

**FILED**

**November 19, 2010**  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

Benjamin, Justice, dissenting:

I respectfully dissent to the majority opinion because I believe that sufficient evidence was adduced at trial to support the appellant's conviction.

As set forth in the majority opinion:

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.

Syllabus Point 1, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995). Viewing the evidence in the light most favorable to the prosecution, there is sufficient evidence that the appellant and his wife were viewed by the children as persons in positions of trust who were in control of the children at the time the appellant committed the offense for which he was convicted.

The evidence indicates that the appellant was the victim's uncle by marriage, and the appellant had access to the victim due to this fact. Further, the appellant's access to the victim presupposed an assumption of control and supervision in that the children called the appellant and his wife for help in catching a loose hamster instead of waking their older sister. Stated another way, the appellant's role as uncle and his presence in the home in order to assist the children created the control which permitted the sexual assault to occur. In addition, the victim testified that during the sexual assault, she did not move away from the appellant until her older sister entered the room because she did not think that she could leave. Thus, the victim's perception of the appellant's control over the situation was integral to the appellant's execution of the assault. Therefore, it is clear to me that there is sufficient evidence that the appellant was a person in a position of trust at the time of the sexual assault to support his conviction.

Significantly, Kacy, the older sister, did not exert her control over her younger siblings until after the appellant committed the alleged offense. While it is true that Kacy confronted Mrs. Longerbeam and demanded that she and the appellant leave the premises, this occurred subsequently to the appellant's crime. Thus, the fact that Kacy ultimately exercised her control over the household does not mitigate the fact that the children perceived the appellant and Mrs. Longerbeam to be in control prior to that time.

In sum, I believe that a review of all of the evidence in the light most favorable to the prosecution, compels the conclusion that a rational trier of fact could have found the essential elements of the appellant's crime proved beyond a reasonable doubt. For this reason, I would affirm the appellant's conviction. Accordingly, I respectfully dissent to the majority opinion.