

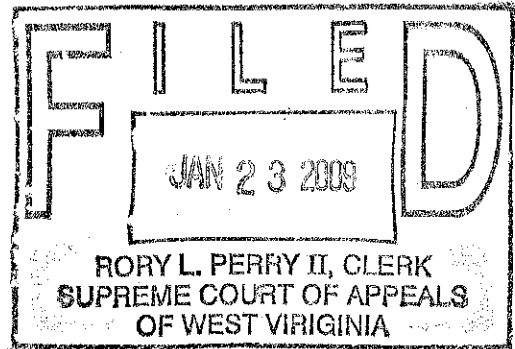
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

v.

RICHARD MALFREGEOT,
Defendant.

Appeal No. 34496



FROM THE CIRCUIT COURT OF
HARRISON COUNTY, WEST VIRGINIA
CASE NO. 07-M-AP-2

STATE/RESPONDENT'S BRIEF IN
RESPONSE TO DEFENDANT/PETITIONER'S
PETITION FOR APPEAL

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I. STANDARD OF REVIEW

**A. STANDARD OF REVIEW FOR PETITIONER'S FIRST ASSIGNMENT OF
ERROR THAT THERE WAS INSUFFICIENT EVIDENCE FROM WHICH TO
CONVICT PETITIONER OF THE OFFENSE OF STALKING/HARASSMENT**

“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). “An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility determinations that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt.” Syllabus Point 3, State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995).

B. STANDARD OF REVIEW FOR PETITIONER’S SECOND ASSIGNMENT OF ERROR THAT THE CIRCUIT COURT’S FINDINGS OF FACT WERE CLEARLY ERRONEOUS

“This Court reviews the circuit court’s final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard.” Burgess v. Porterfield, 196 W.Va. 178, 469 S.E.2d 114 (1996).

C. STANDARD OF REVIEW FOR PETITIONER’S THIRD ASSIGNMENT OF ERROR THAT THE CIRCUIT COURT ERRED IN APPLYING THE LAW TO THE FACTS

“[O]stensible findings of fact, which entail the application of law or constitute legal judgments which transcend ordinary factual determinations, must be reviewed *de novo*.” Syllabus Point 1, State ex rel. Cooper v. Caperton, 196 W.Va. 208, 470 S.E.2d 162 (1996).

II. KIND OF PROCEEDINGS AND NATURE OF RULINGS BELOW

Petitioner sets forth in his Petition for Appeal and Brief in support thereof a succinct and accurate synopsis of the kind of proceedings appealed from and nature of rulings from the underlying matter.

III. ALLEGED OMISSIONS AND INACCURACIES OF PETITIONER'S STATEMENT OF FACTS/CASE

Now comes the State of West Virginia, by and through James Armstrong, Assistant Prosecuting Attorney for Harrison County, West Virginia, and provides to the Honorable Justices of the Supreme Court of Appeals of West Virginia the following Alleged Omissions and Inaccuracies of Petitioner's Statement of Facts/Case:

During the 2005-2006 school year, Lauren L., the victim, was an eighth grade thirteen (13) year old student at Bridgeport Middle School in Bridgeport, West Virginia. *Trial Transcript p. 10, line 7-10.*¹ The Petitioner, Richard Malfregeot, was a teacher and assistant football coach at Bridgeport Middle School during the 2005-2006 school year, although the victim did not have the Petitioner as a teacher for any classes. *Id. at p. 11, line 1-8.* At the beginning of the 2005-2006 school year, the victim met Petitioner on a bus trip to a football game. *Id. at p. 11, line 9-12.* Soon after the victim met the Petitioner, and despite the fact that the victim did not have the Petitioner as a teacher, the Petitioner began making contact with the victim on a daily basis while the victim was at school. *Id. at p. 14, line 1-2.* Petitioner's contact with Lauren L. thereafter progressed from regular conversation with the victim to Petitioner traveling to the victim's locker everyday, the Petitioner placing his arm around the victim, Petitioner playing with the hair of the

¹ Due to the fact that the victim and several witnesses involved in the underlying matter are juveniles, said victim and juvenile witnesses will be referred to by first name and last initial. See In re Jeffrey R.L., 190 W.Va. 24, 435 S.E.2d 162 (1993).

victim, Petitioner rubbing the shoulders of the victim, Petitioner holding the hand of the victim, and the Petitioner displaying photographs of the victim in his classroom without her consent. *Id. at p. 14, line 1-2; p. 18, line 19-24; p. 24, line 2-7; p. 24, line 13-16; p. 28-34.*

At no time did the victim provide Petitioner with permission to rub her shoulders, play with her hair, hold her hand or display pictures of her. *Id. at p. 27, line 14-24; p. 35, line 5-13.* As Petitioner's contact with the victim increased throughout the school year, such contact became increasingly bold culminating with a phone call placed by Petitioner to the personal cell phone of Lauren L. on a non-school day. *Id. at p. 35, line 14-22, p. 36-38.* Specifically, Petitioner obtained the victim's personal cell phone number, not her parent's home number, from another individual and called leaving the message "This is Mr. Malfregeot, Derek G. is at the middle school." *Id. at p. 37, line 15-17.*² The content of the message left on the victim's cell phone was in actuality an enticement for the victim to travel to the location where Petitioner was present. *See Footnote 2.*

On the first school day following the Petitioner's phone call to the victim's cell phone, the Petitioner approached the victim at her locker and showed her where he had saved her name and cell phone number in his cell phone. *Id. at p. 39, line 4-11.* Following the phone call made by Petitioner, the victim notified her father and school personnel. The victim's father also informed the school of Petitioner's conduct which ultimately resulted in a misdemeanor charge of Stalking/Harassment being filed against Petitioner pursuant to West Virginia Code Section 61-2-9a.

In the "Finding of Fact" portion of Petitioner's Petition for Appeal, Petitioner states that teachers at Bridgeport Middle School "engage in academic and non-academic

² Derek G. was a student at the school that the Petitioner knew the victim had a crush on.

conversations with students.” *Petition for Appeal, p.4, line 11-12*. While this statement may be true, Petitioner’s conversations with the victim went far beyond normal teacher-student “academic and non-academic” conversations. Your Respondent would note that Lauren L. had never previously had Petitioner as a teacher and did not have Petitioner as a teacher during the time period in which Petitioner engaged in the acts giving rise to the criminal charge. *Trial Transcript p. 11, line 4-8*. Further, the subject matter of the conversations Petitioner would have with the victim went far beyond that which would normally comprise a normal teacher-student conversation. For instance, a frequent topic of Petitioner’s conversations with the victim was that of her boyfriend and how lucky the boyfriend was to have the victim as his girlfriend. *Id. at p. 12, line 8-20; p. 16, line 17-24*. These conversations could hardly be characterized as normal “non-academic” conversations as no other teachers at the school engaged in conversations with the victim that respected such private matters as her boyfriend. *Id. at p.16, line 14-16; p. 17, line 6-8*. It is also undisputed that the victim and the Petitioner did not engage in any academic or scholastically related conversations. *Id. at p. 17, line 16-21*.

Petitioner states in his “Finding of Fact” portion of the Petition for Appeal that “[m]any teachers display photographs in their classrooms that students have given to them.” Petitioner would surmise that this statement is being made to justify the Petitioner’s display of photographs in his classroom depicting the victim. However, the facts surrounding Petitioner’s display of photographs depicting the victim are quite different from the fact set incorporated into Petitioner’s assertion that “many teachers display photographs in their classrooms that students have given to them.” Specifically, the victim in this case never provided Petitioner with the photographs that were

displayed, never provided Petitioner with permission to display the photographs, and unsuccessfully requested that Petitioner remove the photographs. *Trial Transcript p. 31, line 1-2, p. 28-35*. Lauren L. testified that upon being made aware that the Petitioner was displaying photographs of her, including one in which she was dressed in pajama type clothing, she requested several times that Petitioner remove the photographs but Petitioner would not remove them. *Id. at p. 28, line 16-20*. All in all, Lauren L. unsuccessfully requested that Petitioner remove the photographs approximately five (5) times. *Id. at p. 35, line 5-8*.

Although “many teachers” may display photographs in their classroom that students have given to them, it is undisputed that Lauren L. was not a student of Petitioner, that she did not give Petitioner the photographs of her, that she did not provide Petitioner with permission to display the photographs, and that she repeatedly requested (to no avail) that Petitioner remove the photographs. Petitioner himself confirmed that he had photographs of Lauren in his classroom, that he refused to remove them despite being asked by Lauren and that someone other than himself was ultimately responsible for removing the photographs. *Id. at p. 197, line 2-15*. Another teacher testified that although a teacher may display photographs of a student, the student in the photograph was the individual who provided the photograph to the teacher. *Id. at p. 122, line 1-9*. In the present matter, none of the photographs depicting the victim were given to Petitioner by the victim.

Petitioner contends that it “is not unusual for teachers and students to hug each other or joke with one another.” The State would first note that this statement was made by one of Petitioner’s witnesses who actually testified that that it was not uncommon for

students to hug teachers, not the other way around (i.e. it was not uncommon for students to initiate close physical contact with teachers, not that it was common for teachers to initiate close physical contact with students). *Trial Transcript*, p. 167-168. Secondly, there was no evidence adduced at trial indicating that it was common for teachers to play with a student's hair, to rub a student's shoulders, to hold a student's hand, or to repeatedly place their arm around a student. Quite the contrary, the victim testified at trial that "[m]y other teachers weren't touching me and they weren't talking to me about my boyfriend." *Id.* at p. 39, line 23-24. The principle at Bridgeport Middle School similarly testified that it would be inappropriate for a teacher to rub a student's shoulders. *Id.* at p. 131, line 4-7. Another witness called by Petitioner, also a teacher, testified that it was quite uncommon for a teacher to put their arm around a student and that he had never seen a teacher rub a student's shoulders or place their hands on a student's shoulders. *Id.* at p. 138-140.

Petitioner states that "teachers [at Bridgeport Middle School] were encouraged to engage and interact with students." Despite this assertion, there was no evidence adduced at trial to indicate that it was appropriate for a teacher to have multiple daily interactions, including physical interactions, with a student who was not in that teacher's class. The victim testified that the Petitioner would come to her locker on a daily basis. *Trial Transcript*, p. 15, line 13-14. One of the witness, a student at the middle school also testified that she observed the Petitioner at the victim's locker ever day and that on the occasions she would observe him at the locker, the Petitioner would be "standing close." *Id.* at p. 78, line 4-20. The victim testified that other teachers at the school did not come to her locker in between classes to talk with her, that other teachers did not talk with her

about her boyfriend and that the Petitioner's conversations with her did not involve academic or scholastic related matters. *Id. at p. 16, line 14-16; p. 17, line 6-19.* The victim testified that Petitioner put his arm around her multiple times, asked her to walk with him in the morning, rubbed her shoulders, played with her hair, and held her hand. *Id. at p. 18, line 19-24; p. 19, line 24, p. 20, line 1-2; p. 24, line 2-16; p. 54, line 17-24.* Again, there was no evidence presented at trial to indicate that teachers' interaction with students appropriately included conversations with students about their boyfriends, holding a student's hand, rubbing a student's shoulders, playing with a student's hair, or holding a student's hand. There was also no evidence presented at trial indicating that teachers were encouraged to interact with students by calling students' private cell phone numbers on non-school days to discuss non-scholastic matters. *Id. at p. 35-39; p. 153, line 22-24, p. 154, line 1-6.*

Petitioner further alleges that he "would engage [the victim] in conversation and joke with her as he did with many of the other students, male and female, at the school." Your Respondent contends that there was no evidence presented during the underlying proceeding to indicate that Petitioner had daily contact with other female students who were not actually students in his class, that Petitioner would ask other students to walk with him in the morning, that Petitioner would rub the shoulders and play with the hair of other students, that Petitioner would hold the hand of other students, that Petitioner called other students on their private cell phones on non-school days, that Petitioner showed other students where he had saved their cell phone numbers in his cell phone, or that Petitioner displayed photographs of other students in his classroom despite the protestations of those students that he remove the photographs.

The Petitioner claims that he “didn’t treat Lauren L. any different than the other students.” The State reiterates that there was no evidence presented demonstrating that Petitioner engaged in the same conduct giving rise to the criminal charge with any other student at Bridgeport Middle School. The victim testified that on one occasion, the Petitioner asked her to come to his classroom by herself to type a paper for him. *Trial Transcript p. 22, line 22-24, p. 23, line 1-14*. There was no evidence indicating that the Petitioner had asked other students to come to his classroom, by themselves, to type papers for him. In fact, the principal testified that she did not generally encourage students to be in a room by themselves with a teacher. *Id. at p. 130, line 21-24, p. 131, line 1-3*. It is difficult to characterize the Petitioner’s contact with the victim as being ordinary when the evidence presented in the underlying proceeding indicated such contact made the victim feel “freaky”, “scared”, “weird”, and “terrified.” *Id. at p. 17, line 2-5, p. 18, line 15, p. 25, line 20-23, p. 96, line 23-24*. The victim testified that she characterized the conduct of Petitioner directed toward her as being “almost like flirting.” *Id. at p. 53, line 11-12*. The victim did not testify that other teachers flirted with her.

Petitioner complains that the victim did not report the Petitioner’s conduct to anyone including her “best friends, her parents, the school principal or Mr. Malfregeot.” The victim testified at trial that she “talked to my friends about [Petitioner’s conduct] and then I mentioned a couple times to my parents about the pictures, but they thought that it was just like up on a big board with everyone else’s and I didn’t really tell them until I got the phone call.” *Trial Transcript, p. 26, line 14-18*. The victim further testified that she told her friends about Petitioner’s conduct but that “the boys thought that I was just imagining it because they had him as a football coach and they didn’t think of him that

way.” *Id. at p. 42, line 12-14.* The victim additionally advised one of her teachers, Ms. Bastin, of “everything that had been happening the whole year.” *Id. at p. 46, line 3-17.* A friend and classmate of the victim testified at trial that the victim had told her that she did not like Petitioner coming to her locker everyday and that the victim was “really scared” when she received the telephone call from the Petitioner. *Id. at p. 81, line 13-16; p. 87, line 10-16; p. 93, line 8-10.*

The victim testified that the reason why she never said anything to Petitioner himself was that she was “scared to because I was just always taught to be nice and polite to my teachers and I didn’t really know anything because I was only 13 years old and I didn’t know I could tell a teacher that.” *Id. at p. 18, line 15-18.* The victim’s friend, another student at the school, testified in response to being asked how the victim felt about the Petitioner coming to the victim’s locker everyday that the victim “didn’t like it very well.” *Id. at p. 90, line 22.* This same witness also testified that after the victim received the phone call from the Petitioner that the victim “said she was really scared and she said that she didn’t know what to do so she felt that she should tell the counselors or someone.” *Id. at p. 93, line 8-10.* Lastly, it is important to note that the wording of the statute under which Petitioner was convicted does not contain an element mandating that the victim of stalking and/or harassment convey their disapproval of the offender’s conduct to a third party.

Petitioner himself confirmed that he did in fact ask for the victim’s private cell phone number, not her parent’s telephone number. *Id. at p. 196, line 13-17.* Petitioner testified that he had the victim come to his room to type a letter for him, that he had photographs of the victim displayed in his classroom and that the victim asked him to

take the photographs down but he did not remove them. *Id. at p. 196, line 22-24; p. 197, line 1-11.* Petitioner testified that he did not deny putting his arm around the victim, that he did not deny “flipping” her hair and that he did not deny calling the victim’s cell phone. *Id. at p.197, line 16-21.* Petitioner further testified that he had never called any other students on their cell phones prior to calling the victim on her cell phone and that following the call to the victim’s cell phone, he saved the victim’s cell phone number in his contact list on his cell phone. *Id. at p. 198, line 4-17.*

IV. RESPONDENT’S RESPONSE TO PETITIONER’S ASSIGNMENTS OF ERROR

A. THAT THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT TO CONVINCING A REASONABLE PERSON, BEYOND A REASONABLE DOUBT, THAT THE PETITIONER COMMITTED THE OFFENSE OF STALKING/HARASSMENT.

B. THAT THE CIRCUIT COURT’S FINDINGS OF FACT WERE CLEARLY AND FULLY SUPPORTED BY THE EVIDENCE PRESENTED AT TRIAL AND AS A RESULT, SUCH FINDINGS WERE NOT CLEARLY ERRONEOUS.

C. THAT THE CIRCUIT COURT PROPERLY APPLIED THE LAW CONCERNING STALKING/HARASSMENT TO THE FACTS OF THE CASE.

1. THAT THE PETITIONER WILLFULLY AND REPEATEDLY FOLLOWED THE VICTIM
2. THAT THE PETITIONER HARASSED THE VICTIM BY ENGAGING IN WILLFUL CONDUCT DIRECTED AT THE VICTIM WHICH WOULD CAUSE A REASONABLE PERSON EMOTIONAL DISTRESS
3. THAT THE PETITIONER SOUGHT TO ESTABLISH A PERSONAL AND SOCIAL RELATIONSHIP WITH THE VICTIM

V. POINTS AND AUTHORITIES RELIED ON AND DISCUSSION OF LAW

A. THAT THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT TO CONVINCING A REASONABLE PERSON, BEYOND A REASONABLE DOUBT, THAT THE PETITIONER COMMITTED THE OFFENSE OF STALKING/HARASSMENT.

As noted by this Court, “[a] criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden.” Syllabus Point 3, State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995). In the present matter, ample evidence was presented at trial from which a reasonable person could be convinced beyond a reasonable doubt that the Petitioner committed the offense of Stalking/Harassment. Such evidence was adduced by way of not only the State’s witnesses, but also through the testimony of the Petitioner’s witnesses and the testimony of Petitioner himself.

West Virginia Code Section 61-2-9a(a), as written on the date Petitioner was charged, provides in pertinent part that:

“Any person who willfully and repeatedly follows and harasses a person with whom he or she has or in the past has had or with whom he or she seeks to establish a personal or social relationship, whether or not the intention is reciprocated...is guilty of a misdemeanor and, upon conviction thereof, shall be incarcerated in the county or regional jail for not more than six months or fined not more than one thousand dollars, or both.”

This Court has held that when reviewing challenges to the sufficiency of evidence underlying a criminal conviction “[t]he function of an appellate court...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, in part, State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995). “An appellate court must review all the evidence,

whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility determinations that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt." Syllabus Point 3, State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995).

When reviewing challenges to the sufficiency of the evidence underlying a criminal conviction, this Court has opined that "all the evidence, direct and circumstantial, must be viewed from the prosecutor's coign of vantage, and the viewer must accept all reasonable inferences from it that are consistent with the verdict. This rule requires the trial court judge to resolve all evidentiary conflicts and credibility questions in the prosecution's favor; moreover, as among competing inferences of which two or more are plausible, the judge must choose the inference that best fits the prosecution's theory of guilt." Syllabus Point 2, State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1996).

1. PETITIONER'S CONDUCT WAS REPEATED

In the underlying proceeding, the State presented evidence at trial showing that the Petitioner's conduct was "repeated." Evidence was presented which clearly demonstrated that following the first meeting between Petitioner and the victim, the Petitioner began making daily contact with the victim at her locker during the 2005-2006 school year, despite the fact that the victim did not have the Petitioner as a teacher.

Evidence was presented showing that not only did the Petitioner begin having daily contact with the victim at her locker following the initial meeting between the two, but that Petitioner began having repeated physical contact with the victim such as playing with the victim's hair, rubbing the victim's shoulders, putting his arm around the victim, and holding the victim's hand. As Petitioner's conduct became increasingly bold and more frequent, Petitioner repeatedly found other ways to have contact with the victim such as by calling the victim's cell phone and having the victim come by herself to the Petitioner's classroom to do work for him. The evidence presented at trial was clearly sufficient to convince a rational trier of fact, beyond a reasonable doubt, that the Petitioner's conduct was repeated.

2. PETITIONER'S CONDUCT WAS WILLFUL

Evidence was presented clearly showing that the actions of Petitioner were willful. The evidence presented at trial demonstrated that the Petitioner was the one who initiated the contact with the victim. Petitioner would go to the victim's locker on a daily basis - no evidence was presented showing that the victim invited the Petitioner to her locker or sought the Petitioner out during those times that the victim was required to go to her locker. To the contrary, evidence was presented indicating that the Petitioner was observed traveling from the area of his classroom to the victim's locker. Petitioner actively engaged in and initiated the physical contact with the victim - no evidence was presented that indicated that the victim ever initiated physical contact with the Petitioner or invited the Petitioner to have physical contact with her. The evidence that was presented respecting the Petitioner's contact with the victim was that the victim did not like Petitioner having physical contact with her and that she attempted to dissuade the

Petitioner from having physical contact with her by way of giving him the “cold shoulder” and “shrugging her shoulders” when he touched her. *Trial Transcript, p. 19, line 1-9; p. 24, line 2-10.*

The State presented a significant amount of testimony showing that Petitioner knowingly and intentionally displayed photographs of the victim in his classroom and when asked by the victim on several occasions to remove the photographs, the Petitioner refused to do so – no evidence was presented indicating that the victim provided the Petitioner with permission to display the photographs or that she liked having the photographs displayed. Evidence was presented showing that the Petitioner obtained the victim’s cell phone number from an individual other than the victim and that the Petitioner called the cell phone and left a message enticing the victim to come to the school on a non-school day. The testimony adduced at trial was that the victim did not give the Petitioner her cell phone number, did not invite the Petitioner to call her and did not like the Petitioner calling her.³ Based upon the foregoing evidence, the State contends that the evidence presented at trial was clearly sufficient to convince a rational trier of fact, beyond a reasonable doubt, that the Petitioner’s conduct was willful.

3. PETITIONER FOLLOWED THE VICTIM

Evidence was presented by the State unequivocally demonstrating that not only did the Petitioner actively follow the victim, but that Petitioner passively followed the victim. The Petitioner actively followed the victim by physically traveling from his classroom to locations where the victim was present. The Petitioner actively followed the victim by traveling to the locker of the victim on a daily basis. The Petitioner actively

³ The State believes that it is important to note that the Petitioner did not request or call the home phone number for the victim, but that the Petitioner instead requested and called the private cell phone of the victim.

followed the victim by traveling to areas where the victim was present to have physical contact with the victim (i.e. the computer lab where he rubbed the victim's shoulders).

The State contends that the Petitioner also passively followed the victim by calling the victim on her cell phone and leaving a message that could reasonably be construed as an enticement to the victim to come to the location where the Petitioner was present. The State argues that the common sense meaning of the word "follow" not only includes physically following an individual but also includes conduct engaged in by a person that has the purpose of establishing and/or maintaining contact with a subject, namely the person being followed. This is especially true, the State argues, when the act engaged in for the purpose of establishing and/or maintaining contact is but one of a repeated series of acts whose effect is to establish and/or maintain contact with the subject. As an example, if the only act engaged in by Petitioner was calling the victim on her cell phone, the Petitioner may have a better argument that this act did not constitute "following" the victim. However, when the act of calling the victim on her cell phone and leaving a message enticing the victim to come to a location where Petitioner was present is viewed in light of the other numerous and repeated actions engaged in by Petitioner to maintain contact with the victim, the State believes that the act constitutes "following" the victim

4. PETITIONER HARASSED THE VICTIM

The State adduced testimony at trial showing that the Petitioner harassed the victim. West Virginia Code Section 61-2-9a(g)(1), as written when the Petitioner was charged, defines the term "harasses" as "willful conduct directed at a specific person or persons which would cause a reasonable person mental injury or emotional distress." As

previously discussed, the State presented evidence demonstrating beyond a reasonable doubt that Petitioner's conduct was willful. Significant evidence was presented in the underlying proceeding that Petitioner's conduct was directed at a specific person, Lauren L. There was no evidence presented at trial indicating that the Petitioner engaged in the same conduct with other student's that he engaged in with the victim. The victim did not have the Petitioner as a teacher nor did the two ever discuss scholastic related matters so there was no legitimate reason for Petitioner to have such frequent contact with the victim. Testimony at trial from another teacher at the school indicated that it was uncommon for teachers, which would include Petitioner presumably, to put their arm around a student. The same teacher testified that he had never seen a teacher rub a student's shoulders or place their hands on a student's shoulders. The victim testified that no other teachers came to her locker on daily basis, nor did other teachers play with her hair, rub her shoulders, hold her hand or call her on her cell phone on non-school days. In light of the foregoing evidence, it is clear that Petitioner was undoubtedly directing his conduct toward a specific person – namely, the victim.

5. PETITIONER'S CONDUCT CAUSED A REASONABLE PERSON TO SUFFER EMOTIONAL DISTRESS

The State further presented evidence at trial clearly showing that not only was the victim "a reasonable person", but that she suffered emotional distress as a result of Petitioner's conduct. Testimony at trial indicated that the victim was well liked, friendly, a good student, respectful of authority and polite to her teachers. The principal at the school testified that the victim was "a sweetheart", respectfully, polite and considerate. *Trial Transcript, p. 126, line 4-18.* No evidence was presented in the underlying proceeding showing that the victim was generally hyper sensitive or held unreasonable or

unfair beliefs toward the Petitioner. The State would argue, though, that the term “reasonable person” should be construed as meaning a reasonable person of the victim’s age and in the setting and environment in which the victim was found. In other words, the State feels that it is more appropriate to determine the actions of Petitioner directed against a reasonable fourteen (14) year old middle school student as opposed to a reasonable forty (40) year old man. Nonetheless, the victim did suffer significant emotional distress as a result of Petitioner’s conduct.

In regard to evidence of the emotional distress incurred by the victim as a result of Petitioner’s conduct, evidence was presented at trial that the victim was scared and terrified as a result of the conduct. The victim was embarrassed and hesitant to address the Petitioner’s conduct due to the Petitioner occupying the role of teacher and the age difference between the two. The Petitioner’s conduct eventually scared the victim to the point that the victim and her parents were forced to address the matter with the school, school board, and law enforcement. Therefore, not only was direct evidence presented indicating the emotional distress suffered by the victim, but the actions of the victim and her family are clearly symptomatic of the distress incurred by the victim. The State asserts that the evidence presented at trial was clearly sufficient to convince a rational trier of fact, beyond a reasonable doubt, that the victim was “a reasonable person” and that she additionally suffered emotional distress as a result of Petitioner’s conduct.

6. PETITIONER SOUGHT TO ESTABLISH A PERSONAL AND SOCIAL RELATIONSHIP WITH THE VICTIM

Evidence was presented at trial demonstrating that the Petitioner sought to establish a personal and social relationship with the victim. “[A]n instruction which permits a jury to infer, but states they need not infer, a certain conclusion from an

established set of facts does not create an impermissible burden shifting presumption.” State v. Watson, 173 W.Va. 553, 565, 318 S.E.2d 603, 615 (1984); also see State v. Whiting, 164 W.Va. 352, 263 S.E.2d 896 (1980). In the present matter, and although the Petitioner never explicitly told the victim what the purposes of his actions were, the Circuit Court judge, sitting at trier of fact, was permitted to infer from the facts and circumstances the intent underlying the Petitioner’s conduct. The State asserts that when examining the evidence presented at trial, it was not difficult to permissibly infer the intent of Petitioner that motivated his conduct.

As mentioned above, there was no evidence presented indicating that the Petitioner engaged in conduct with other students similar to that which he engaged in with the victim, thus he singled the victim out. Conversely, no other teachers engaged in conduct with the victim similar to that which the Petitioner engaged in with the victim, thus Petitioner’s conduct as directed to the victim was different from the conduct of all other teachers.

Although the Petitioner never explicitly told the victim that he wanted to establish a social or personal relationship with her, his actions spoke for him. Petitioner’s conduct of having daily contact with a female non-student, Petitioner’s conduct of seeking the victim out, Petitioner’s physical contact (i.e. the shoulder rubbing, hand holding, etc.), Petitioner calling the victim on her cell phone, Petitioner saving the cell phone number of the victim and Petitioner discussing the victim’s romantic interests with her clearly give rise to an inference that Petitioner was seeking to establish a social and personal relationship with the victim. This inference was further supported by the fact that Petitioner did not have the victim as a student, Petitioner did not engage in similar

conduct with other students and that other teachers did not engage in similar conduct with the victim. As this Court would note, there is no requirement in the wording of the statute under which Petitioner was convicted that directs that the offender explicitly convey to the victim the purpose of his conduct.

7. DISCUSSION ON RECIPROCATION

Lastly, the wording of the statute under which Petitioner was convicted provides that it is immaterial “whether or not the intention [to establish the specific relationship] is reciprocated.” West Virginia Code Section 61-2-9a. Although it is immaterial that a victim reciprocates the intention of the offender in determining whether the offender has committed the offense of Stalking/Harassment, your Respondent nonetheless believes that an examination of whether the victim reciprocated the offender’s conduct can be important in determining whether the Petitioner’s conduct was harassing in nature and thus whether the victim suffered emotional distress as a result of the conduct. In this matter, the fact that Petitioner’s conduct and intention was not reciprocated does nothing but strengthen the finding that the victim was harassed and that she suffered emotional distress as a result of Petitioner’s conduct.

Specifically in regard to the issue of reciprocation, the victim testified in response to the question by Petitioner’s counsel of “...he just wasn’t getting the hint that you were not interested in talking to him...?” that Petitioner apparently wasn’t getting the hint “because he kept on talking to me even when I would give him the cold shoulder.” *Id. at p. 49, line 18-21*. Thus, even though the victim did not enjoy or condone Petitioner’s conduct, and even though she attempted to dissuade him from continuing to engage in the

conduct, the Petitioner nevertheless continued harass the victim causing her emotional distress.

When viewing the evidence presented at trial in a light favorable to the prosecution, and in resolving competing inferences of which two or more are plausible in favor of the prosecution, it is abundantly clear that a rational trier of fact could be convinced beyond a reasonable doubt that each and every element of the crime of Stalking/Harassment was proven beyond a reasonable doubt in the underlying matter.

B. THAT THE CIRCUIT COURT'S FINDINGS OF FACT WERE CLEARLY AND FULLY SUPPORTED BY THE EVIDENCE PRESENTED AT TRIAL AND AS A RESULT, SUCH FINDINGS WERE NOT CLEARLY ERRONEOUS.

In the present matter, the Findings of Fact made by The Honorable Thomas A. Bedell, Circuit Court of Harrison County, Division II, were clearly supported by the evidence presented at trial. Upon a review of the record in its entirety, the reviewer is left with a manifest impression that the findings made by the Circuit Court were amply supported by the evidence and that no mistake was made in arriving at said findings.

“Trial court finding is clearly erroneous when although there is evidence to support it, reviewing court on entire evidence is left with definite and firm conviction that a mistake has been committed.” Syllabus Point 3, Boarman v. Boarman, 194 W.Va. 118, 459 S.E.2d 395 (1995). “If a circuit court’s account of the evidence is plausible in light of the record viewed in its entirety, Supreme Court of Appeals may not reverse it, even though convinced that, had it been sitting as the trier of fact, it would have weighed the evidence differently.” Syllabus Point 3, Brown v. Gobble, 196 W.Va. 559, 474 S.E.2d 489 (1996). “When findings are based on determinations regarding credibility of witnesses, rule governing review for clear error demands even greater deference to trial court’s

findings; deference is appropriate because trial judge was on the spot and is better able than appellate court to decide whether error affected substantial rights of the parties.”

Syllabus Point 6, In Interest of Tiffany Marie S., 196 W.Va. 223, 470 S.E.2d 177 (1996).

“Supreme Court of Appeals will disturb only those factual findings that strike it wrong with the force of a five-week-old unrefrigerated dead fish.” Syllabus Point 4, Brown v. Gobble, 196 W.Va. 559, 474 S.E.2d 489 (1996).

The State submits that the Circuit Court’s findings were clearly supported by the evidence presented at trial and that such findings were made in light of the entire evidence before the court and in consideration of the context and setting in which the acts occurred. The court was in the best position to determine the credibility of the witnesses who testified and there is no indication that a mistake was made by the court in formulating its findings.

The Petitioner claims that the Circuit Court erred in making the following specific Findings of Fact⁴:

7. That upon first meeting the Defendant, the Defendant began discussing with the victim her boyfriend;
8. That after first meeting the Defendant, the Defendant began approaching the victim at school;
9. That after first meeting the victim, the Defendant began approaching her at school in the bus room, in the cafeteria, in the hallway, and at her locker;
10. That at the outset, the Defendant’s contact with the victim was sporadic but that as the school year progressed, the Defendant began having contact with the victim on a daily basis, with such contact occurring several times per day;
12. That because the victim did not have the Defendant as a teacher, there was no legitimate reason for the Defendant to have such frequent contact with the victim;
14. That almost all contact between the victim and the Defendant was initiated by the Defendant;

⁴ The Findings are numbered to comport with the manner in which Petitioner numbered his Findings. Therefore, the number preceding each Finding comports to the same numerical Finding contained in the Circuit Court’s “Order Following Appeal of Magistrate Court Case to Circuit Court and Sentencing Defendant” previously made a part of the record of this appeal.

15. That regardless of where the contact between the Defendant and the victim took place, the Defendant would not discuss academic or school related issues with the victim during his contact with her, but that the Defendant would instead discuss personal matters such as the victim's boyfriend and the victim's appearance;
17. That the victim and other witnesses testified that other teachers did not go to the students' lockers on a daily basis;
18. That witnesses testified that teachers at the school did not discuss with the students the types of things that the Defendant discussed with the victim;
21. That the victim testified that the Defendant had taken photographs of her;
26. That the Defendant did not take all of the photographs that depicted the victim and which were displayed in the Defendant's classroom. However, the Defendant had obtained several photographs depicting the victim;
30. That the victim testified that once she was made aware of the photographs being displayed in the Defendant's classroom, she became upset;
31. That the Defendant was asked to remove the photographs of the victim from the Defendant's classroom, but that the Defendant refused to do so;
33. That the photographs were eventually removed from the Defendant's classroom by another student because the Defendant would not remove the photographs himself;
37. That the victim never gave the Defendant permission to place his arm around the victim; and
47. That the Defendant told the victim's younger brother that he would need to first speak with the victim to make sure that it was alright for the victim's younger brother to have the football.

In regard to Finding of Fact number 7, evidence was presented at trial that the victim first met the Petitioner during a bus trip to a football game in 2005. *Trial Transcript, p. 11, line 9-15*. Testimony was adduced that upon first meeting the victim, the Petitioner began talking with the victim about the victim's boyfriend and how lucky the boyfriend was to have a girlfriend like the victim. *Id. at p. 12, line 6-20*. In light of the evidence presented at trial, Finding of Fact number 7 that "upon first meeting the Defendant, the Defendant began discussing with the victim her boyfriend" is unequivocally supported by the evidence.

Further, Finding of Fact number 7 is in no way taken out of context as Petitioner alleges. The victim testified that no other teachers at the school spoke with her about her

boyfriend. *Id. at p. 16, line 14-16; p. 17, line 6-8; p. 39, line 23-24.* Because the victim did not have the Petitioner as a teacher and because other teachers did not discuss the victim's boyfriend with her, any argument by Petitioner that such discussions with the victim were in the context of normal student/teacher discussions is not supported by the evidence.

Petitioner claims that Findings of Fact numbered 8 and 9 are also erroneous. Specifically, Petitioner contends that the court erred by finding that after the first meeting between the Petitioner and victim, the Petitioner began approaching the victim at school, in the busroom, hallway, cafeteria and at her locker. As with Finding of Fact number 7, the findings numbered 8 and 9 were clearly supported by the evidence produced at trial. The victim testified that after the Petitioner got to know the victim better he "would start coming to my locker almost every day." *Id. at p. 14, line 1-2.* The victim testified that the Petitioner initially came to her locker approximately twice per week, but that this increased to the Petitioner coming to the victim's locker every day. *Id. at p. 15, line 13-14.* The victim testified that the Petitioner started coming into her gym class prior to when she reported his conduct. *Id. at p. 19, line 18-24; p. 20, line 1-2.* The victim testified that the Petitioner would come to her table in the cafeteria and also ask her to walk with him in the mornings. *Id. at p. 21, line 21-24.* The victim testified that the Petitioner came to a computer room where she was located and began rubbing her shoulders and playing with her hair. *Id. at p. 24, line 2-6.* The victim's friend testified that she would see the Petitioner "standing down the hallway and every now and then I would see him go up and talk to her." *Id. at p. 79, line 4-6.* The victim's friend testified at trial that she observed the Petitioner approach the victim's locker. *Id. at p. 79, line 7-8.*

The victim's friend testified that she did not believe that she ever saw the victim go seek the Petitioner out. *Id. at p. 79, line 9-11*. The victim testified that she was called from the busroom to go to Petitioner's classroom to type a paper for him. *Id. at p. 22, line 22-24; p. 23, line 1-3*. In light of the foregoing evidence, the Circuit Court's finding that Petitioner began approaching the victim at school, in the busroom, hallway, cafeteria and at her locker is clearly correct and supported by the evidence.

In response to Petitioner's claim that Finding of Fact number 10 that Petitioner began having contact with the victim on a daily basis with such contact occurring several times per day is clearly erroneous, your Respondent would reply that this finding is clearly supported by the evidence. The victim testified that the Petitioner started coming to her locker every day. *Id. at p. 14, line 1-2*. The victim testified that the Petitioner initially came to her locker approximately twice per week, but that this increased to the Petitioner coming to the victim's locker every day. *Id. at p. 15, line 13-14*. The victim testified that as the school year progressed, the Petitioner would go to her locker "at least once a day" every day. *Id. at p. 18, line 2-6*.

The Petitioner argues that one of his witnesses, a teacher named Richard Pratt, testified that he never saw Petitioner interact with the victim or speak with the victim. However, the Petitioner, despite being specifically asked whether he approached the victim's locker on a regular basis, never denied doing the same. The victim's friend testified that she observed the Petitioner speaking with the victim almost every day at the victim's locker and that on those occasions, the Petitioner would be "standing close" to the victim. *Id. at p. 78, line 4-20*. As a result of the evidence presented in the underlying matter, Finding of Fact number 10 that Petitioner began having contact with the victim on

a daily basis with such contact occurring several times per day is clearly accurate and supported by the evidence.

Petitioner complains that Finding of Fact number 12 that “because the victim did not have the Defendant as a teacher, there was no legitimate reason for the Defendant to have such frequent contact with the victim” is clearly erroneous. During the trial, the victim testified that other teachers at Bridgeport Middle School did not come to her locker in between classes to talk to her and that the Petitioner’s conversations with her did not pertain to academic or scholastic related matters. *Id. at p. 16, line 14-16; p. 17, line 6-19.* Another student at the school, Chelsey E., testified that she never observed other teachers besides the Petitioner at the locker of the victim. *Id. at p. 83, line 15-17.* The Petitioner cites the testimony of a teacher at the school, Tom Fogg, in support of his contention that teachers developed a rapport with all the students at the school.

Specifically, Mr. Fogg testified that:

“You develop a rapport with all kinds of students. You know, students like you see in the hallway every day, I don’t know some of their names, you know, you say hi or you have got a West Virginia shirt on, good game or you have got a Marshall shirt on, oh, bad game, you know, just joking around saying oh, West Virginia beat you, just you know, you just develop a rapport talking with students. You know, I will be walking through the halls and you know I am pretty slow and I will say watch out of the way for the fat guy or the other day in the hall I was saying after the first day of school I was saying, hey, kids, we have only 179 more student days until summer vacation, you know.” *Id. at p. 174, line 15-24.*

The Respondent would note that the type of student/teacher interaction that Mr. Fogg actually testified in support of is quite different from the type of interaction that the Petitioner engaged in with the victim. Mr. Fogg’s testimony indicated that he apparently did not undertake efforts to learn the names of some of the students he was referring to, yet the Petitioner was on a first name basis with the victim. Mr. Fogg did not testify that

he engaged in conversations with these students regarding their boyfriends, engaged in frequent daily conversations with these students, or engaged in numerous instances of physical contact with these students. Similarly, the testimony of Mr. Fogg indicates that the discourse he refers to was directed at “students” in general and not at one particular student on multiple occasions. Because the evidence presented supports Finding of Fact number 12 that there was no legitimate reason underlying Petitioner’s frequent contact with the victim in light of the fact that he did not have the victim as a student, no error was made by the Circuit Court in making said finding.

Petitioner alleges that the Circuit Court erred in by making Finding of Fact number 14 that almost all contact between the Petitioner and victim was initiated by the Petitioner. The victim testified that after the Petitioner got to know the victim better he “would start **coming** to my locker almost every day.” (**emphasis added**) *Id. at p. 14, line 1-2*. The victim testified that the Petitioner initially **came** to her locker approximately twice per week, but that this increased to the Petitioner **coming** to the victim’s locker every day. (**emphasis added**) *Id. at p. 15, line 13-14*. The victim testified that the Petitioner started **coming** into her gym class prior to when she reported his conduct. (**emphasis added**) *Id. at p. 19, line 18-24; p. 20, line 1-2*. The victim testified that the Petitioner would **come** to her table in the cafeteria and **ask** her to walk with him in the mornings. (**emphasis added**) *Id. at p. 21, line 21-24*. The victim testified that the Petitioner **came** to a computer room where she was located and **began** rubbing her shoulders and playing with her hair. (**emphasis added**) *Id. at p. 24, line 2-6*. The victim’s friend testified that she would see the Petitioner “standing down the hallway and every now and then I would see him **go up** and talk to her.” (**emphasis added**) *Id. at p. 79, line*

4-6. The victim's friend testified at trial that she observed the Petitioner **approach** the victim's locker. (**emphasis added**) *Id. at p. 79, line 7-8*. The victim's friend testified that she did not believe that she ever saw the victim go seek the Petitioner out. *Id. at p. 79, line 9-11*. Upon examining the words used to describe the manner in which contact between the Petitioner and victim occurred, it is abundantly clear that Petitioner initiated the contact between himself and the victim. Thus, there was substantial evidence presented at trial to support Finding of Fact number 14.

Petitioner complains that the Circuit Court erred by making Finding of Fact number 15 that "regardless of where the contact between the Defendant and the victim took place, the Defendant would not discuss academic or school related issues with the victim during his contact with her, but that the Defendant would instead discuss personal matters such as the victim's boyfriend and the victim's appearance." Evidence was in fact presented that the Petitioner most frequently discussed the issue of the victim's boyfriend, that her boyfriend "was lucky to have a girl like [the victim]" and that she and the Petitioner did not talk about "academic stuff or school related things." *Id. at p. 16, line 17-24; p. 17, line 16-19*. Petitioner appears to characterize as innocuous this finding because "all teachers were encouraged to develop a rapport with the students." However, despite this assertion, there was no evidence presented at trial that other teachers were discussing students' romantic interests on such a frequent basis. To the contrary, the victim testified that no other teachers were discussing her romantic interests with her. *Id. at p. 16, line 14-16; p. 17, line 6-8; p. 39, line 23-24*. Another female student at the school testified that the Petitioner also discussed that student's boyfriend frequently and that no other teachers at the school talked to her about her boyfriend. *Id. at p. 83, line 1-3*.

Because it is clear that the evidence presented in the underlying proceeding supports Finding of Fact number 15, and because the entire record shows that this finding was not taken out of context, said finding was not clearly erroneous.

Finding of Fact number 17 was that “the victim and other witnesses testified that other teachers did not go to the students’ lockers on a daily basis.” This finding was supported by the victim’s testimony that other teachers did not come to her locker and talk to her between classes. *Id. at p. 16, line 14-16*. A friend of the victim testified that she did not witness any teachers other than Petitioner at the victim’s locker. *Id. at p. 83, line 15-17*.

Petitioner, in his brief, offers the explanation that he was in charge of monitoring a section of hallway in which the victim’s locker was located and that this was the only reason he had contact with the victim. This begs the question, how could Petitioner effectively monitor the hallway when he was at one individual student’s locker on a daily basis? Respondent contends that it is counterintuitive to suggest that Petitioner was only at the victim’s locker in conjunction with his hallway monitoring duties when Petitioner’s attention was directed at one individual student during those times that particular student was at her locker. Because the evidence presented at trial clearly supports Finding of Fact number 17 that “the victim and other witnesses testified that other teachers did not go to the students’ lockers on a daily basis”, this finding is clearly correct.

Finding of Fact number 18 that “witnesses testified that teachers at the school did not discuss with the students the types of things that the Defendant discussed with the victim” is also disputed by Petitioner. As with the other findings addressed *supra*, this finding was supported by the evidence presented. Evidence was presented that a frequent

topic of conversation between Petitioner and the victim was the victim's boyfriend and that the victim and the Petitioner did not talk about academic related matters. *Id. at p. 16, line 17-24; p. 17, line 16-19.* The victim testified that no other teachers were discussing her boyfriend with her. *Id. at p.16, line 14-16; p. 17, line 6-8; p. 39, line 23-24.* As referenced above, another female student at the school testified that the Petitioner also discussed that student's boyfriend frequently and that no other teachers at the school talked to her about her boyfriend. *Id. at p. 83, line 1-3.* Evidence was clearly presented to support the Circuit Court's finding regarding the topic of the conversations initiated by Petitioner with the victim. It is also difficult to characterize this finding as being taken out of context when no evidence was presented to show that other teachers did in fact frequently discuss students' romantic interests with particular students.

The Petitioner next challenges Findings of Fact numbered 21 and 26 that "the victim testified that the Defendant had taken photographs of her" and that "the Defendant did not take all of the photographs that depicted the victim and which were displayed in the Defendant's classroom. However, the Defendant had obtained several photographs depicting the victim." Specifically, Petitioner mistakenly states in his brief that the Circuit Court found that the Petitioner had taken photographs of the victim which were displayed in Petitioner's classroom and that "[i]t was undisputed that he petitioner did not take any photographs of Lauren L." Respondent would first note that finding number 21 that "the victim testified that the Defendant had taken photographs of her" is not only a completely separate finding from Finding of Fact number 26, but that Finding of Fact number 21 is supported by the evidence. Despite Petitioner's claim that it was "undisputed that he petitioner did not take any photographs of Lauren L", Lauren L.

testified that “[t]he first pictures were after the football championship game. We all went out to dinner and he [Petitioner] had a camera and he took pictures of me and Chelsey and Tommy and Jeff...” *Trial Transcript*, p. 28, line 3-6. The victim’s friend testified that on one of the occasions that the victim claimed the Petitioner had photographed her, the Petitioner was indeed present at the location with a camera taking photographs. *Id at p. 85, line 8-24; p. 86, line 1-6*. Therefore, contrary to Petitioner’s assertion in his brief, there was evidence presented showing that Petitioner did in fact take pictures of the victim.

In respect to Finding of Fact number 26, the Circuit Court’s finding that the Petitioner displayed photographs of the victim that Petitioner had taken is supported by the evidence. The Circuit Court actually found that Petitioner “did not take all of the photographs that depicted the victim and which were displayed in the Defendant’s classroom. However, the Defendant had obtained several photographs depicting the victim.” The Petitioner had several photographs of the victim displayed in his classroom and these photographs were displayed without the consent of, and to the dismay and embarrassment of, the victim. The victim testified, upon being questioned by Petitioner’s attorney, that the Petitioner took two photographs of the victim that were displayed in the Petitioner’s classroom. *Id. at p. 44, line 8-10*. So there was evidence presented indicating that the Petitioner displayed at least *some* of the photographs of the victim that he had taken.

Petitioner contends that the Circuit Court erred by making Findings of Fact numbered 30, 31 and 33 that “the victim testified that once she was made aware of the photographs being displayed in the Defendant’s classroom, she became upset; Defendant

was asked to remove the photographs of the victim from the Defendant's classroom, but that the Defendant refused to do so; and that the photographs were eventually removed from the Defendant's classroom by another student because the Defendant would not remove the photographs himself." In regard to Finding of Fact 30, the victim testified that she did not want the Petitioner displaying photographs of her "because I thought it was embarrassing and then when he would put more up the kids would just tell me because I just stopped trying to tell him to take them down because he wouldn't." *Trial Transcript, p. 29, line 7-11*. The victim also testified that she felt "freaked out" as a result of the Petitioner displaying photographs of her without her permission. *Id. at p. 34, line 1-3*. Based upon the testimony of the victim, there is ample evidence to support the finding of the Circuit Court that the victim became upset when she learned that the Petitioner was displaying photographs of her.⁵

In regard to the Circuit Court's finding that the Petitioner was asked to remove the photographs of the victim from the Petitioner's classroom, but that the Petitioner refused to do so, the Respondent argues that there is significant evidence to support this finding as well. The victim testified that she asked the Petitioner to remove the photographs and that Petitioner responded by stating "...no, I am not taking them down and then the more I asked him he got more aggravated." *Id. at p. 34, line 7-11*. The victim testified that she asked Petitioner to remove the photographs approximately five (5) times and that she never provided the Petitioner with permission to display the photographs. *Id. at p. 35, line 5-13*. Petitioner himself testified that the victim asked him to remove the pictures and he refused to do so. *Id. at p. 197, line 6-11*. As with the other findings discussed, the State

⁵ The Respondent would also note that the Circuit Court judge was present during the testimony of the victim was in a position to best note the victim's demeanor and emotional reaction while testifying to the matters supporting the Findings contained in the Circuit Court's Order.

presented ample evidence to support Finding of Fact number 31 that the Petitioner was asked to remove the photographs of the victim from the Petitioner's classroom, but that the Petitioner refused to do so.

In respect to Finding of Fact number 33 concerning the photographs of the victim that Petitioner displayed, the State contends that the finding by the Circuit Court that the photographs were eventually removed from the Petitioner's classroom by another student because the Petitioner would not remove the photographs himself is clearly supported by the evidence. The victim testified that despite asking Petitioner to remove the pictures depicting her, the pictures were not actually removed until another student, Natalie L., removed the pictures. *Id. at p. 34, line 12-13*. Petitioner himself testified that he didn't "know who took the [photographs] down." *Id. at p. 197, line 14-15*. As a result of the evidence presented at trial, the court's finding that the photographs were eventually removed from the Petitioner's classroom by another student because the Petitioner would not remove the photographs himself is clearly correct.

Petitioner's final contention in respect to the photographs of the victim is that the findings of the Circuit Court in regard to the pictures were taken out of context. In support of this contention, Petitioner cites in his brief that "Mrs. Crawford, the principal at Bridgeport Middle School testified that it was common for teachers to have pictures of the students on the board in their rooms and that students often gave pictures to the teachers which they expected would be put up in the classroom." Respondent believes that the content of Mrs. Crawford's trial testimony stands for a proposition quite different from that which Petitioner is attempting to use it for. Mrs. Crawford, the principal, actually testified that it was common for her to have pictures of students in her office and

that “[i]f they [kids] give you a picture they are not giving it to you to put in your wallet. They are giving it to you to put up.” *Id. at p. 122, line 1-9*. She later clarified this testimony by stating “[w]hat I said was if they give it to you they like for you to put it up, that is why they are giving it to you.” *Id. at p. 124, line 1-5*. Respondent asserts that the gist of the witness’s testimony was that if a student voluntarily gave a teacher a picture of the student providing the picture, it was appropriate for the teacher to display the picture. In the victim’s matter the situation was quite different – the victim did not provide the Petitioner with the pictures and the victim did not want the Petitioner displaying the pictures. As a result, Respondent argues that the findings of the Circuit Court respecting the photographs of the victim displayed in Petitioner’s room were not made out of context.

Petitioner next asserts that Finding of Fact number 37 by the Circuit Court that the victim never gave the Petitioner permission to place his arm around the victim is clearly erroneous. The State disagrees. The victim testified that when the Petitioner would place his arm around her it made her feel as if her privacy was invaded. *Id. at p. 24, line 20-22*. The victim testified that it made her feel “weird having an older man just come up to you and talk to you all the time and put his arm around you or play with you hair.” *Id. at p. 25, line 20-22*. The victim testified that she never provided the Petitioner with permission to rub her shoulders, play with her hair or hold her hand. *Id. at p. 27, line 15-23*. Petitioner, as with several other findings by the Circuit Court, claims that this finding was taken outside the context of normal teacher/student interaction. The State replies by pointing out that Petitioner’s conduct of placing his arm around the victim on numerous

occasions is but one of several actions of Petitioner that constituted the harassment of the victim.

Your Respondent also disagrees with Petitioner's contention that Finding of Fact number 37 is erroneous because the conduct comprising the finding was taken out of context. As an example, if the Petitioner's only conduct directed toward the victim was placing his arm around her on one occasion, the Respondent acknowledges that it would be difficult to argue that such conduct constituted harassment or fell outside the normal bounds of teacher/student conduct. However, when the action of Petitioner placing his arm around the victim on multiple occasions is coupled with Petitioner's actions of playing with the victim's hair, holding the victim's hand, rubbing the victim's shoulders, calling the victim's cell phone, and having at least daily contact with the victim, the context of Petitioner placing his arm around the victim can hardly be characterized as normal teacher/student conduct.

Petitioner's last specific allegation concerning the findings of the Circuit Court is that the court was clearly erroneous in making Finding of Fact number 47 that the Petitioner surreptitiously obtained the victim's cell phone number by telling the victim's younger brother that Petitioner would need to first speak with the victim to make sure that it was alright for the victim's younger brother to have a football. The victim's younger brother testified at trial that the Petitioner obtained the victim's cell phone number by telling the witness "he was going to call her and ask her for a football that she showed me." *Id. at p. 70, line 6-10*. Interestingly, Petitioner did not ask for the victim's home phone number, where the victim's parents might answer, and Petitioner after obtaining the phone number thereafter left a message enticing the victim to come to the

school on a non-school day. Finding of Fact number 47 made by the Circuit Court respecting the manner by which Petitioner obtained the cell phone number of the victim is supported by the evidence and this finding was not taken out of context.

When reviewing the identified Findings of Fact made by the Circuit Court in the underlying proceeding, it is apparent that not only was there significant and credible evidence to support the findings, but that there is no indication that a mistake was committed by the Circuit Court in making such findings "out of context". In regard to Petitioner's contextual argument, this argument appears to be nothing more than a request for this Court to engage in the second guessing prohibited by Brown v. Gobble, 196 W.Va. 559, 474 S.E.2d 489 (1996).

The Circuit Court's account of the evidence, as reflected in the Findings of Fact made by the court, is not only plausible but overwhelmingly probable in light of the record viewed in its entirety. Specifically, each instance of Petitioner's conduct appears more egregious when viewed in the context of the other instances of conduct perpetrated by Petitioner. For this reason, the Findings of Fact by the Circuit Court are clearly correct and there are no findings cited by Petitioner that would appear so egregious as to strike this court "wrong with the force of a five-week-old unrefrigerated dead fish." Syllabus Point 4, in part, Brown v. Gobble, 196 W.Va. 559, 474 S.E.2d 489 (1996).

C. THAT THE CIRCUIT COURT PROPERLY APPLIED THE LAW CONCERNING STALKING/HARASSMENT TO THE FACTS OF THE CASE.

- 1. THAT THE PETITIONER WILLFULLY AND REPEATEDLY FOLLOWED THE VICTIM**
- 2. THAT THE PETITIONER HARASSED THE VICTIM BY ENGAGING IN WILLFUL CONDUCT DIRECTED AT THE VICTIM WHICH WOULD CAUSE A REASONABLE PERSON EMOTIONAL DISTRESS**
- 3. THAT THE PETITIONER SOUGHT TO ESTABLISH A PERSONAL AND SOCIAL RELATIONSHIP WITH THE VICTIM**

The Circuit Court properly and carefully applied West Virginia Code Section 61-2-9a to the facts of the underlying matter. The care and prudence exercised by the Circuit Court in reaching its decision is evidenced by the court's remark during sentencing that:

"I have spent considerable time reviewing the record in this matter, just not the proposed findings of fact and conclusions of law as it relates to what counsel has submitted. I have certainly reviewed the record that was generated both here and in the magistrate court...[a]nd perhaps unbeknown to counsel I have also prior to today's date requested that the official court reporter prepare a transcript of these proceedings...and I have reviewed that at least three times...[and I have] certainly conducted the appropriate statutory analysis." *Sentencing Hearing Transcript*, p. 9, line 20-24; p. 10, line 1-15.

It is apparent that the Circuit Court performed a careful time consuming analysis of the facts, the law and the application of the law to the facts. When mixed questions of law and fact are involved, this Court has held that "questions of law are subject to de novo review." State v. Kearns, 210 W.Va. 167, 168, 556 S.E.2d 812, 813 (2001). In his appeal, Petitioner alleges that the Circuit Court erred in making the following

Conclusions of Law:

73. That the conduct of the Defendant directed towards the victim was not accidental and was willful;
74. That the Defendant's conduct of having frequent and regular contact with the victim at her locker was willful and intentional and that such proposition is supported by the fact that the Defendant was the individual who initiated such contact;
85. That the Defendant "followed" the victim by regularly going to locations where the victim was present to have contact with the victim and that this proposition is supported by the fact that the Defendant did not have the victim in any of his classes (i.e. there was no reason for the Defendant to have such regular contact with the victim);
86. That the Defendant "followed" the victim by calling the victim's cell phone and leaving a message that could reasonably be construed as an enticement to the victim to come to the location where the Defendant was present;
89. That the Defendant's conduct was designed to facilitate a social and personal relationship with the victim as demonstrated by the Defendant's frequent contact

with the victim, the Defendant's physical contact with the victim, the Defendant's discussion with the victim of personal non-school related matters, and the Defendant's actions of obtaining and using the victim's cell phone number for the purpose of leaving a message on the victim's cell phone which can reasonably be construed as an enticement for the victim to come to the location where Defendant was present;

90. That the victim did not engage in conduct that evidences that she reciprocated the Defendant's attempt to establish a social and personal relationship with the Defendant;⁶

91. That the victim did not give the Defendant permission to have physical contact with her and she attempted to discourage the Defendant from continuing to do so by way of physical gestures and body language; and

92. That the victim did not give the Defendant permission to come to her locker on an almost daily basis.⁷

1. THAT THE PETITIONER WILLFULLY AND REPEATEDLY FOLLOWED THE VICTIM.

The State presented evidence in the underlying proceeding that not only did the Petitioner actively follow the victim, but that Petitioner passively followed the victim. The Petitioner actively followed the victim by physically traveling from his classroom to locations where the victim was present. The Petitioner initiated this conduct, therefore this conduct was "active" conduct on his part. The Petitioner actively followed the victim by traveling to the locker of the victim on a daily basis. The Petitioner actively followed the victim by traveling to areas where the victim was present to have physical contact with the victim (i.e. the computer lab where he rubbed her shoulders).

The Petitioner also passively "followed" the victim by calling her on her cell phone. As discussed above, the Respondent believes a common sense interpretation of

⁶ The State believes that Conclusion number 90 should read "that the victim did not engage in conduct that evidences that she reciprocated the Defendant's attempt to establish a social and personal relationship with the victim" and that the use of the word "Defendant" at the end of this Conclusion is obviously a typographical error in the Order Following Appeal of Magistrate Court Case to Circuit Court and Sentencing Defendant".

⁷ The Conclusions are numbered to comport with the manner in which Petitioner numbered the Conclusions. Therefore, the number preceding each Conclusion comports to the same numerical Conclusion contained in the Circuit Court's "Order Following Appeal of Magistrate Court Case to Circuit Court and Sentencing Defendant" previously made a part of the record of this appeal

the word "follow" not only includes physically following an individual but also includes conduct engaged in by a person that has the purpose of establishing and/or maintaining contact with the person being followed. This is especially true when the act engaged in for the purpose of establishing and/or maintaining contact with the victim is but one of a repeated series of acts whose purpose is to establish and/or maintain contact with the victim. Put another way, if the only act engaged in by Petitioner was calling the victim on her cell phone, the Petitioner may have a better argument that this act did not constitute "following" the victim. However, when the act of calling the victim on her cell phone and leaving a message enticing the victim to come to the location where Petitioner was present is viewed in light of the other numerous and repeated actions engaged in by Petitioner to maintain contact with the victim, it appears that the Petitioner's act of calling the victim was part of series of acts that constituted "following" the victim.

Petitioner additionally claims that the evidence was undisputed that the Petitioner did not single the victim out at any time. The Respondent would strongly disagree with this statement. As referenced above, the victim testified that no other teachers engaged in the type of behavior that Petitioner engaged in. The victim testified that no other teachers came to her locker everyday, held her hand, put their arm around her, rubbed her shoulders, played with her hair, called her cell phone, saved her cell phone number, talked to her frequently about her boyfriend, asked her to go walking with them or displayed photographs of her that she did not provide. Similarly, there was no evidence presented at trial that the Petitioner did all of these things with other students. The overwhelming weight of the evidence indicates that Petitioner undoubtedly singled out the victim.

The Circuit Court's application of the law to the facts regarding whether the Petitioner "followed" the victim was clearly correct and as a result there was no error in such application.

2. THAT THE PETITIONER HARASSED THE VICTIM BY ENGAGING IN WILLFUL CONDUCT DIRECTED AT THE VICTIM WHICH WOULD CAUSE A REASONABLE PERSON EMOTIONAL DISTRESS.

Petitioner's conduct was clearly willful and directed at Lauren L. The evidence presented at trial demonstrated that the Petitioner was the one who initiated **ALL** of the contact with the victim (**emphasis added**). Petitioner would come to the victim's locker on a daily basis despite the fact that the victim did not want the Petitioner at her locker and that his frequent presence at her locker made her feel uncomfortable.

Petitioner actively engaged in and initiated the physical contact with the victim. A significant amount of evidence was presented demonstrating that the victim did not like the Petitioner having physical contact with her and that the victim attempted to discourage the Petitioner from having physical contact with her by way of giving him "the cold shoulder" and "shrugging" when he placed his arm around her and rubbed her shoulders. Evidence was presented showing that Petitioner knowingly and intentionally displayed photographs of the victim in his classroom and refused to remove them despite being asked to do so. Evidence was presented showing that the Petitioner obtained the victim's cell phone number from an individual other than the victim and that the Petitioner called the cell phone and left a message enticing the victim to come to the school on a non-school day. The victim testified that she did not give the Petitioner her cell phone number and that it frightened her when he called.

Based upon the fact that the Petitioner initiated all contact with the victim, that Petitioner did not "get the hint" when the victim attempted to dissuade him from having physical contact with her and that the Petitioner refused to comply with the victim's requests that he remove the pictures of her despite knowing she did not like him having them displayed, it is unquestionable that the Petitioner's conduct was willful.

Petitioner contends that the Circuit Court's conclusion that a reasonable person would not suffer emotional distress as a result of Petitioner's harassing conduct was erroneous. The State submits that this conclusion was clearly correct. Evidence was presented at trial unquestionably showing that not only was the victim "a reasonable person", but that she suffered emotional distress as a result of Petitioner's conduct. Testimony at trial indicated that the victim was well liked, friendly, a good student, respectfully of authority and polite to her teachers. There was nothing to indicate that the victim was hyper sensitive, held unreasonable or unfair beliefs, or was unreasonable in her view towards Petitioner's conduct. Evidence was presented at trial that the victim was scared and terrified as a result of Petitioner's conduct. The victim was embarrassed and hesitant to address the Petitioner's conduct due to the Petitioner occupying the role of teacher and the age difference between the two.

The Petitioner's conduct eventually scared the victim to the point that the victim and her parents were forced to address the matter with the school, school board, and law enforcement. Therefore, not only was direct evidence in the form of the testimony of the victim and other witnesses presented indicating the emotional distress suffered by the victim, but the actions of the victim and her family are clearly symptomatic of the distress incurred by the victim. As a result, the Circuit Court's application of the law to the facts

regarding whether the Petitioner engaged in harassing conduct that resulted in a reasonable person incurring emotional distress was clearly correct and as a result there was no error in the legal conclusion reached by the Circuit Court following such application.

3. THAT THE PETITIONER SOUGHT TO ESTABLISH A PERSONAL AND SOCIAL RELATIONSHIP WITH THE VICTIM

The State presented more than enough evidence at the trial in this matter from which it was apparent that the Petitioner's conduct was motivated by the purpose of establishing a social and personal relationship with the victim. While the State acknowledges that the Petitioner never explicitly told the victim of his intentions, a substantial amount of circumstantial evidence was presented from which the clear inference was that the Petitioner was attempting to establish a social and/or personal relationship with the victim. "[A]n instruction which permits a jury to infer, but states they need not infer, a certain conclusion from an established set of facts does not create an impermissible burden shifting presumption." State v. Watson, 173 W.Va. 553, 565, 318 S.E.2d 603, 615 (1984); also see State v. Whiting, 164 W.Va. 352, 263 S.E.2d 896 (1980). Further, "[a]n appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility determinations that the jury might have drawn in favor of the prosecution." Syllabus Point 3, in part, State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995).

The State presented evidence which supported the court's conclusion that:

"the Defendant's conduct was designed to facilitate a social and personal relationship with the victim as demonstrated by the Defendant's frequent contact

with the victim, the Defendant's physical contact with the victim, the Defendant's discussion with the victim of personal non-school related matters, and the Defendant's actions of obtaining and using the victim's cell phone number for the purpose of leaving a message on the victim's cell phone which can reasonably be construed as an enticement for the victim to come to the location where Defendant was present." *Conclusion of Law 89.*

Specifically, the State presented the following evidence from which the Circuit Court judge, sitting as trier of fact, could easily draw the permissible inference that Petitioner's conduct was motivated by his intent to establish a social and personal relationship with the victim: That the Petitioner went to the victim's locker on at least a daily basis following the brief period when he initially began having contact with the victim; that the Petitioner initiated all contact with the victim; that the Petitioner discussed personal matters (i.e. boyfriend) frequently with the victim; that Petitioner placed his arm around the victim numerous times; that Petitioner rubbed the victim's shoulders; that the Petitioner played with the victim's hair; that the Petitioner held the victim's hand; that the Petitioner displayed several photographs of the victim; that the Petitioner sought out the victim to come to his room by herself; that the Petitioner asked the victim to go walk with him on several occasions; that the Petitioner called the victim's cell phone on a non-school day and left a message enticing the victim to come to the school; that the Petitioner's conduct was repeated; that Petitioner's conduct became increasingly bold as the school year went on; that Petitioner did not engage in the same conduct with other students; that other teachers did not engage in the same conduct with the victim; and that the Petitioner did not have the victim as a student in his class.

While much of the foregoing evidence was presented as direct evidence for the purpose of establishing other elements of the crime, such as the element of "repeated" or the element of "followed", the purpose of presenting this evidence was also to

circumstantially show why the Petitioner was engaging in this conduct. The reasonable and logical permissible inference that can be drawn from Petitioner's conduct is that he was attempting to establish a personal and social relationship with the victim.

It must be kept in mind that it is not a requirement of West Virginia Code Section 61-2-9a that the perpetrator of the offense explicitly convey to the victim that the reasons underlying the perpetrator's actions. Based upon the evidence presented in the underlying proceeding, the logical inference drawn from the Petitioner's conduct is clear – he wanted to establish a personal and social relationship with Lauren L.

VI. CONCLUSION

The State respectfully submits that when examining the evidence presented in the underlying proceeding in a light most favorable to the State, it is apparent that such evidence was credible and sufficient to convince a rational trier of fact that the State had proven each and every element of the offense of Stalking/Harassment beyond a reasonable doubt. The State therefore contends that the Petitioner has not met the "heavy burden" mentioned in Syllabus Point 3 of State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995). The record, when reviewed in its entirety, clearly supports the conclusion that no mistake was made by the Circuit Court in formulating the Findings of Fact contained in the "Order Following Appeal of Magistrate Court Case to Circuit Court and Sentencing Defendant". Lastly, the State is firm in its belief that the trial court exercised considerable and meticulous care in applying the facts of the underlying matter to the applicable law.

Based upon the foregoing representations, and in light of the record of the underlying matter, the State respectfully requests that this Court affirm Petitioner's

conviction and award to the State such further and additional relief to which it may be entitled to receive under the circumstances.

Respectfully submitted,
STATE OF WEST VIRGINIA,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

V.

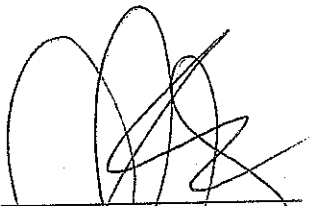
APPEAL NO. 34496

RICHARD MALFREGEOT,
Defendant.

CERTIFICATE OF SERVICE

I certify that on the 22nd day of January, 2009, I served the foregoing State/Respondent's Brief in Response to Defendant/Petitioner's Petition for Appeal upon the following party by depositing a true copy of the same, enclosed in a sealed envelope, postage prepaid, in the United States mail and addressed as follows:

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