer part of this case.

> circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review.

Syl. Pt. 3, *State v. Vance*, 207 W. Va. 640, 535 S.E.2d 484 (2000).

In his first assignment error, petitioner argues that the circuit court erred in denying his motion for a mistrial. We have long held that

> [t]he decision to declare a mistrial, discharge the jury and order a new trial in a criminal case is a matter within the sound discretion of the trial court. A trial court is empowered to exercise this discretion only when there is a 'manifest necessity' for discharging the jury before it has rendered its verdict. This power of the trial court must be exercised wisely; absent the existence of manifest necessity, a trial court's discharge of the jury without rendering a verdict has the effect of an acquittal of the accused and gives rise to a plea of double jeopardy.

State v. Lowery, 222 W. Va. 284, 288, 664 S.E.2d 169, 173 (2008) (citations omitted).

Petitioner contends that the circuit court erred in failing to declare a mistrial when an inherently prejudicial photograph depicting a young nude female, purported to be the victim, was published to the jury. The State argues that the circuit court did not err in refusing to declare a mistrial following publication of the subject photograph, as the victim identified herself as the young female in the photograph so published and as petitioner was not charged related to the photograph itself. Based upon our review of the record, we agree with the State. Here, the court, as was within its sound discretion, sustained petitioner's trial objection regarding the publication of the photograph and read a curative instruction to the jury that specifically advised the jury not to consider such evidence. Under the limited facts and circumstances of this case, as the circuit court provided a curative instruction to the jury related to the publication of the photograph at issue, without specific objection as to the instruction from the parties, we find no error. We further concur with the State and note that the record below is replete with other evidence to support petitioner's convictions, without reference to the photograph at issue.

Next, petitioner argues that the circuit court erred in failing to order a new trial given the State's failure to disclose issues with regard to the chain of custody related to the photograph at issue until the second trial, which violated petitioner's rights under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). This Court has held that

> [a] claim for violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963), presents mixed questions of law and fact. Consequently, the circuit court's factual findings should be reviewed under a clearly erroneous standard, and questions of law are subject to a *de novo* review.

Syl. Pt. 7, *State v. Black*, 227 W. Va. 297, 708 S.E.2d 491 (2010).

In order to establish a claim for a constitutional due process violation under *Brady*, this Court has held that three components must be established: "(1) the evidence at issue must be favorable to the defendant as exculpatory or impeachment evidence; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must have been material, i.e., it must have prejudiced the defense at trial." Syl. Pt. 2, in part, *State v. Youngblood*, 221 W. Va. 20, 650 S.E.2d 119 (2007).

Here, petitioner contends that is it clear from Trooper Heavener's trial testimony that petitioner's electronic devices remained on his desk, unprotected, for a period of five months. It is undisputed that the State never disclosed this information to petitioner and that petitioner remained unaware of any defect in the chain of custody until the second trial. Petitioner argues that had he known of the "defect" prior to trial, it would have been possible to litigate and determine the admissibility of the photograph before any prejudicial exposure.[4]

Conversely, the State argues that the circuit court correctly found there was no *Brady* violation herein. We agree with the State and find that petitioner did not satisfy his burden in establishing that a *Brady* violation occurred. Under the limited facts and circumstances of this case, we conclude that the alleged defect in the chain of custody was not material, as it did not directly go to proving any count against petitioner. Accordingly, we find the circuit court did not err in this regard.

In his third assignment of error, petitioner argues that the circuit court erred in denying his motion to suppress evidence gathered as a result of his November 13, 2012, interview with law enforcement officers, and subsequent production of his electronic devices. Petitioner contends that consent to his interview and production of his electronic devices was given only after law enforcement officers inaccurately represented that they had the authority to have warrants issued and that they could have petitioner arrested. This Court has held that

> [w]hen reviewing a rule on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court's factual findings are reviewed for clear error.

Syl. Pt. 1, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996).

Petitioner alleges that the law enforcement officers did not have the proper authority to obtain warrants to secure petitioner's electronic devices as no exigent circumstances existed and their representations to him otherwise were improper. Accordingly, petitioner argues that the

[4] Petitioner acknowledges his belief that the State did not have any actual knowledge of the chain of custody issue prior to the second trial but asserts that the most appropriate relief to remedy the circuit court's error in this regard is to reverse petitioner's convictions and remand the case for a new trial.

circuit court erred by not suppressing any evidence obtained as "fruit" from the November 13, 2012 interview.

The State argues, and we concur, that petitioner's argument fails in light of the record. Here, construing all facts in the light most favorable to the State, we find that petitioner readily agreed to allow the officers to take his electronic devices for analysis. The court held a series of hearings on petitioner's motion to suppress on September 2, 2015; September 29, 2015; and January 11, 2016. Thereafter, the court ruled that within the context of the entire discussion between petitioner and law enforcement officers the officers' statements to petitioner wherein they advised petitioner "he was not going to be arrested that night" and that they "did not have warrants," did not support petitioner's claim of coercion. As consent is an exception to the Fourth Amendment's warrant requirement, we find no merit to petitioner's argument that his consent resulted from coercion.[5] Based on the totality of the circumstances herein, petitioner willingly and voluntarily consented to the search of his home and seizure of his electronic devices. Accordingly, the circuit court did not err in denying petitioner's motion to suppress.

Petitioner next argues that the circuit court erred in permitting expert testimony from a law enforcement officer. At the trial below, Corporal Loudin was called to testify, and offered testimony regarding M.A.H.'s forensic interview. During his direct examination, a video of M.A.H.'s interview was played for the jury. In this video, M.A.H. identifies petitioner as her abuser. Following the presentation of the video, Corporal Loudin was asked "In your experience in that – in your position and with your training, is it your – what is your experience with regard to children disclosing every single thing that happened to them in the very first interview that's conducted?" Corporal Loudin responded by stating that "typically never happens" but went on to state that the details relayed by M.A.H. in her statement was an indicator that "this child is being honest in their disclosures." Petitioner's counsel objected that such testimony was in defiance of the court's pre-trial ruling as to the scope of Corporal Loudin's expert testimony. The State conversely argued that this testimony was in accord with the pre-trial rulings. Ultimately, the court provided a curative instruction to the jury, as follows:

> But now, as to the ultimate issue – and I'll instruct the jury that he's permitted to testify and I've ruled about his procedure and why he followed that procedure. Now, what he found as significant, he can testify to that.
>
> As far as the ultimate issue of whether or not he believed that the witness was honest or dishonest or truth or – or not truth, he cannot testify about that. Because that's for you to decide.

Petitioner argues that Corporal Loudin's testimony as to the tendency of his interrogation protocol to produce reliable statements was tantamount to impermissible witness advocacy, prejudicial to petitioner, and invaded the province of the jury. Conversely, the State argues that it did not purposefully elicit testimony from Corporal Loudin regarding the honesty or dishonesty of M.A.H.'s statement. The State asked Corporal Loudin a proper question, which he answered,

[5] *See* Syl. Pt. 1, *State v. Buzzard*, 194 W. Va. 544, 461 S.E.2d 50 (1995).

after which he volunteered additional information. In response to Corporal Loudin's testimony, the Court took immediate and appropriate action and gave a curative instruction to the jury to disregard any testimony as the ultimate issue. *See State v. Jones*, 230 W. Va. 692, 742 S.E.2d 108 (2013).

This Court has previously held that "[a] trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard." Syl. Pt. 4, *State v. Rodoussakis*, 204 W. Va. 58, 511 S.E.2d 469 (1998). Here, based upon our review of the record, we find no error. The court properly provided a curative instruction to the jury, to which neither party objected, and acted within its discretion.

Next, petitioner argues that the circuit court further erred in permitting evidence to be introduced at trial, in violation of Rule 404(b) of the West Virginia Rules of Evidence. Specifically, petitioner contends that the circuit court erred by permitting Rule 404(b) testimony of a second purported victim of the petitioner, when the testimony related to an instance that was excessively remote in time and was more prejudicial than probative.

We disagree. Here, the State properly noticed its intent to introduce such evidence at trial for the purpose of establishing petitioner's lustful disposition towards children, and the appropriate pre-trial hearings were held. While petitioner is critical of the remoteness of time of the claims of E.W. against petitioner, this Court has held that the length of time between the Rule 404(b) evidence and the charged offense goes to the weight of the evidence rather than the admissibility of the evidence. *See State v. Gary A.*, 237 W. Va. 762, 791 S.E.2d 392 (2016). Accordingly, we find no error in the circuit court's denial of petitioner's motion for new trial on this ground.

Petitioner further argues in assignment of error number six that the circuit court erred in denying his motion to cross-examine the victim under an exception to the rape shield law.[6] Petitioner contends that pursuant to Rule 412 of the West Virginia Rules of Evidence he was permitted to cross-examine the victim related to her statements made on social media and regarding her hymen. The State argues that the trial court did not err in denying petitoner's ability to cross-examine M.A.H. regarding her previous sexual history.

We agree with the State. Here, the previous sexual conduct of the victim was not at issue. The victim's statement on social media regarding the age of her oldest sexual partner was not an exculpatory or contradictory statement. With regard to petitioner's proposed questioning of M.A.H. about her hymen, the court found that "specific instances of sexual behavior if offered to prove that someone other than the defendant was the source of the injury [to M.A.H.'s hymen]" could be admitted. We find that the circuit court thoroughly reviewed this issue, holding two separate hearings over a three-month period. The circuit court gave petitioner additional time to show some specific instance of the victim's sexual behavior, but petitioner conceded that he could not make any such showing. As such, the type of questioning requested by petitioner is

[6] *See* Syl. Pt. 2, *State v. Timothy C.*, 237 W. Va. 435, 787 S.E.2d 888 (2016).

exactly the type of questioning the rape shield law was designed to limit.[7] Accordingly, the circuit court did not err in its application of the rape shield law to prohibit petitioner from cross-examining the victim as to her hymen and her social media posts regarding the age of her sexual partners.

Petitioner argues in his seventh assignment of error that the circuit court erred in permitting the State to elicit irrelevant evidence of expert medical testimony. Specifically, petitioner contends that through the testimony of Dr. Catherine Chua the State attempted to lay a foundation for medical records concerning the fact that the alleged victim's hymen was not intact.[8] Petitioner argues that this ruling was contradictory to the court's other rulings that the physical state of the victim's hymen was "essentially meaningless." Petitioner contends that the admission of such evidence prejudiced him.

Here, we find no abuse of the circuit court's discretion in allowing the admission of such evidence. While such testimony is not absolute evidence of sexual assault, as Dr. Chua testified, the non-presence of a hymen could be a result of sexual assault. Accordingly, we find that under Rule 401 of the West Virginia Rules of Evidence, permitting the introduction of relevant evidence, the circuit court did not err.

In his eighth assignment of error, petitioner argues that the circuit court erred in its denial of petitioner's motion for judgment of acquittal on the basis of insufficient proof of an element of an offense in the indictment. This Court has found that

> "'"[u]pon motion to direct a verdict for the defendant, the evidence is to be viewed in light most favorable to prosecution. It is not necessary in appraising its sufficiency that the trial court or reviewing court be convinced beyond a reasonable doubt of the guilt of the defendant; the question is whether there is substantial evidence upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt." *State v. West,* 153 W.Va. 325, 168 S.E.2d 716 (1969).' Syl. pt. 1, *State v. Fischer,* 158 W.Va. 72, 211 S.E.2d 666 (1974)." Syl. Pt. 10, *State v. Davis,* 176 W.Va. 454, 345 S.E.2d 549 (1986).

Syl. Pt. 1, *State v. Rogers,* 209 W. Va. 348, 547 S.E.2d 910 (2001).

Here, petitioner argues that the jury did not have a sufficient factual basis to find that the element of petitioner's age was proven beyond a reasonable doubt. The State responds that there was sufficient evidence that petitioner was over the age of eighteen. Based on our review of the record, we agree with the State.

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[7] *See* Rule 412 of the West Virginia Rules of Evidence, 2014 Comment on Rule 412.

[8] Dr. Chua, who examined the victim, testified that there are a number of reasons that a female's hymen may not be intact which include, but are not limited to, sexual conduct.

In syllabus point six of *State v. Richey*, 171 W. Va. 342, 298 S.E.2d 879 (1982), this Court noted that "[w]here the exact age is not required to be proved, the defendant's physical appearance may be considered by the jury in determining age but there must be some additional evidence suggesting defendant's age." At the time of his trial, petitioner herein was approximately forty seven years old. Jurors observed petitioner's physical appearance, which corresponded with his age, and heard testimony that he had been married and divorced and had daughters around the same age of the victim. Further, several of the State's witnesses, including Trooper Heavener and victim, testified that petitioner was over the age of eighteen. Accordingly, we find no error.

Petitioner additionally argues that the circuit court erred in its denial of petitioner's motion for judgment of acquittal as to the display of obscene matter charge due to insufficient factual proof of the elements of the crime. Conversely, the State argues that the record contained sufficient evidence to sustain petitioner's conviction. At trial, the victim testified that petitioner watched graphic pornography (showing two individuals having sexual intercourse) on television in her presence and that petitioner was the only individual in the room who could have put said pornography on the television. Accordingly, viewing the evidence in the light most favorable to the State, we find no error.

In his final assignment of error, petitioner contends that the circuit court's cumulative errors prejudiced him and necessitate the reversal of his convictions and award of a new trial. Our standard for reviewing a cumulative error argument was set forth in syllabus point five of *State v. Smith*, 156 W. Va. 385, 193 S.E.2d 550 (1972) ("Where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error."). Further, this Court has recognized that the cumulative error doctrine "should be used sparingly" and only where the errors are apparent from the record. *Tennant v. Marion Health Care Found., Inc.*, 194 W. Va. 97, 118, 459 S.E.2d 374, 395 (1995). Here, as we find no error, we find no merit in petitioner's argument for the application of the cumulative error doctrine.

Based on the foregoing, we find no error below and affirm petitioner's August 3, 2016 convictions on five counts of first degree sexual assault, one count of display of obscene matter to a minor, and two counts of third degree sexual assault.

Affirmed.

ISSUED: June 15, 2018

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Menis E. Ketchum
Justice Elizabeth D. Walker

Justice Loughry, Allen H., II suspended and therefore not participating

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on October 9, 2018, the following order was made and entered:

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 17-0170

Wilfred H.,
Defendant Below, Petitioner

ORDER

The Court, on October 4, 2018, having maturely considered the petition for rehearing filed by the petitioner, Wilfred H., by Jeremy B. Cooper, his attorney, is of the opinion to and does hereby refuse said petition for rehearing.

Justice Allen H. Loughry II suspended and therefore not participating. Justice Paul T. Farrell sitting by temporary assignment.

A True Copy

Attest: /s/Edythe Nash Gaiser
Clerk of Court

IN THE CIRCUIT COURT OF RANDOLPH COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff,

v. **Case No.: 14-F-117**
Hon. John Henning

WILFRED DOYLE HINCHMAN, II,
Defendant.

POST-TRIAL MOTIONS

The Defendant, Wilfred Doyle Hinchman, II, by counsel, Jeremy B. Cooper, presents the following to this Honorable Court as his post-trial motions in the above-referenced matter. The Defendant was convicted by Jury Verdict of guilt on August 3, 2016, of five counts of first degree sexual assault (Counts 1, 4, 5, 6, and 7); one count of display of obscene matter to minor (Count 3), and two counts of third degree sexual assault (Counts 38 and 57). No verdict was reached on the remaining forty-nine counts of the indictment. The Defendant asserts the following grounds for mistrial pursuant to Rule 26.3 of the West Virginia Rules of Criminal Procedure, judgment of acquittal pursuant to Rule 29(c) of the West Virginia Rules of Criminal Procedure, and for a new trial pursuant to Rule 33 of the West Virginia Rules of Criminal Procedure.

1. Renewed Motion for Mistrial, and for dismissal of the indictment with prejudice, or in the alternative, a New Trial, on the basis of the publication to the jury of inadmissible, prejudicial evidence, and related constitutional violations.

A. Procedural history and issues presented

The Defendant, during trial, made one motion for mistrial. This motion was made upon the basis of the State's prior publication of a photograph to the jury that purported to depict a nude, underage image of the alleged victim. Prior to said publication, the Defendant objected to the publication on two grounds: a reassertion of issues that had been litigated prior to trial, and secondly, that the State had failed to establish a chain of custody pertaining to the photograph. The Court overruled the Defendant's objections, and the State published the photograph by physically holding and moving the image in close proximity to the seated jury.

Subsequently, the state elicited additional testimony from Trooper Heavner. During his testimony, Trooper Heavner admitted, under the State's direct examination, that the materials received back from the State Police Crime Lab sat unguarded on his desk for a period of approximately five months. Following said testimony, the Court precluded the State from publishing the photograph through a different witness.

The Defendant moved for a mistrial on the basis that the State had offered inadmissible evidence of a highly prejudicial nature to the jury. The Court ruled that the State had failed to prove the chain of custody on the basis of Trooper Heavner's testimony. The Court also agreed that the evidence was prejudicial. The Court further inquired of the parties what the appropriate remedy would be. At that time, the Defendant argued that a mistrial was warranted, and further that a dismissal of all charges with prejudice was warranted because the grounds for the mistrial were caused by the State's malfeasance. The Court ultimately ruled that the photograph would be removed from evidence, and that the jury would be instructed not to consider the photograph. The Defendant objected to the Court's remedy. Following the verdict, the Defendant renewed the motion for mistrial, and incorporates and memorializes the same in this written motion.

It is the Defendant's contention that three sets of legal issues are raised by this sequence of events. The Defendant's analysis rests on the assumptions that the photograph was both prejudicial and inadmissible (these assumptions are based upon the Court's ruling from the bench at the time the motion for mistrial was originally made). The first issue is whether the publication of the inadmissible photograph justifies a mistrial, rather than an instruction, under the applicable legal standards. The second issue is whether the State's failure to inform the Defendant prior to trial of the contents of Trooper Heavner's testimony constitutes a Brady violation. The third issue is whether a dismissal with prejudice or a new trial would be the appropriate posture if the motion for mistrial is granted.

B. Grounds for mistrial vs. instruction

The Supreme Court has laid out a standard for when the use of inadmissible evidence by the

State constitutes reversible error, and when it would be deemed harmless error. That standard is laid out in Syllabus Point 2 of State v. Atkins, 163 W.Va. 502, 261 S.E.2d 55 (1979), and its progeny:

> 2. Where improper evidence of a nonconstitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury.

In the present matter, although the Defendant does not concede that there was sufficient evidence to sustain the conviction with or without the inadmissible photograph, the Defendant will assume, *arguendo*, for the purposes of this individual issue, that there was sufficient evidence without the photograph, based upon this Court's earlier denial of the Defendant's motions for judgment of acquittal. Therefore, if this Court deems that the the photograph's publication to the jury was harmless, then the denial of a mistrial was appropriate, and no further relief beyond this Court's earlier instruction would be available to the Defendant.

The photograph was far from harmless, however. This Court has already ruled that the photograph was inherently prejudicial (as evidence offered at trial tends to be). Adkins elucidates several additional factors to weigh when determining the extent of the prejudice to the Defendant:

> In any inquiry into the prejudicial impact of the error, we will be guided by whether the record reveals that the error was repeated or singled out for special emphasis in the State's argument. We will scrutinize the record to determine if the error became the subject of a special instruction to the jury, or produced question from the jury. Also of importance is the overall quality of the State's proof.
>
> ...
>
> If the case contains a number of substantial key factual conflicts or is basically a circumstantial evidence case, or is one that is largely dependent on the testimony of a co-participant for conviction, there is an increased probability that the error will be deemed prejudicial.

Id., 261 S.E.2d 62-63, 163 W.Va. 514-515.

In this case, the inadmissible evidence was indeed made part of the State's opening statement,

compelling the Defendant to respond in his own opening statement. The inherent inadmissibility of the evidence was also discovered during the State's efforts to establish chain of custody in hopes of publishing the photograph a second time. Additionally, the photograph did require an instruction to the jury once its inadmissibility had been established.

The final factor has to do with the relationship between the photograph and the rest of the evidence offered by the State. By the State's own admission, there was no confession in the case. The State's proof rested heavily on otherwise uncorroborated testimony of the alleged victim. The State attempted to provide corroboration in the form of a PTSD diagnosis, but that corroborating factor was disproved when the State's expert witness admitted the alleged victim's medical records were not consistent with diagnostic criteria. The State did not have any blood or DNA evidence. There was eye-witness testimony offered by the Defendant's sole witness contradicting the alleged victim's testimony. The State put forth a 404(b) witness, but her testimony was factually distinct from the alleged victim's account, and unrelated to the allegations in the indictment.

The only meaningful corroboration of the alleged victim's account other than her own prior (and frequently inconsistent) statements was the photograph. If the jury believed that the photograph depicted her, then the photograph would dramatically bolster her credibility. It is also worth noting that even with the benefit of the photograph being shown to the jury, as has taken place in both of the trials of this matter, the State's case has failed to consistently produce convictions on the allegations contained in the indictment. Of the 104 total charges that have been examined by the respective juries during the two trials of this matter, more than ninety percent have not resulted in a verdict. It cannot be said that the remaining evidence aside from the photograph is sufficiently strong as to outweigh the effect of the improperly published exhibit. Quite the contrary.

The practical effect of a curative instruction in the face of such immensely prejudicial evidence is inherently weak. What has been seen cannot be unseen. “A drop of ink cannot be removed from a glass of milk.” Government of Virgin Islands v. Toto, 529 F.2d 278 (C.A.3 (Virgin Islands), 1976).

This is no fault of the jury. The human mind is not designed to mechanically excise memory. Judge Learned Hand once described a curative instruction as "the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else." Nash v. United States, 54 F.2d 1006, 1007 (2nd Cir., 1932).

Nevertheless, there is a line of cases following Syllabus Point 18 of State v. Hamric, 151 W.Va. 1, 151 S.E.2d 252 (1966), which states: "Ordinarily where objections to questions or evidence by a party are sustained by the trial court during the trial and the jury instructed not to consider such matter, it will not constitute reversible error." It is worth comparing, however, the instant circumstances to those in some other cases in which this rule has been applied. Such analysis is instructive that the prejudice caused to the Defendant significantly outweighs the prejudice complained of in the fact patterns where the Hamric rule has been applied.

In Hamric itself, the instructions referred to an unanswered question about another witness' sexual conduct with an alleged victim; and subsequently to another unanswered question concerning supposed insults by an out-of-court declarant. In State v. Tyler G., Docket No. 14-0937, (W.Va., 2015) (memorandum decision), the issue was an unsolicited reference to a polygraph. In State v. Radford, Docket No. 13-0056, (W.Va., 2013) (memorandum decision) the issue was an oblique question and answer to a police officer that implicated the defendant's right to remain silent. In State v. Jones, 230 W.Va. 692, 742 S.E.2d 108 (2013), the instruction related to an expert offering an improper opinion on an ultimate issue. In State v. R.T., Docket No. 11-0468, (W. Va. 2012) (memorandum decision), the instruction pertained to improper hearsay testimony. In State v. Honaker Docket No. 11-0918, (W.Va., 2012) (memorandum decision), the issue was a disparaging remark about the cost to taxpayers of a publicly-funded defense expert. In State v. White, 678 S.E.2d 33, 223 W.Va. 527 (2009) the instruction pertained to collateral crimes evidence in relation to sex offender registry status. In State v. Mahood, 227 W.Va. 258, 708 S.E.2d 322 (2010), the improper testimony was about the defendant's extramarital relationship. In State v. Gwinn, 288 S.E.2d 533, 169 W.Va. 456 (1982), the instruction was granted in

response to a witness's unsolicited opinion about the defendant's motive.

The Court in Gwinn remarked that "[t]here are extraordinary situations where the objectionable evidence is so prejudicial that an instruction to the jury to disregard it is ineffective, and a mistrial is an appropriate remedy. See, e.g., Cannellas v. McKenzie, W.Va., 236 S.E.2d 327 (1977); see generally, F. Cleckley, Handbook on Evidence § 18, at 38 (1979 Supp.)" 169 W.Va. at 471, 288 S.E.2d at 542."

The Defendant's case in the present matter is exactly that sort of case. Unlike these other cases, the improper evidence was demonstrative evidence, a photograph, which has enhanced effect as compared to written documents or verbal descriptions. The photograph was also directly linked to the *res gestae* of the allegations, and not a mere off-hand remark or collateral matter. Indeed, in Cannellas, cited above by the Gwinn Court, habeas relief was granted on the basis of ineffective assistance of counsel because trial counsel failed to take efforts to combat the chain of custody of two pieces of clothing, which like the photograph at issue in this case, constituted the main form of corroboration of otherwise unsupported witness testimony. Thus in Cannellas, the case most factually similar to the instant case, the effect of such evidence being admitted sufficiently prejudiced the accused that he was ultimately awarded a new trial.

It is worth citing Justice Cleckley's *Handbook on Evidence* on this issue, which, following a discussion of the general presumption toward the effectiveness of limiting instructions, states that:

> In other words, while a judge may remove error by giving pertinent curative instructions, it is foolhardy to suggest that every prejudicial error is cured by a curative instruction. Clearly, an error can be so prejudicial in nature that it cannot be cured; in spite of anything that may be said by judges, some evidence will be so inherently harmful that the jury will most definitely draw conclusions from it.

F. Cleckley, *Handbook on Evidence* § 103.03[b], at 1-99 (5th Ed., 2014).

When weighing the seemingly competing standards of Hamric and Atkins, it is clear that under the facts of this case, the prejudice to the Defendant far outweighed the utility of a curative instruction. A curative instruction is sufficient to address routine, and largely inevitable trial error. It is not the

appropriate remedy for improperly admitted demonstrative evidence that is crucial to the State's narrative.

C. Brady/Youngblood violation

The Defendant asserts that the State's failure to apprise the Defendant prior to trial of the defect in the chain of custody constitutes a violation of the duty to disclose exculpatory evidence in the possession of law enforcement, contrary to the mandates of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and State v. Youngblood, 650 S.E.2d 119, 221 W.Va. 20 (2007). It is clear from Trooper Heavner's testimony that the items from the State Police Crime Lab remained on his desk, unprotected for a period of five months, and that Trooper Heavner was personally aware of this fact. Nevertheless, the State never disclosed this information to the Defendant, who only became aware of the defect in the chain of custody during the trial. The recent case of Buffey v. Ballard, 782 S.E.2d 204, 236 W.Va. 509 (2015) extends the State's Brady duty to the plea negotiation stage, clearly rendering a mid-trial disclosure untimely. Had the Defendant been made aware of that information, it would have been possible to litigate the issue *in limine* before trial.

Syllbus Points one and two of Youngblood read as follows:

> 1. A police investigator's knowledge of evidence in a criminal case is imputed to the prosecutor. Therefore, a prosecutor's disclosure duty under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and State v. Hatfield, 169 W.Va. 191, 286 S.E.2d 402 (1982) includes disclosure of evidence that is known only to a police investigator and not to the prosecutor.
>
> 2. There are three components of a constitutional due process violation under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and State v. Hatfield, 169 W.Va. 191, 286 S.E.2d 402 (1982):(1) the evidence at issue must be favorable to the defendant as exculpatory or impeachment evidence; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must have been material, i.e., it must have prejudiced the defense at trial.

The facts set forth in Trooper Heavner's testimony are absolutely sufficient to satisfy the first syllabus point. Trooper Heavner is a police investigator, and he had knowledge of the circumstances surrounding chain of custody. As pertains the second syllabus point, the chain of custody defect would

have been highly favorable knowledge for the Defendant in seeking the exclusion of a piece of evidence that the Defendant had sought to exclude in multiple ways prior to the trial. The evidence was suppressed by the State, because the Defendant was not made aware of it until well into the State's case-in-chief, and not until such time as the photograph had already been published to the jury. The Defendant was clearly prejudiced by the publication of the photograph to the jury, as this Court stated on the record that the photograph was prejudicial by nature.

D. Remedy

The inquiry into the proper remedy for the State's non-disclosure of the chain of custody defect, and the publication of the photograph to the jury notwithstanding that defect, is two-fold. The first inquiry is whether, if a mistrial is granted on evidentiary grounds, jeopardy should attach and preclude the re-trial of the Defendant. The second inquiry is whether the circumstances of the Brady violation bar a re-trial. The answer to both of these questions, however, is tied to the intention of the prosecutor, and therefore the situation in this particular case may be assessed under the standard of whether the State engaged in bad faith.

The Supreme Court of Appeals of West Virginia has held that a defendant's motion for mistrial is most closely comparable to a contemporaneous assertion of trial error during the trial. In assessing a defendant's predicament in State ex rel. Betts v. Scott, 165 W.Va. 73, 89, 267 S.E.2d 173, 182 (1980), the Supreme Court observed that "[w]hat did exist was a trial error which prejudiced the defendant and placed him in a position of having either to request a mistrial or to make an objection and seek an ultimate resolution from the jury with the right of an appeal if the jury convicted." Typically a successful appeal on the basis of trial error will result in a new trial, as opposed to a dismissal with prejudice.

The state Supreme Court has stated, in Syllabus Points three, four, eight, nine, and ten of State v. Elswick, 225 W.Va. 285, 693 S.E.2d 38 (2010), that:

> 3. "When a mistrial is granted on motion of the defendant, unless the defendant

> was provoked into moving for the mistrial because of prosecutorial or judicial conduct, a retrial may not be barred on the basis of jeopardy principles. Oregon v. Kennedy, 456 U.S. 667, 679, 102 S.Ct. 2083 2091, 72 L.Ed.2d 416, 427 (1982)." Syl. Pt. 8, State v. Pennington, 179 W.Va. 139, 365 S.E.2d 803 (1987).
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> 4. "The determination of 'intention' in the test for the application of double jeopardy when a defendant successfully moves for a mistrial is a question of fact, and the trial court's finding on this factual issue will not be set aside unless it is clearly wrong." Syl. Pt. 2, State ex rel. Bass v. Abbot, 180 W.Va. 119, 375 S.E.2d 590 (1988).
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> [...]
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> 8. "A prosecution that withholds evidence which if made available would tend to exculpate an accused by creating a reasonable doubt as to his guilt violates due process of law under Article III, Section 14 of the West Virginia Constitution." Syl. Pt. 4, State v. Hatfield, 169 W.Va. 191, 286 S.E.2d 402 (1982).
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> 9. "There are three components of a constitutional due process violation under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and State v. Hatfield, 169 W.Va. 191, 286 S.E.2d 402 (1982): (1) the evidence at issue must be favorable to the defendant as exculpatory or impeachment evidence; (2) the evidence must have been suppressed by the State, either wilfully or inadvertently; and (3) the evidence must have been material, i.e., it must have prejudiced the defense at trial." Syl. Pt. 2, State v. Youngblood, 221 W.Va. 20, 650 S.E.2d 119 (2007).
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> 10. "In determining what consequences should flow from the State's breach of its duty to preserve evidence, a trial court should consider (1) the degree of negligence or bad faith involved; (2) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence produced at the trial to sustain the conviction." Syl. Pt. 2, in part, State v. Osakalumi, 194 W.Va. 758, 461 S.E.2d 504 (1995).

The Defendant asserted at trial, and continues to assert, that the necessity of the Defendant's motion for mistrial was caused by the State's misconduct, in the form of the late-disclosed defects in the chain of custody. The Defendant does believe that there was negligence both in Trooper Heavner's handling of the evidence, and in the State's failure to disclose his mishandling thereof. However, in candor, the Defendant does not believe that the State was intentionally trying to provoke a mistrial, based upon the circumstances under which the chain of custody defect became apparent. Furthermore, the Defendant does not have any reason to believe that the Assistant Prosecuting Attorney had any actual knowledge of the chain of custody defect. Therefore, while Trooper Heavner's knowledge is

properly imputed to her under the Youngblood analysis, the Defendant cannot in good faith assert belief that the Assistant Prosecuting Attorney was intentionally withholding the evidence.

These factors weigh against a dismissal with prejudice, and more in favor of the granting of a new trial. Therefore, while the Defendant does assert that it is within the Court's legitimate power to order a dismissal with prejudice, the Defendant acknowledges that the most appropriate relief under the law, given the facts at hand, is the granting of the Defendant's motion for mistrial, followed by a new trial.

2. Motions for Judgment of Acquittal

The Defendant states the following as his motions for judgment of acquittal made pursuant to Rule 29 of the West Virginia Rules of Criminal Procedure.

A. Motion for Judgment of Acquittal on the basis of inherently incredible testimony.

The Defendant moves this Honorable Court to enter a judgment of acquittal on all charges on the basis of the State's proof having rested on inherently incredible testimony. "A conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible, the credibility is a question for the jury." Syl. pt. 5, State v. Beck, 167 W.Va. 830, 286 S.E.2d 234 (1981). In the present case, the alleged victim's out-of-court writing was admitted in which she claimed to remember each and every event of alleged abuse that took place at the hands of the Defendant. However, at trial, she was only able to recount a select few actual details regarding a tiny minority of alleged assaults. The evidence in that regard was inherently incredible because of the total incompatibility of the alleged victim's previous assertions when compared with the testimony she was actually able to produce at trial. Additionally, the alleged victim asserted that she was forced into sexual intercourse hundreds of times by the Defendant without a condom, yet never became pregnant. The State's witness, Dr. Chua, indicated that the alleged victim did not have any abnormalities concerning her reproductive system based upon her examination. The alleged victim's account seriously strains credulity on that basis as well. Because the State's proof rested overwhelmingly upon

the alleged victim's testimony, in the absence of a confession or forensic evidence, relief is proper in the form of a judgment of acquittal.

B. Motion for Judgment of Acquittal on Count 3 on the basis of insufficient proof of the elements of obscenity.

The Defendant moves this Honorable Court to enter a judgment of acquittal on Count 3 of the indictment, Display of Obscene Matter to a Minor, on the basis that the State's proof failed to support all of the elements necessary to demonstrate that the matter in question was obscene matter. The alleged victim testified that the Defendant displayed a video of individuals engaging in an explicit depiction of sexual intercourse, without providing any additional details as to the nature of the video in question. To support its allegation in Count 3, the State must prove the following elements concerning the alleged obscene matter:

> [a]n average person, applying contemporary adult community standards, would find, taken as a whole, appeals to the prurient interest, is intended to appeal to the prurient interest, or is pandered to a prurient interest." W. Va. Code §61-8A-1(k)(1).
>
> "[a]n average person, applying community standards, would find depicts or describes, in a patently offensive way, sexually explicit conduct." W. Va. Code §61-8A-1(k)(2).
>
> "[a] reasonable person would find, taken as a whole, lacks serious literary, artistic, political or scientific value." W. Va. Code §61-8A-1(k)(2).

It is the Defendant's contention that the jury cannot make a sufficient finding on these factors without access to the alleged obscene matter itself. These factors were made part of the statutory definition of "obscene matter" pursuant to the holding of the Supreme Court of the United States in Miller v. California, 413 U.S. 15 (1973). These factors are properly in the province of the jury, but the Defendant asserts that without knowing what exact content was allegedly being played, the jury was deprived of the opportunity to make a determination sufficient to uphold the conviction. On this basis, a judgment of acquittal is appropriate concerning Count 3 of the Indictment.

C. Motion for Judgment of Acquittal on all counts on the basis of failure of proof of age.

Every count of the indictment contains the Defendant's age as an essential element necessary to

sustain a conviction. The Counts of First Degree Sexual Assault require that the Defendant be over eighteen years of age. The Count of Display of Obscene Matter to Minor requires that the Defendant be an adult, defined in W. Va Code §61-8A-1 as being "a person eighteen years of age or older". The Counts of Third Degree Sexual Assault require that the Defendant be over eighteen years of age, or not more than four years of age older than the alleged victim. During trial, testimony was put on by the alleged victim that the Defendant was over eighteen, and by another witness who attempted to approximate the Defendant's age. However, no documentary support was given for either assertion. Syllabus Point 6 of State v. Richey, 298 S.E.2d 879, 171 W.Va. 342 (W.Va., 1982) states that: "Where the exact age is not required to be proved, the defendant's physical appearance may be considered by the jury in determining age but there must be some additional evidence suggesting the defendant's age."

A more recent case citing Richey is State v. Delbert R. Docket No. 14-0728, (W. Va. 2015) (memorandum decision), in which the defendant complained of insufficient proof of age. However, in that case, the Supreme Court noted that the defendant's birth certificate had been admitted into evidence without objection, rendering his assignment of error groundless. In the present case, contrary to Delbert R., no documentary evidence was given at any point to support the bare estimates of the Defendant's age. In Richie, the Court accepted the State's proof on the grounds that in addition to bare assertions of the defendant's age, there was evidence that he was a member of the House of Delegates, and that said body has a minimum age requirement of eighteen. The Defendant herein asserts that under the Richie standard, the evidence was insufficient to support a conviction on any of the charges due to there being no evidence of the Defendant's age being set forth other than bare, unsupported assertions by witnesses.

3. Motions for New Trial

The Defendant states the following as his Motions for New Trial, pursuant to Rule 33 of the West Virginia Rules of Criminal Procedure.

A. Motion for New Trial on the basis of error in pretrial rulings.

The Defendant moves this Honorable Court for a New Trial on the basis of error in pre-trial rulings that resulted in prejudice to the Defendant at trial. The Defendant incorporates each of the following pre-trial motions by reference, and requests that the Court grant the Defendant a new trial on the basis of prejudice to the Defendant at trial resulting from the effects of the pre-trial motions.

i. State's Motion to permit 404(b) evidence: The Court permitted the State to elicit 404(b) testimony from Emily Shiflett, concerning allegations that she had been subject to inappropriate sexual conduct by the Defendant when she was a child. This ruling was extremely prejudicial to the Defendant, because any probative effect the testimony would have had concerning a lustful disposition toward children was outweighed by the likelihood that the jury would punish the Defendant for this uncharged conduct. Furthermore, the ruling was contrary to established law, to the extent that the allegation was approximately twelve years remote from the present day, and as many as eight years remote from a certain counts of the indictment. Syllabus Point 2 of State v. Edward Charles L., 398 S.E.2d 123, 183 W.Va. 641 (1990) [in part, emphasis added]:

> 2. Collateral acts or crimes may be introduced in cases involving child sexual assault or sexual abuse victims to show the perpetrator had a lustful disposition towards the victim, a lustful disposition towards children generally, or a lustful disposition to specific other children **provided such evidence relates to incidents reasonably close in time to the incident(s) giving rise to the indictment.**

In State v. Edward Charles L., this type of evidence was likened to *res gestae*, a term which is also referred to as intrinsic evidence. In the case at bar, the Defendant was already subject to extensive amounts of intrinsic evidence outside of what was actually charged in the indictment. The cumulative effect of a bare, uncorroborated allegation from twelve years ago was beyond the scope of permissible collateral act evidence, was more prejudicial than probative, and dramatically increased the probability that the Defendant would not receive a fair trial.

ii. Defendant's Motion for Release and In Camera Review of Sealed Records: prior to the

first jury trial in this matter, the Defendant had sought to have an in camera review of certain sealed records, including school records, family court pleadings, DHHR records, and therapeutic records of the alleged victim. Judge Wilmoth reviewed those records, and determined that no exculpatory evidence was contained in them, and had the records sealed in the court file. However, by agreement after the first trial, the State and the Defendant agreed to the disclosure of the family court file and the therapeutic records. Upon review, those records did indeed contain exculpatory evidence, of which the Defendant was deprived at the first trial. This evidence included a record showing that the alleged victim's PTSD diagnosis was faulty, as well as evidence showing a timeline for events described by the alleged victim that was different than any other timeline of events she had provided. To this day the Defendant is still unaware of what is contained in the remainder of the sealed records, but based upon what was ultimately disclosed, the Defendant believes there is a high probability that other exculpatory evidence that remains unknown and unavailable to the Defendant. The Defendant objected at the time that the Court sealed the records without permitting counsel to review them independently, and now asserts that the convictions are in error due to not having been permitted to view the sealed records in totality.

iii. Defendant's Motion to Suppress Trooper Loudin's Interview of Defendant (and fruits thereof): The Defendant sought to suppress the recording of Trooper Loudin's interrogation of the Defendant on constitutional grounds, as well as the electronic files that were obtained by the State as a result of that interrogation. This suppression was sought on the basis that the Defendant's consent to speak with law enforcement and turn over his computer and phone was obtained under duress as a result of Cpl. Loudin's assertion to the Defendant that he had the power to arrest him, when in fact he had not obtained independent judicial approval for an arrest warrant. The Defendant continues to assert that allowing the interrogation and the electronic files into evidence was a violation of the Defendant's constitutional rights, and is grounds for a new trial.

iv. Defendant's Motion to Determine Scope of Intrinsic Evidence: The Defendant sought to

exclude the photograph (discussed in great detail in the Defendant's renewed motion for mistrial, *supra*), as outside the scope of intrinsic evidence. It was the Defendant's contention that the photograph should have been subject to 404(b) analysis before it could be admitted. For the reasons stated in that motion, the Defendant maintains that contention, and further asserts that due to more recently disclosed defects in the chain of custody of that photograph, that the State's efforts to admit the photograph as collateral act evidence would not have survived a McGinnis hearing. The consequent publication of the photograph to the jury at trial was therefore error for this reason in addition to those cited earlier in these Post-trial Motions.

v. Defendant's Motion to Determine whether Anticipated Evidence Falls within the Rape Shield Statute: The Defendant contends that he was denied a fair trial on the basis that he was not permitted by the Circuit Court, following a motion in limine, to cross-examine the alleged victim on a statement she made on social media in which she claimed the oldest person she ever had sex with was eighteen years old. That statement was obviously at odds with her testimony at trial concerning the Defendant. Given that the strength of the State's case rested on the alleged victim's testimony, the deprivation of the opportunity to cross-examine her on her own out-of-court statements deprived the Defendant of a fair trial, and is grounds for a new trial.

vi. Defendant's Motion to Cross-examine Alleged Victim concerning her Sexual History: Following the State's disclosure of Dr. Chua as a witness, along with the alleged victim's medical records, the Defendant (correctly) anticipated that the State was going to attempt to gain testimony from Dr. Chua that the alleged victim's hymen had been ruptured. The State did indeed elicit that testimony at both trials, despite the fact that there is no significant correlation between a ruptured hymen and being a victim of sexual abuse. Consequently, the Defendant sought permission to cross-examine the alleged victim about the extent to which she had had vaginal intercourse with other males prior to the relevant medical examination referred to in the records. The Defendant was not permitted by the Court to delve into that subject matter, despite the fact that it was the State, and not the

Defendant, who opened the door to scientifically bogus insinuations concerning the alleged victim's hymen. Therefore, the Defendant was once again deprived of the ability to meaningfully confront the State's prime witness with other potential explanations for Dr. Chua's findings regarding her anatomy.

B. Motion for New Trial on the basis of Cpl. Loudin's Impermissible Testimony

Prior to trial, the State had noticed, and the parties litigated in multiple hearings, the extent to which Cpl. Loudin would be permitted to testify on the State's proffered topic of expert testimony, specifically, Cpl. Loudin's expertise in forensic interviewing. Ultimately, the parties reached an agreement that Cpl. Loudin would not be permitted to testify as to the tendency of the Finding Words protocol to produce reliable statements. However, at trial, Cpl. Loudin testified as to the ultimate issue specifically agreed upon by the parties to be excluded. [As an aside, the order memorializing the agreement was not signed until shortly after this testimony. However, to the extent the agreement is deemed inoperative until such signing, it is worth noting that the State would still be precluded from eliciting that testimony, because the Defendant's motion had the effect of placing the burden on the State to prove the scientific veracity of the proposed expert testimony. This burden had never been met, absent the agreement being in force.] Following this testimony, the Court gave a limiting instruction to the jury.

Nevertheless, Cpl. Loudin's testimony continued on to discuss the Reid Technique, which is a form of interrogation practiced by law enforcement. Although the State had given no notice of its intent to procure expert opinion testimony concerning the Reid Technique, Cpl. Loudin went on to offer opinion testimony stemming from the application of the Reid Technique to the Defendant's statement. The Defendant objected again, on the basis that the State had not noticed its intent to obtain expert testimony concerning the Reid Technique, and that if it had, the Defendant would have challenged its dubious scientific veracity in the same manner that the Defendant had challenged the Finding Words protocol.

The effect of this opinion testimony, on both topics, was prejudicial to the Defendant, because it

tended bolster the alleged victim's testimony in an impermissible manner, and likewise permitted Cpl. Loudin to impute a confession into the Defendant's statement where none existed. Cpl. Loudin's testimony was tantamount to impermissible witness advocacy. *See* Justice Starcher's dissent, State v. Catlett, 536 S.E.2d 728, 207 W. Va. 747 (2000). The State's elicitation of this testimony from Cpl. Loudin defeated the entire purpose of the extensive litigation and carefully crafted agreement of the parties. It was also in contravention of the requirement to provide notice and appropriate documentation to the Defendant concerning opinion testimony about Cpl. Loudin's interrogation of the Defendant via the Reid Technique. Permitting such bolstering testimony, contrary to expert disclosure requirements, prejudiced the Defendant and deprived him of the benefit of the agreement previously reached with the State. Furthermore, it invaded the province of the jury for Cpl. Loudin to attempt to impute meaning into the Defendant's mannerisms on the basis of his supposed expertise. A new trial is justified on this basis.

C. Motion for New Trial on the Basis of Impermissible Questioning of the Alleged Victim

The Defendant moves for a new trial on the basis of an impermissible line of questioning of the alleged victim by the State, that was permitted over the Defendant's objection. Late in the direct examination of the Defendant, the State began to ask questions concerning the effect of the alleged assaults on the alleged victim. The Defendant objected and was overruled. This line of questioning culminated in the State asking the alleged victim whether she thought it was important for her to testify, and why. The alleged victim responded to the effect that she did not want there to be any future victims of the Defendant. This line of questioning is impermissible on the basis that it is not relevant, and because it has the tendency to improperly inflame the jury by encouraging them to consider the incapacitation of the defendant. It is improper for the jury to consider punishment, as sentencing is the province of the trial court. The elicitation of this testimony is consequently prejudicial to the Defendant, and an appropriate ground for a new trial.

D. Motion for New Trial based upon other circumstances appearing in the record.

The Defendant moves this Court to order a New Trial on the basis of other circumstances appearing in the record not specifically enumerated in these Post-Trial Motions. To the extent that any other error appears in the as-yet-unavailable transcript of the trial, it is the Defendant's intention to preserve the same.

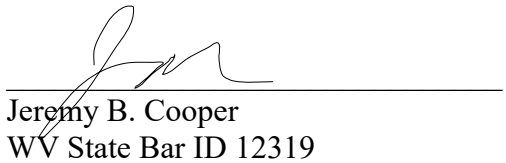
E. Motion for New Trial based upon cumulative trial error.

The Defendant moves this Court for a New Trial on the basis of the combination of the above-recited grounds to the extent that this Court finds any prejudice stemming from an individual ground insufficient on its own to justify a new trial, while finding that the combination of numerous factors and the consequent combined prejudice are sufficient to form the basis for an order for a New Trial.

WHEREFORE, the Defendant respectfully requests the relief requested herein, including the granting of a mistrial, a Judgment of Acquittal on all counts, or a New Trial, or any other relief the Court deems just and proper.

Respectfully submitted,

WILFRED DOYLE HINCHMAN, II, Defendant,
By Counsel,



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IN THE CIRCUIT COURT OF RANDOLPH COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff,

v. **Case No.: 14-F-117**
Hon. John Henning

WILFRED DOYLE HINCHMAN, II,
Defendant.

CERTIFICATE OF SERVICE

On this 13th day of August, 2016, I, Jeremy B. Cooper, hereby certify to this Court that I have delivered a true and exact copy of the foregoing "Post-trial Motions" to Lori Haynes, Assistant Prosecuting Attorney, by facsimile transmission.

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