IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2010 Term

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No. 35472

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee

v.

DONALD LEE LONGERBEAM,
Defendant Below, Appellant

Appeal from the Circuit Court of Jefferson County
Honorable David H. Sanders, Judge
Civil Action No. 08-F-91

REVERSED

Submitted: October 12, 2010
Filed: November 18, 2010

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The Opinion of the Court was delivered PER CURIAM.

Justices Benjamin and Workman dissent and reserve the right to file dissenting opinions.

SYLLABUS BY THE COURT

1. “The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.” Syl. Pt. 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Per Curiam:

Appellant Donald L. Longerbeam seeks a reversal of his conviction on one count of sexual abuse by a parent, guardian, custodian, or person in a position of trust with regard to a child.[1] As grounds for the reversal, Appellant maintains that he does not meet the definition of any of the specified classes of individuals that West Virginia Code § 61-8D-5(a) (2005) is directed at and he further argues that the alleged victim was not under his care, custody, or control at the time of the alleged sexual conduct. Upon our careful review of these arguments in conjunction with the record in this case, we conclude that the trial court committed error by denying Appellant's post-trial motion for a judgment of acquittal. Accordingly, the decision of the trial court is reversed.

I. Factual and Procedural Background

On June 8, 2007, Appellant and his wife, Cindy Longerbeam, were shopping at Wal-Mart when Mrs. Longerbeam received a cellular telephone call from the youngest of her sister's three daughters, Taylor G.,[2] asking for help to catch a loose hamster.[3] By the

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[1]*See* W.Va. Code § 61-8D-5(a) (2005).

[2]As is our custom in sensitive matters, we identify the juveniles by initials only. *See Matter of Jonathan P.*, 182 W.Va. 302, 303 n. 1, 387 S.E.2d 537, 538 n.1 (1989).

[3]The hamster actually belonged to Mrs. Longerbeam, but her sister and nieces were keeping it as the Longerbeams were in the midst of moving out of their residence at (continued...)

time Appellant and his wife arrived at Mrs. Longerbeam's sister's residence it was mid-morning and the hamster had already been secured. This fact was determined when Mrs. Longerbeam yelled upstairs upon her arrival. Mrs. Longerbeam asked her nieces Taylor G. and Marissa G. to come downstairs. After a short while, Mrs. Longerbeam went upstairs with Taylor G. apparently to check on the hamster. When Mrs. Longerbeam left the first floor living room area, Appellant was seated somewhere between the middle and the right side of the couch and the twelve-year-old victim, Marissa G., was seated on the left side of the couch. During the time when they were the only two people in the living area, Marissa G. testified that Appellant moved closer to her on the couch, put his arm around her shoulders, and touched her breast through her clothing.[4]

Soon after the alleged touching occurred, Kassandra M. or "Kacy," the sixteen-year-old sister of Taylor G. and Marissa G., came into the living area and encountered the situation. There was testimony that Appellant quickly moved away from

[3](...continued)
this time.

[4]At trial, Marissa G. testified that Appellant had been touching her "on my boobs and my butt and my . . . [vagina]" when her older sister Kacy walked into the room.

Marissa G. and/or that his leg twitched[5] upon Kacy's entry into the living room.[6] Kacy headed up the stairs to the second floor and Marissa G. followed her. When both Kacy and Marissa were on the second floor, Marissa G. informed her older sister in response to Kacy's questioning, that Appellant "ha[d] been touching her." Kacy then went downstairs in search of her aunt and uncle and found Mrs. Longerbeam outside on the front porch. Kacy asked her aunt where Appellant was and was told by Mrs. Longerbeam that he had walked down the street. Kacy told Mrs. Longerbeam in no uncertain terms: "[Y]ou need to get him and you need to leave." The record indicates that Mrs. Longerbeam put up no protest and promptly complied with Kacy's directive.

Kacy called the police to report the alleged sexual assault of Marissa G. by Appellant. Officer Patrick Norris initially responded to the call and he contacted Detective Tracy Lynn Edwards to aid in the investigation of the complaint.[7] According to the criminal complaint prepared by Detective Edwards, Kacy informed her that as she walked into the living room on her way to the bathroom she witnessed her uncle on the couch with "his arm

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[5]Mrs. Longerbeam testified that because of circulation problems Appellant's leg sometimes twitched.

[6]Kacy had been sleeping in a first-floor bedroom just down the hall from the living area before she entered the room after having completed a shift of employment at McDonald's at 5 a.m.

[7]Detective Edwards testified that she was called by Officer Norris because of her experience in investigating complaints of sexual assault and child abuse.

underneath" Marissa. The criminal complaint relates that Kacy witnessed Appellant "move[] quickly on the couch" after she entered the room. Through the complaint, Appellant was initially charged with two counts of sexual assault in the third degree[8] in connection with this incident. When the grand jury returned its indictment, Appellant was charged with five counts of sexual abuse by a guardian under West Virginia Code § 61-8D-5(a), occurring on unspecified dates between January 2006 and June 2007.[9]

At the conclusion of the two-day trial that began on March 3, 2009, Appellant was convicted on one count of touching Marissa G.'s breast in violation of West Virginia Code § 61-8D-5(a). He was sentenced on March 4, 2009, to ten to twenty years in prison for that singular offense. Through this appeal, Appellant seeks a reversal of the conviction based on his position that there was insufficient evidence to convict him of the offense of "sexual abuse by a guardian of a child"[10] under West Virginia Code § 61-8D-5(a). At issue is whether Appellant was properly convicted under the statute that imposes severe and

[8]*See* W.Va. Code § 61-8B-5 (2005).

[9]Three counts were for alleged touching of the victim's breasts and two counts were for alleged touching of her vagina.

[10]While it appears that the statute was repeatedly referred to in abbreviated fashion as "sexual abuse by a guardian of a child," the statute is aimed at four classes of individuals: (1) parents, (2) guardians; (3) custodians; and (4) persons in positions of trust. *See* W.Va. § 61-8D-5(a).

enhanced penalties for sexual abuse committed by four specific classes of individuals.[11]

II. Standard of Review

As we recognized in syllabus point one of *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995):

> The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

With this standard in mind, we proceed to determine whether there was sufficient evidence introduced to convict Appellant of sexual abuse by a parent, guardian, custodian, or person in a position of trust with regard to a child under West Virginia Code § 61-8D-5(a).

III. Discussion

To convict Appellant under West Virginia Code § 61-8D-5(a), the State had to prove that a qualifying act of sexual abuse[12] was performed by a specified class of

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[11]*See* note 10 *supra*.

[12]Under West Virginia Code § 61-8D-5(a) the acts that qualify as abuse are defined as "engag[ing] in or attempt[ing] to engage in sexual exploitation of, or in sexual intercourse, sexual intrusion or sexual contact."

individual. The four distinct classes of people that the Legislature has imposed enhanced punishment on for acts of sexual abuse are "parent[s], guardian[s] or custodian[s] of or other person[s] in a position of trust in relation to a child under his or her care, custody or control." W.Va. Code § 61-8D-5(a). Rather than disputing the occurrence of a defined act of sexual abuse,[13] Appellant argues that the State did not meet its burden of demonstrating that he fell within the class of entities subject to enhanced penalties for sexual abuse. *See id.*

A. Custodian

Because Appellant was neither the parent or the guardian[14] of the victim in this case, our focus is on whether he qualified as either a "custodian" or a "person in a position of trust" with regard to Marissa G. A "custodian" is statutorily defined as

> a person over the age of fourteen years who has or shares actual physical possession or care and custody of a child on a full-time or temporary basis, regardless of whether such person has been granted custody of the child by any contract, agreement or legal proceeding. "Custodian" shall also include, but not be limited to, the spouse of a parent, guardian or custodian, or a person cohabiting with a parent, guardian or custodian in the relationship of husband and wife, where such spouse or other person shares actual physical possession or care and custody of a child with the parent, guardian or custodian.

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[13]*See* note 12 *supra*.

[14]Under the pertinent definition, a "guardian" is a "person who has care and custody of a child as the result of any contract, agreement or legal proceeding." W.Va. Code § 61-8D-1(5) (2005).

W.Va. Code § 61-8D-1(4) (2005). Because Mrs. Longerbeam was never alleged to have "actual physical possession or care and custody of" Marissa G., Appellant does not automatically come under the definition of "custodian" as her spouse. *Id*. Given that the second sentence of the definition is clearly inapplicable, we proceed to determine whether Appellant qualified as a "custodian" by examining whether he had "actual physical possession or care and custody" of Marissa G. on a "full-time or temporary basis." *Id*.

The record of this case makes clear that Appellant did not have "actual physical possession" of Marissa G. on a "full-time or temporary basis." Consequently, to come within the statutory definition of "custodian," the State was required to prove that Appellant had "care and custody" of the victim on a "full-time or temporary basis." W.Va. Code § 61-8D-1(4). Because the State sought only to show that the Appellant was the custodian of Marissa G. on limited occasions, we look to see whether he fulfilled the role of "custodian" on a part time basis.

The State argued that the "Longerbeams voluntarily became the custodians of . . . Marissa and her sisters when they arrived at the house to respond to the children's request for help" with the escaped hamster. Upon entry into the residence, the State posits that Appellant and his wife became responsible for the "care and custody" of all three girls. As evidence of this assumed duty, the State cites to the fact that the Longerbeams entered

the house without knocking and then Mrs. Longerbeam acted in a custodial fashion by telling Marissa G. and Taylor G. to come downstairs. The State contends that Appellant assumed a custodial role with regard to the victim based on the fact that he was the only adult in the room with her at the time of the alleged incident.

In response to these arguments, Appellant points out that Kacy was the person charged by her mother with the responsibility of caring for her two younger sisters, Marissa G. and Taylor G., while their mother was working. The fact that Appellant and his wife came onto the premises upon the invitation of Taylor G. to help locate the hamster did not, according to Appellant, cloak them with any custody-based responsibility towards the three children inside that house. To support his contention that Kacy's status as the child's caregiver was not negated by the presence of her aunt and uncle, Appellant observes that not only did Kacy order the Longerbeams to leave the property upon learning of the alleged abuse, but, as the record indicates, they immediately complied with her request.

The State seeks to sidestep Kacy's position as the intended babysitter or custodian[15] of her sisters by suggesting "that it is possible for an individual to voluntarily become the custodian of the child even when other legal custodians are present." As support

[15]In syllabus point one of *State v. Stephens*, 206 W.Va. 420, 525 S.E.2d 301 (1999), this Court held that a babysitter may fall under the definition of a "custodian" for purposes of the sexual offenses included in West Virginia Code § 61-8D-5.

for this contention, the State relies upon our determination in *State v. Collins*, 221 W.Va. 229, 654 S.E.2d 115 (2007), that an adult who took a minor child four-wheeling with the permission of the child's mother was a custodian of that child for purposes of West Virginia Code § 61-8D-5(a). The State suggests that under *Collins* it is clear that the "presence" of one legal custodian does not negate another person from also being recognized as a custodian of a minor. In making this argument, the State completely overlooks several factual distinctions between *Collins* and this case. In *Collins*, the individual determined to qualify as a custodian physically removed the victim, with her mother's implicit permission, from her residence and took her to another location to commit the acts of alleged abuse. *See* 221 W.Va. at 234, 654 S.E.2d at 120. On those particular facts, this Court found that the perpetrator of the alleged abuse was a voluntary, temporary custodian. There is nothing even remotely analogous in this case to *Collins* as Appellant did not physically remove Marissa G. from her home with the permission of either her mother or her custodian at the time–her sister, Kacy.

The record disproves the State's contention that Appellant and his wife became the custodians of their three nieces upon walking into the victim's household. When asked whether she was going to her sister's house "to watch the kids," Mrs. Longerbeam was firm in responding, "No, just going into [sic] catch the hamster." And when she was questioned about whether she would watch the younger two nieces, Taylor G. and Marissa

G., "when Kacy was present," Mrs. Longerbeam stated: "No, Kacy watched them." As a follow-up to this inquiry, Appellant's counsel inquired: "So if Kacy was present she would be the person in charge?" In response, Mrs. Longerbeam testified without hesitation "[y]es."

Seeking to dispel the position of responsibility that Kacy occupied with regard to her two younger sisters, the State framed the following argument to the jury in closing:

> I am going to ask you who is in charge when there is an adult and a 12-year-old in the room? The adult. Who is in charge when a 16-year-old is asleep in a bedroom, a 16-year-old who is asleep? Is it the aunt and uncle who are awake in the house? You know the answer[;] it is the adult who is there who is in charge. In fact, [Mrs.] Cindy Longerbeam testified today that she was in charge when the kids were there. Then when Mr. Wrye [Appellant's counsel] asked a few more questions, well, Marissa would ask Kacy. But ask yourselves was the 16-year-old sister in charge or was the adult aunt and adult uncle who are there in charge? I think you know the answer [is] it is clearly the adult.

While the State sought to emphasize the fact that Kacy was sleeping during the alleged touching incident, Kacy testified that "if they [Marissa G. and Taylor G.] needed something they came to me and they knew to stay in the house and not to go anywhere and if they needed something [to] come get me."

The fact that Appellant and his wife were older than Kacy did not vitiate her mother's charge of being the caregiver of her sisters. Similarly, the fact of Kacy being asleep did not in itself abrogate her responsibilities. While it certainly is not ideal for a

caregiver to be asleep, the testimony offered by Kacy made clear that her sisters knew the rule of staying in the house and that they were to wake her if they "needed something."[16] Contrary to the picture the State sought to paint for the jury, Kacy remained in charge of her sisters despite the presence of Appellant and his wife. This was demonstrated by the fact that upon learning what had just happened to Marissa G., Kacy immediately confronted her aunt after discovering that her uncle was no longer in the household and demanded that they both leave the premises. The fact that Mrs. Longerbeam complied with Kacy's directive further proves that Kacy was the person in charge of her two younger sisters. Not only did Kacy take control of the situation upon discovering the alleged abuse but she continued to act in a clear-thinking, adult fashion by promptly contacting the police to report the alleged sexual assault.

When the facts of this case are applied to the applicable portion of the statutory definition of "custodian" that requires "care and custody" on at least a part-time basis, we simply cannot conclude that Appellant was a custodian of Marissa G. at the time of the alleged assault in question. The record makes clear that she was not under his care and

[16]We cannot help but note that if the children's mother had been sleeping at the time of the incident the State would not be arguing that the aunt and uncle assumed a custodial role just by walking through the front door. A careful analysis demonstrates that the fact of a caregiver's being asleep does not resolve the critical issue of who was charged with and responsible for the victim's welfare at the time of the incident under review.

custody at the time of the incident for which Appellant was convicted.[17] Accordingly, Appellant was not a "custodian" of Marissa G. within the meaning of West Virginia Code 61-8D-5(a) at the time of the alleged incident of sexual assault.

B. Person in Position of Trust

The only remaining class of individuals encompassed within West Virginia Code 61-8D-5(a) that is potentially applicable to Appellant's conviction is a "person in a position of trust in relation to a child." The statute was specifically amended in 2005 to add this class of persons as subject to the enhanced penalties for committing sexual abuse on children. By definition, this class of individuals includes

> any person who is acting in the place of a parent and charged with any of a parent's rights, duties or responsibilities concerning a child or someone responsible for the general supervision of a child's welfare, or any person who by virtue of their occupation or position is charged with any duty or responsibility for the health, education, welfare, or supervision of the child.

W.Va. Code § 61-8D-1(12).

[17]As evidence that Marissa G. was under the "care and custody" of Appellant within the meaning of West Virginia Code § 61-8D-1(4), the State argues that she was frozen and unable to get up off the couch when the alleged assault took place. The victim's inability to move indicates her powerlessness; it is not evidence of Appellant fulfilling the statutorily-defined position of "custodian."

The State proposes that Appellant occupied a "position of trust" with regard to Marissa G. based on his familial relationship of being an uncle by marriage. Citing extrajurisdictional case law, the State argues that "it is the position of 'trust, authority or supervision' which often provides a heightened opportunity for . . . sexual assault to occur." *People v. Kaminski*, 615 N.E.2d 808, 811 (Ill. App. 2nd Dist. 1993). Following that observation, however, the court in *Kaminski* proceeded to determine whether the alleged abuser held a position of supervision with regard to the victim on the night of the alleged abuse. 615 N.E.2d at 811-12. After reviewing the evidence that included the victim's parents expressly giving her permission to stay with Appellant, her brother-in-law, and his wife, following a group meeting that had taken place at the victim's parents' home, the trial court had no difficulty concluding that "both defendant and Roberta [his wife] were responsible for looking after the welfare of the victim on the night in question." 615 N.E.2d at 812. These facts contrast severely to the evidence in this case. Marissa G. did not leave the premises of her own home on the day in question and she was not under the supervision, or to be statutorily-specific "care, custody or control," of Appellant when she was subject to the alleged abuse.

While we do not mean to minimize the criminal significance of adults who prey upon their victims based on a familial or any other relationship that typically implies a sense of security to the child, the relationship must still play a part of the actual incident

of abuse to come within the meaning of West Virginia Code § 61-8D-5(a). *See Williams v. State*, 895 N.E.2d 377, 382 (Ind. App. 2008) (recognizing that familial relationship is not "tantamount to being in a position of trust" and that previous residence of alleged abuser in victim's neighborhood is not proof of element of trust "at the time of the offenses"). This is clear from the statutory language that follows the delineation of the classes of individuals who are subject to the offense. Not only does the statute require proof that the alleged abuser fell within the specified class of delineated individuals, but the offense requires that the act of abuse must occur with "a child under his or her care, custody or control." W.Va. Code § 61-8D-5(a).

The State argues that the evidence makes clear that Appellant occupied a position of trust in relation to Marissa G. on June 8, 2007, the date of the alleged abuse for which Appellant was convicted. Yet, the only evidence that the State relies upon as proof that Appellant occupied the temporally relevant status of a "person in position of trust" with regard to the victim on the date in question is *prior* instances of supervision of Marissa G. that took place at the residence of Appellant and his wife.[18] While those previous instances could be relied upon to establish that there were occasions when Appellant was responsible

[18]The State suggests that "[t]here is no evidence to suggest that the Defendant would not have occupied the same position of trust by virtue of his position than he had on any other occasion when he was alone with Marissa." To suggest that the State could prove the elements of the offense by virtue of Appellant's failure to disprove prior instances of presumed trust is not only sophistic, but possibly unconstitutional.

for the "general supervision" of the victim's "welfare," those instances do not establish that he was acting in that capacity–as a "person in a position of trust"–on the date in question.[19] W.Va. Code § 61-8D-1(12). The record in this case falls woefully short of demonstrating either that the victim's mother or her sister Kacy had charged Appellant with supervisory responsibilities towards Marissa G. on the subject date or that Appellant occupied any position by which he was statutorily charged with such responsibility. *See* W.Va. Code § 61-8D-1(12). As we discussed at length in the "custodian" section of this opinion, the evidence presented at trial was that the victim's sister, Kacy, was the individual who was charged with and retained that supervisory responsibility. Accordingly, we conclude that the State did not establish that Appellant was a "person in a position of trust" with regard to the victim within the meaning of West Virginia Code 61-8D-5(a).

Based on the foregoing conclusion that there was insufficient evidence to convict Appellant for committing an offense under West Virginia § 61-8D-5(a) as either a "custodian" or a "person in a person of position of trust,"[20] we find that the trial court-

[19]We disagree with the State's contention that the statute does not require the alleged abuser to be in a position of trust at the time of the act. To make this argument is to nullify the language which requires that the act of abuse occur with "a child under his or her [alleged abuser's] care, custody or control." W.Va. Code § 61-8D-5(a).

[20]To be clear, we are not ruling that there was insufficient evidence that Appellant committed an act of sexual abuse with regard to the victim–only that the State failed to meet its burden of demonstrating that the abuse properly fell under the provisions of West Virginia § 61-8D-5(a) and its correspondent enhanced penalties.

committed error by not granting Appellant's post-trial motion for an acquittal.[21] Accordingly, we reverse.

Reversed.

[21]Because we reverse on other grounds, we do not address Appellant's contention that the trial court confused the jury with an erroneous jury verdict form.