
NO. 33171

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

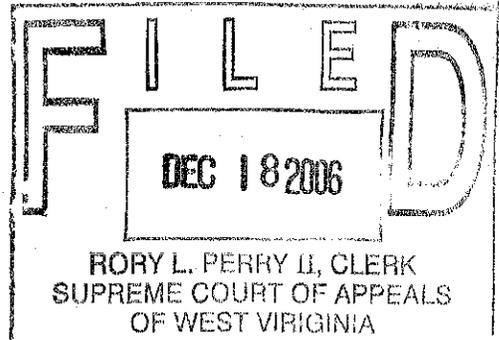
STATE OF WEST VIRGINIA,

Appellee,

v.

JULIAN RUDOLPH SMITH,

Appellant.



BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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STATE OF WEST VIRGINIA,

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BRIEF OF APPELLEE STATE OF WEST VIRGINIA

I.

**KIND OF PROCEEDING AND
NATURE OF THE RULING BELOW**

During the early morning hours of August 24, 1991, an armed robbery occurred at the Taco Bell located in South Charleston, West Virginia. On August 28, 1991, a Criminal Complaint was filed with the Magistrate Court of Kanawha County naming Julian R. Smith (hereinafter "Appellant") as the defendant of the aggravated robbery. (Record [hereinafter "R"] at 4.) On that same day, a warrant was issued by the Kanawha County Magistrate for Appellant's arrest. (R. 5.) On April 8, 1992, Appellant was indicted by a Kanawha County Grand Jury for one count of aggravated robbery in violation of West Virginia Code § 61-2-12. (R. 56-57.) On January 19, 1993, the criminal trial against Appellant began in Kanawha County Circuit Court. (Transcript [hereinafter "Tr."] at 6.) On January 21, 1993, the jury found Appellant guilty of aggravated robbery. (Tr. 351.)

By Order dated May 28, 1993, the circuit court sentenced Appellant to prison for 40 years with that sentence to run consecutively with a murder conviction in an unrelated case. (R. 117-19.)

On June 24, 2004, Appellant filed a pro se Writ of Habeas Corpus alleging four claims. On April 4, 2005, the Kanawha County Circuit Court issued an Order summarily dismissing three of the four claims, and ordering the State to respond to Appellant's claim that he was not advised of his right to appeal his conviction. (R. 141-50.) The State subsequently admitted that it had not advised Appellant of his right to appeal. Therefore, on July 15, 2005, the circuit court held a hearing and advised Appellant that he had the right to appeal. (R. 160.) The circuit court then entered an Order dated July 18, 2005, allowing Appellant to file a notice of appeal. (R. 151-52.)

Shortly after the circuit court's ruling, Appellant filed a Notice of Intent to Appeal his conviction and sentence. (R. 153-55.) On January 23, 2006, Appellant filed a petition with the West Virginia Supreme Court of Appeals praying for an appeal from the judgment of the Kanawha County Circuit Court's July 18, 2005 Order. On September 6, 2006, the West Virginia Supreme Court entered an Order granting an appeal to only the first assignment of error.

II.

STATEMENT OF THE FACTS

During the early morning hours of August 24, 1991, Julian Rudolph Smith, Freeman Caffee, and Harold Jones were partying at the Warehouse nightclub located in Charleston, West Virginia. (Tr. 62.) The three men left the club with the intention of robbing the South Charleston Taco Bell. (*Id.*) It was Appellant's idea to rob the restaurant. (*Id.*) Before the night of the robbery, the Appellant had discussed robbing the Taco Bell on at least a couple of occasions. (Tr. 62-63.) Indeed, on August 23, 1991, just a few hours before the robbery, Appellant and Caffee went to the

Taco Bell so that Appellant could speak to his girlfriend, Beverly Pauley, who was the late night shift manager. (Tr. 101.) Upon reentering the car, Appellant told Caffee that "it's on." (Tr. 102.) Appellant was referring to the robbery that would take place later that night. (*Id.*)

After leaving the Warehouse, Appellant, who was driving a rented white Chevy Lumina, transported Caffee and Jones to Jones' house. (Tr. 63-64.) Jones went inside the house to get a gun and gave it to Appellant upon reentering the car. (Tr. 64.) The men then drove to Appellant's home where he got some clothes and put them in the trunk. (Tr. 65.) Appellant then drove the men to a local Go-Mart where Caffee, following Appellant's orders, went inside the store and purchased a pair of gloves with money that Appellant had given him. (Tr. 66-67.) Caffee gave the gloves to Appellant upon reentering the car. (*Id.*) Appellant wore the gloves during the robbery. (Tr. 73.)

The three men then drove to the area of the Taco Bell with the intent to rob the restaurant. (Tr. 67.) Appellant parked the car at Charleston Tire, which was a block or two away from the Taco Bell. (*Id.*) Appellant and Caffee exited the vehicle; meanwhile, Jones followed Appellant's orders to stay in the car as a "watch out." (Tr. 67-68.) Appellant and Caffee then put on the clothes that Appellant had earlier placed in the trunk. (Tr. 68.) Caffee left a gold Seiko watch and a Miami Hurricanes hat in the car. (*Id.*) Appellant left a walkie-talkie and told Jones that the two of them would stay in contact via the walkie-talkie. (Tr. 68-69.) Appellant then donned a "ninja mask" in order to disguise his face while Caffee used a Miami Hurricanes t-shirt as a scarf to cover the lower half of his face. (Tr. 71-72.) Caffee then painted their exposed skin with shoe polish that Appellant had given him. (Tr. 73.) Appellant and Caffee then took position outside of the Taco Bell by hiding behind the dumpster located in the parking lot. (Tr. 72.)

There were four employees present at the Taco Bell at the time of the robbery including shift manager Beverly Pauley. (*Id.*) As shift manager, Pauley was in charge of the other employees. (Tr. 22.) The employees were “closers” because they served customers until the store closed at 4:00 a.m., and then spent an additional hour cleaning up the restaurant. (Tr. 21.) Slightly before 5:00 a.m., after they finished their shift, the employees attempted to leave the store through the common store entrance. (Tr. 22.) As the door opened, Appellant pushed Caffee out from behind the dumpster. (Tr. 74.) The employees heard a voice that said “Freeze!” and saw two people coming towards them. (Tr. 22-23.) The taller¹ perpetrator had a gun, a hooded jacket, baseball hat, and a scarf that covered half of his face. (Tr. 26-27.) The shorter perpetrator had dark clothes, a hood, and a ninja mask. (Tr. 27.)

The employees then went back into the store and the robbers forced three of the employees into the restaurant’s walk-in freezer. (Tr. 23-24.) The robbers kept shift manager Pauley outside the freezer because she had the combination to the safe where the restaurant’s money was stored. (Tr. 24, 41.) Pauley opened the safe and Appellant put the money into a large plastic Taco Bell bag. (Tr. 77.) The stolen money consisted of cash, rolls of change, and money in a locked bank bag. (Tr. 78.) Approximately five minutes after the other three employees were placed in the freezer, the robbers returned with Pauley and placed her in the freezer (Tr. 24-25.) The three employees spent approximately 15 to 20 minutes in the freezer, while Pauley was in there for approximately 10 to 15 minutes. (Tr. 24.) After approximately 20 minutes of being in the freezer, the four employees came out after they decided that the robbers had probably left. (Tr. 26.) Fortunately, the robbers had already vacated the restaurant. (*Id.*)

¹Caffee testified that he is taller than Appellant. (Tr. 76.)

While the robbery was occurring, South Charleston Police were called about a suspicious vehicle located on Park Street. (Tr. 46.) The suspicious vehicle was a four-door white Chevy Lumina. (Tr. 47.) The vehicle was parked near Charleston Tire, partially on the street and partially in the alley, blocking off the store's service entrance. (*Id.*) Charleston Tire is across the street from Memorial Park cemetery and is approximately half-a-block to a full block away from the Taco Bell. (*Id.*)

Inside the vehicle police found Harold Jones, the getaway driver and "watch out" for the robbery. (*Id.*) Jones was unable to produce a driver's license. (Tr. 48.) After reviewing paperwork found in the car, the police determined that the Lumina was a rental car registered to Avis Corporation and rented to James Jones.² (*Id.*) Harold Jones told the police that he was waiting on his Uncle Rudy.³ (Tr. 48-49.) In an attempt to explain his presence, Jones told the police a variety of conflicting names for the person he was supposedly waiting on. (Tr. 55.) The police decided to tow the vehicle because it was blocking the store's entrance and Jones was unable to produce a driver's license. (Tr. 50.) Before the vehicle was towed, police removed several items from the backseat including the walkie-talkie Appellant provided to Jones and Caffee's Seiko watch and Miami Hurricanes hat. (Tr. 50-52; 70-71.)

Approximately 20 minutes after the police arrived on the scene of the suspicious vehicle, they received a call that the Taco Bell, which was approximately one block away, had just been robbed.

²The Appellant's uncle, James Harold Jones, had rented the white Lumina because the Appellant had told him that he planned on taking a trip to King's Island. (Tr. 124.) Uncle Jones never saw the car again after he had given the keys to Appellant. (Tr. 128.) Uncle Jones is of no relation to co-defendant Harold Jones (Tr. 123.)

³The Appellant, whose middle name is "Rudolph," is commonly known as "Rudy."

(Tr. 53.) The police again asked Jones why he was parked at Charleston Tire. Jones stated he was waiting for Julian Rudolph Smith. (Tr. 54.) Shortly thereafter, the police and store manager arrived at the Taco Bell. (Tr. 164-65.) The manager calculated that the robbers stole \$3,088.13. (Tr. 165.) The manager also told police that she suspected that Beverly Pauley and Julian Smith were involved in the robbery. (Tr. 180.) Just moments earlier, the police had been told by Jones that he was waiting on his uncle, Julian Rudolph Smith.

After the robbery, Appellant and Caffee left the Taco Bell in order to make their escape. (Tr. 82.) Appellant was carrying the gun and the money. (*Id.*) The robbers then ran towards the getaway car that Jones was supposed to be sitting in. (*Id.*) However, the robbers noticed that the police were next to the getaway car. (Tr. 83.) Needing a new escape route, the robbers ran across MacCorkle Avenue towards the cemetery across the street. (*Id.*) They jumped over a barbed wire fence in order to enter the cemetery. (*Id.*) Appellant then hid the gun in a tree. (Tr. 85.) The bag of money was heavy enough to cause Caffee to fall down several times in the cemetery area.⁴ (*Id.*)

The two robbers then ran up the interstate ramp and began to walk towards Dunbar. (Tr. 86.) They eventually got off the interstate and climbed down the hill to the street below. (Tr. 87.) That street runs from Dunbar to North Charleston. (*Id.*) While fleeing on this road, Appellant gave a lady \$40 to drive them to Charleston. (Tr. 88.) She dropped them off a little bit past Hanna Drive. (*Id.*) At the time of the robbery, Appellant lived on Hanna Drive. (Tr. 89.) The two robbers went to Appellant's house where they showered and changed clothes. (Tr. 90-91.) The robbers then put

⁴The day after the robbery, Sherman Spurlock, who lived beside the cemetery, was working near his garden when he found a mask and a roll of nickels. (Tr. 136.) Mr. Spurlock dismissed the discovery; however, after conferring with his wife, he decided to call the police. (Tr. 138.) The police quickly came to his residence and took the mask and coins as evidence. (Tr. 139.) The mask was identified by Caffee as the "ninja mask" that Appellant wore during the robbery. (Tr. 71.)

the clothes they wore during the robbery, empty change wrappers and the bank bag into a Taco Bell bag. (Tr. 92-93, 96.) Appellant told Caffee to get rid of the bag full of evidence and gave him \$10 in order to get a cab back to St. Albans. (Tr. 96-97.) Caffee threw the bag into some weeds at the end of Hanna Drive. (Tr. 99.)

Unfortunately for the robbers, the discarded bag of evidence was discovered by neighborhood kids and its contents were given to the police. (Tr. 141-42.) Inside the bag was a box for the walkie-talkies, a Radio Shack receipt for the walkie-talkies, a Radio Shack bag, a package of old clothes, money bags, empty coin wrappers and Taco Bell deposit receipts. (*Id.* at 154.) The receipt for the walkie-talkies stated that the purchaser was "James Smith," the Appellant's uncle.⁵ (Tr. 198.) That receipt also had latent fingerprints belonging to the left little finger of Appellant. (Tr. 213.) The empty bank bags had "Taco Bell" written on them. (Tr. 153.) Several Taco Bell deposit tickets were also found in the bag. (Tr. 155.) At trial, the store manager confirmed that the Taco Bell bank bags and the deposit receipts came from the store that was robbed. (Tr. 168, 171-74.) The locked bags were sliced opened because the robbers did not have the key. (Tr. 169.) At trial, Caffee testified that the clothing that the children found in the Taco Bell bag was the clothing that he and Appellant had worn during the robbery. (Tr. 69-70.) Larry Keeling, one of the Taco Bell employees, also testified that the clothes were worn by the robbers. (Tr. 32-33.)

Shortly after Caffee got home he received a telephone call from Appellant warning him that the police had already stopped by his house to talk to him about the robbery. (Tr. 102-03.) Appellant told Caffee what he had told the police and advised Caffee to tell the same story. (Tr. 103.)

⁵Appellant admits that his Uncle James Smith gave him the money to purchase the walkie-talkie set; however, Appellant claims that the walkie-talkie set was a gift for his brother's birthday. (Tr. 241, 246-47.)

When the police arrived a short time later, Caffee followed Appellant's orders and told the police that he had been at the Warehouse and that Jones had given him a ride home in Appellant's rented Lumina. (*Id.*) Caffee then stated he did not know where Appellant had been. (*Id.*) Caffee testified at trial that this story was a fabrication. (Tr. 104, 113.) Caffee also discussed that he agreed to testify against Appellant because of a plea bargain with the State. (Tr. 108-09, 119-20.)

After the police talked to Appellant and Caffee, they did not yet have enough evidence to make any arrests. Approximately three days after the robbery, Caffee and Jones met with Appellant at his mother's house in order to split up the stolen money. (Tr. 105.) Pauley then showed up with the money. (Tr. 106.) Caffee received \$700 while Jones got \$100. (*Id.*) Appellant and Pauley kept the rest of the money. (Tr. 107.)

On August 27, 1991, Jones made a statement to police that he and the Appellant had been socializing at the Warehouse with Caffee. (Tr. 273.) Jones then stated that they partied together into the early morning hours until he took Caffee and Appellant to their homes at approximately 3:00 a.m. (Tr. 277.) Jones then said that he was tired and drunk and pulled over near the Taco Bell in South Charleston to rest.⁶ (Tr. 274.) Jones also stated that he did not believe Appellant had gone to the Taco Bell that night. (Tr. 276.) This untruthful story is virtually identical to the story that Appellant had Caffee tell police when they were on the way to his house on the morning following the robbery. During cross-examination, Jones admitted that this statement was untrue and that he "was scared, so I lied." (Tr. 276-77.) Jones also admitted that a plea bargain had been discussed with the State and that he hoped to receive probation in exchange for testifying. (Tr. 278-79.)

⁶The police did not detect that Jones had been abusing alcohol. (Tr. 55.)

III.

RESPONSE TO ASSIGNMENT OF ERROR

Appellant argues that his due process rights were violated when the circuit court denied his motion for a mistrial based on the State's failure to provide Appellant with Harold Jones' statement prior to trial. The circuit court did not err because the supposed exculpatory statement was not material to the determination of guilt nor was Appellant denied a fair trial. In addition, the supposed exculpatory statement did not create a reasonable doubt of Appellant's guilt that did not otherwise exist. Finally, a "manifest necessity" requiring a mistrial did not occur because the court took proper steps in rectifying any error by allowing Jones to be cross-examined about his previous statement and by allowing the statement to be introduced as evidence for the jury's consideration.

IV.

ARGUMENT

A. THE APPELLANT WAS NOT DENIED DUE PROCESS OF LAW BECAUSE THE SUPPOSED EXCULPATORY STATEMENT WAS NOT MATERIAL TO GUILT NOR DID IT DENY APPELLANT A FAIR TRIAL.

In *Brady*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215, 218 (1963). The "*Brady* rule is based on the requirement of due process . . . not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur." *United States v. Bagley*, 473 U.S. 667, 675, 105 S. Ct. 3375, 3379-3380, 87 L. Ed. 2d 481, 489 (1985).

In a second landmark case, the Supreme Court emphasized that “the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant’s right to a fair trial.” *United States v. Agurs*, 427 U.S. 97, 108, 96 S. Ct. 2392, 2400, 49 L. Ed. 2d 342, 352 (1976). The *Agurs* Court then rejected the proposition that all prosecutorial misconduct that prevented disclosure of exculpatory evidence results in automatic error requiring a new trial. *Id.* at 111-112, 96 S. Ct. at 2401, 49 L. Ed.2d at 354. Instead, as *Brady* states, the error must be material. As the Court explained, “[u]nless every nondisclosure is regarded as automatic error, the constitutional standard of materiality must impose a higher burden on the defendant.” *Agurs*, 427 U.S. at 112, 96 S. Ct. at 2401, 49 L. Ed. 2d at 355. Thus, a constitutional error based on the prosecutor’s failure to disclose exculpatory evidence to the defendant exists “if the omitted evidence creates a reasonable doubt that did not otherwise exist.” *Id.* at 112, 96 S. Ct. at 2402, 49 L. Ed. 2d at 355. It is also necessary “that the omission must be evaluated in the context of the entire record” in order to test if the omitted evidence could have created a reasonable doubt to the defendant’s guilt. *Id.* Therefore, in cases where there “is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial.” *Id.* at 112-13, 96 S. Ct. at 2402, 49 L. Ed. 2d at 355. However, in cases where “the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.” *Id.* at 113, 96 S. Ct. at 2402, 49 L. Ed. 2d at 355.

In a third landmark case, *United States v. Bagley*, the Supreme Court looked at *Agurs* and other cases in an attempt to further define “materiality.” 473 U.S. at 667, 105 S. Ct. at 3375, 87 L. Ed. 2d at 481. The *Bagley* court concluded that under *Brady*, “the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that,

if suppressed, would deprive the defendant of a fair trial.” *Id.* at 675, 105 S. Ct. at 3380, 87 L. Ed. 2d at 489-90. The Court stated, “[a] fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial.” *Id.* at 674-675, 105 S. Ct. at 3379, 87 L. Ed. 2d at 489. The *Bagley* Court then held that exculpatory or favorable evidence is material to a defendant “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” *Id.* at 682, 105 S. Ct. at 3383, 87 L. Ed. 2d at 494.

The Supreme Court has further defined what types of undisclosed exculpatory evidence materially affects a criminal defendant’s right to a fair trial. Under *Bagley*, “a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant’s acquittal.” *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 1566, 131 L. Ed. 2d 490, 506 (1995). Instead, the issue becomes “whether in its absence he received a fair trial.” *Id.* The Court also explained that a *Brady* violation can occur “by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Id.* at 435, 115 S. Ct. at 1566, 131 L. Ed. 2d at 506.

Thus, under *Brady* and its progeny, due process is violated if the material exculpatory evidence that was withheld denied a criminal defendant a fair trial. In this case, Appellant was not entitled to a new trial because withholding Jones’ exculpatory statement did not deny Appellant his right to a fair trial. In order for a new trial to be granted, the withheld evidence must be “material” in that it creates a “reasonable doubt that did not otherwise exist.” *Agurs*, 427 U.S. at 112, 96 S. Ct. at 2402, 49 L. Ed. 2d at 355. Evaluating the omission in the context of the entire record, the

statement in this case was not material because it did not create a reasonable doubt that did not already exist. Both accomplices to the crime testified against the Appellant, and both admitted that they had lied when they made previous statements to the police. Appellant's attorney was able to cross-examine both accomplices about their previous statements, plea bargain deals, and any other issues that might be relevant to creating a reasonable doubt. Indeed, Appellant's attorney did cross-examine Jones at great length about his various contradictory statements. (Tr. 273-82.) The trial court also permitted Jones' statement to be introduced as evidence for the jury's consideration. (Tr. 279-80.)

A new trial is not warranted in cases where there "is no reasonable doubt about guilt whether or not the additional evidence is considered." *Agurs*, 427 U.S. at 112-13, 96 S. Ct. at 2402, 49 L. Ed. 2d at 355. In this case, two accomplices testified against Appellant and indicated that Appellant was the mastermind of the robbery. Just a block away from the robbery, police found Appellant's rental car with Jones sitting in it. Jones then told police he was waiting for his Uncle Julian Rudolph Smith. Inside the car, police found the Seiko watch and Miami Hurricanes hat that Caffee testified he left in the car. Police also found a walkie-talkie in the car. Near the cemetery, a local resident found a roll of nickels and a "ninja mask" the morning after the robbery occurred. In addition, children found the Taco Bell bag full of evidence on the same street that Appellant lived on. The clothes worn during the robbery, coin wrappers, slit open bank bags, and Taco Bell deposit slips were all inside the bag. Caffee and Keeling identified the clothing as the clothes worn during the robbery. The Taco Bell general manager testified that the bank bag and deposit slips came from the Taco Bell that was robbed. In addition, the walkie-talkie receipt had Appellant's fingerprint on it and bore the name of Appellant's uncle. Thus, in this case, there was no "reasonable probability"

that the withheld statement undermined the confidence in the trial's outcome because there was a large amount of testimonial and physical evidence used to convict the Appellant.

Moreover, Jones' statement may not even be considered exculpatory. In the statement, Jones states that he dropped Appellant off at his house in Charleston at 3:00 a.m. This is a full two hours before the robbery occurred. Thus, even if this statement were true, there would still have been plenty of time for Appellant to get to the Taco Bell in South Charleston by 5:00 a.m. to commit the robbery. And the prosecutor in Appellant's case stated, "I didn't consider the fact that Harold Jones, even if you assume that this statement was true, letting the Defendant out at 3:00 o'clock in the morning when the robbery happened two hours earlier,⁷ was exculpatory." (Tr. 271-72.)

This Court has incorporated into West Virginia jurisprudence the principles set forth in the *Brady* and *Agurs* line of cases. Thus, under the West Virginia Constitution, "[a] prosecution that withholds evidence which if made available would tend to exculpate an accused by creating a reasonable doubt as to his guilt violates due process of law under Article III, Section 14, of the West Virginia Constitution." Syl. Pt. 4, *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982). "In the context of criminal trials, it is without question that it is a constitutional violation of a defendant's right to a fair trial for a prosecutor to withhold or suppress exculpatory evidence." *Lawyer Disciplinary Bd. v. Hatcher*, 199 W. Va. 227, 232, 483 S.E.2d 810, 815 (1997).

Under West Virginia law, there is a five-part test utilized to test if a new trial should be granted because of newly discovered evidence. See Syl. Pt. 1, *Halstead v. Horton*, 38 W. Va. 727,

⁷The prosecutor appears to have mis-spoken here because the robbery actually happened two hours after, not before, Jones allegedly dropped off Appellant. However, the prosecutor's point was that even if Jones did drop Appellant off at 3:00 a.m., Appellant still had time to commit the crime.

18 S.E. 953 (1894), *overruled on other grounds by State v. Bragg*, 140 W. Va. 585, 87 S.E.2d 689 (1955). However, that newly-discovered evidence test is not applicable “where the State has suppressed exculpatory material. In this latter event, the constitutional due process standard only requires that the evidence would have a reasonable likelihood of affecting the jury verdict.” *State v. Frazier*, 162 W. Va. 935, 942 n.5, 253 S.E.2d 534, 538 n.5 (1979).

“When a trial court grants a pre-trial discovery motion requiring the prosecution to disclose evidence in its possession, non-disclosure by the prosecution is fatal to its case where such non-disclosure is prejudicial. The non-disclosure is prejudicial where the defense is surprised on a material issue and where the failure to make the disclosure hampers the preparation and presentation of the defendant’s case.” Syl. Pt. 5, *State v. Graham*, 208 W. Va. 463, 541 S.E.2d 341 (2000), citing Syl. Pt. 2, *State v. Grimm*, 165 W. Va. 547, 270 S.E.2d 173 (1980). “““The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.”” *State v. Fortner*, 182 W. Va. 345, 353, 387 S.E.2d 812, 820 (1989), quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481, 494 (1985).” Syl. Pt. 6, *State v. Kerns*, 187 W. Va. 620, 420 S.E.2d 891 (1992).

Under West Virginia Rule of Criminal Procedure 16(a)(1)(F), “the state shall furnish to the defendant a written list of names and addresses of all state witnesses whom the attorney for the state intends to call in the presentation of the case in chief.” In this case, Jones was called as a rebuttal witness; thus, he was not required to be on the witness list as Appellant maintains. The trial court did not err in allowing Jones to testify as a rebuttal witness because his testimony was offered to contradict Appellant’s testimony that he was home at the time of the crime. This Court has held that

“[w]hether a party shall introduce further evidence after that of the adverse party has been heard, is a matter within the sound discretion of the court, and its exercise will rarely, if ever, be the cause of reversal.” Syl. Pt. 3. *State v. Williams*, 49 W. Va. 220, 38 S.E. 495 (1901).

In this case, the Appellant was not surprised or prejudiced on a material issue that casts doubt upon his conviction requiring a new trial. As noted supra, the supposed exculpatory evidence was not material because it would not have created a reasonable doubt that did not otherwise exist because there was testimony by accomplices about Appellant’s role in the robbery and there was testimonial and physical evidence linking Appellant to the crime. In addition, Appellant’s counsel was given Jones’ statement during the trial and was able to use the statement during Jones’ cross-examination in an attempt to impeach his credibility or bring out any other issues that would be relevant to establishing a reasonable doubt. Appellant was not surprised, because Jones’ supposedly exculpatory statement was virtually identical to the fabricated story that Caffee had told police – a story concocted by Appellant. Thus, Appellant is not entitled to receive a new trial because he was not prejudiced on a material issue. Because the State’s evidence in this case was so strong, this is not a case where “additional evidence of relatively minor importance might be sufficient to create a reasonable doubt [because the] verdict is already of questionable validity.” *Agurs*, 427 U.S. at 113, 96 S. Ct. at 2402, 49 L. Ed. 2d at 355.

B. THE LOWER COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO ORDER A MISTRIAL AFTER IT WAS REVEALED THAT THE APPELLANT DID NOT RECEIVE JONES’ STATEMENT.

Under West Virginia Code § 62-3-7, during a criminal case, a court “may discharge the jury, when it appears . . . that there is manifest necessity for such discharge.” Such a “manifest necessity” in a criminal case permitting the discharge of a jury without rendering a verdict may arise from

various circumstances. Whatever the circumstances, they must be forceful to meet the statutory prescription." Syl. Pt. 2, *State v. Little*, 120 W. Va. 213, 197 S.E. 626 (1938.) While the term "manifest necessity" has not been abstractly defined," it is viewed "as the happening of an event, beyond the control of the court, which would require the discharge of the jury and would permit a new trial without justifying a plea of double jeopardy." *State ex rel. Dandy v. Thompson*, 148 W. Va. 263, 268-69, 134 S.E.2d 730, 734 (1964). Events that are outside the control of courts that justify a mistrial include "the illness or death of a juror, the accused, the judge or counsel." *Id.* at 269, 134 S.E.2d at 734. Thus, a manifest necessity requiring the discharge of the jury and a subsequent retrial occurs where "unforeseeable circumstances arise during the trial, making its completion impossible." *Id.*

Trial courts are given much latitude in deciding whether or not to grant a mistrial. Indeed, "[t]he decision to declare a mistrial, discharge the jury and order a new trial in a criminal case is a matter within the sound discretion of the trial court." *State v. Williams*, 172 W. Va. 295, 304, 305 S.E.2d 251, 260 (1983), citing *State v. Craft*, 131 W. Va. 195, 47 S.E.2d 681 (1948.) However, trial courts are "empowered to exercise this discretion only when there is a 'manifest necessity' for discharging the jury before it has rendered its verdict." *Williams*, 172 W. Va. at 304, 304 S.E.2d at 260. Thus, the decision to order a mistrial should not be taken lightly; instead the power "must be exercised wisely; absent the existence of manifest necessity, a trial court's discharge of the jury without rendering a verdict has the effect of an acquittal of the accused and gives rise to a plea of double jeopardy." *Id.* Indeed, "[o]nce the trial begins jeopardy attaches and remains unless removed under the provisions of Code, 1931, 62-3-7. If such provisions are not satisfied the defendant is

entitled to plead former jeopardy and thus avoid further prosecution on the charge.” *Dandy*, 148 W. Va. at 269-70, 134 S.E.2d at 735.

In *Dandy*, the trial court incorrectly allowed evidence that was seized without a search warrant to be admitted into evidence at a criminal trial. Later, the trial court realized that it had made a mistake and issued a mistrial. On review, the West Virginia Supreme Court asked, “Does mere error on the part of the trial court create a manifest necessity for a mistrial?” *Id.* at 268, 134 S.E.2d at 734. The Court then answered, “We are firmly of the opinion that it does not.” *Id.* The West Virginia Supreme Court then held that “[w]here the trial court erroneously permits inadmissible matters to be introduced into evidence, such error does not create a manifest necessity for a mistrial within the meaning and intent of Code, 1931, 62-3-7.” Syl. Pt. 1, *Dandy*. The Court continued that “[w]here the ground upon which the court relied to discharge the jury was a circumstance over which the court had control and which, by the exercise of due diligence, it could have prevented, no manifest necessity existed which would warrant the declaration of a mistrial.” *Id.* at 269, 134 S.E.2d at 734-35. The Court then held that the lower court abused its discretion by ordering a mistrial “for the reason that it had erroneously permitted, over the objection of the petitioner, certain evidence to be introduced.” *Id.* at 270, 134 S.E.2d at 735.

In this case, there was no manifest necessity requiring a mistrial. After Jones’ statement was revealed, the trial court took steps to rectify the alleged error by allowing the witness to be cross-examined about his statement and any possible plea bargain deals that had been negotiated with the State. The statement was also introduced to the jury as evidence. This cured the situation and avoided a “manifest necessity” that would require a mistrial. This was also an appropriate remedy because under *Dandy*, the trial court would have abused its discretion by ordering a mistrial

based on an event that was within the court's control. If the trial court had issued such a faulty mistrial, the Appellant would have likely been able to avoid a retrial due to double jeopardy concerns because the mistrial did not originate from a "manifest necessity."

A mistrial is appropriate whenever a court determines, "taking all the circumstances into consideration, [that] there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." *Keller v. Ferguson*, 177 W. Va. 616, 620, 355 S.E.2d 405, 409 (1987), citing *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580, 6 L. Ed 165 (1824). This "power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes." *Id.* In this case, the lower court properly denied a motion for a mistrial because under all the circumstances of the case, withholding Jones' statement was not an "urgent circumstance" or a "very plain and obvious cause" requiring a mistrial. This is because Jones admitted that he lied when he made the previous statement, he was then cross-examined about it and his previous statement was admitted into evidence. In addition, the statement may not even be considered exculpatory considering that even if Appellant was dropped off at his house at 3:00 a.m., he would have still had time to commit the crime. Thus, because no manifest necessity existed, had the court issued a mistrial the Appellant could not have been retried due to double jeopardy.

Under these circumstances, the circuit court did not abuse its discretion in refusing to grant a mistrial.

V.

CONCLUSION

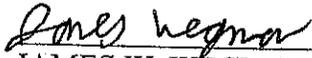
For the foregoing reasons, the judgment of the Circuit Court of Kanawha County should be affirmed by this Honorable Court.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Appellee,

By Counsel

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL

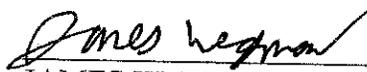


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CERTIFICATE OF SERVICE

I, James W. Wegman, Assistant Attorney General for the State of West Virginia, do hereby certify that a true copy of the foregoing "Brief of Appellee State of West Virginia" was served upon counsel for the Appellant by depositing the same postage prepaid in the United States mail, this 18th day of December, 2006, addressed as follows:

To: Paula M. Cunningham
Deputy Public Defender
P.O. Box 2827
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JAMES W. WEGMAN