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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THOMAS MacPHEE,

Appellant,

v.

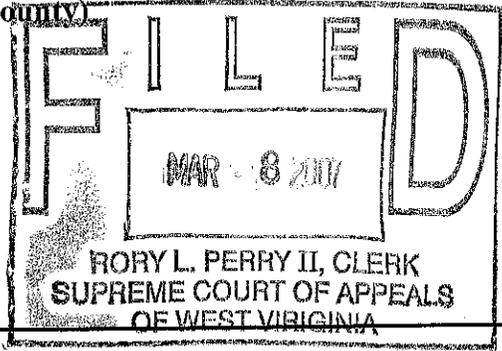
Supreme Court No. 062264

Circuit Court No. 03-F-153(M)

(McDowell County)

STATE OF WEST VIRGINIA,

Appellee.



BRIEF OF APPELLANT

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INTRODUCTION

To this day, nobody knows for sure where Lori Keaton is or what happened to her. She has not been seen since January 30, 2003. Everyone agrees she was going to leave town that day, but no one really can prove anything further. Only Thomas MacPhee's story credibly suggests otherwise.

Mr. MacPhee admits he was at home on the evening of January 30, when Danny England shot and killed Ms. Keaton in Mr. MacPhee's house, a house he had recently purchased from Ms. Keaton. He told the police he had left the house and gone out on the porch while Mr. England and Ms. Keaton were having an argument, not realizing what was about to happen. Mr. MacPhee was not present when the murder occurred. Upon hearing the shotgun blast and racing back inside, he was put in an impossible position – either help conceal the evidence of Mr. England's crime, or join Ms. Keaton's corpse in death.

Under the duress of Mr. England's shotgun barrel, he helped transport her body and some belongings into the woods of McDowell County. Following the instructions given to him by Mr. England, he then took her car away, hid it, and took her dog to Salem, Virginia, where he released it.

When the police came calling, Mr. MacPhee was candid with them, telling them what Danny England had done. But Mr. MacPhee had one problem – he was an outsider in McDowell County, being from New Jersey. As the “Yankee”, his status was already suspect. It took him a while to trust the police enough to tell them what happened, but by then it was too late. They decided he – the Yankee – must have done this crime, and now was trying to blame the poor, innocent son of McDowell County for being a murderer. Danny England, has never been tried.

Mr. MacPhee found himself indicted for murder, grand larceny, and conspiracy to commit murder. He doesn't deny that hiding the car was wrong, and so does not complain of his conviction for grand larceny. But his trial for murder and conspiracy is a different matter.

Lori Keaton's body was never found, and neither was any evidence that showed she actually was dead. Not a single shred of physical evidence of her death or her death was a criminal act has ever been presented by the State. Only two small drops of her DNA, both with plausible reasons for being present, plus the utterly fabricated testimony of a prisoner from the Southwest Regional Jail which does not match any of the other evidence in the case, were ever shown as independent evidence of her death and the connection of Thomas MacPhee.

Mr. MacPhee's statement was the only evidence elicited at trial that showed what happened to Lori Keaton. His statements that he was outside the house when the shot was fired, that Danny England had the shotgun in his hand when he raced back inside, that he was forced to assist in the cleanup of the crime scene, and that he had no idea what Danny England intended to do went uncontradicted.

Seeing that he had a serious proof problem, the Prosecuting Attorney of McDowell County decided to take a forbidden path – to do something this Court has told him before he should never do. At closing argument, he went all out – not placing his emphasis on his weak evidence, but instead summoning sympathy for the family of Lori Keaton, pulling at the heartstrings of the jury.

Seven times he called the jury's attention to the family of Lori Keaton. Seven times he forced to the jurors' minds images of their suffering. Seven times he threw emotions at them, hiding the weakness of his evidence. He said on several occasions he and the police had done their duty, vouching for his own case, putting the prestige of his office out as a reason to vote for

him in the jury room. He called for “justice”, demanding that only by convicting could justice be served, as if the idea of freeing a man who did not commit a murder was somehow betraying the people of their county. He even brought the image of his own mother into the case.

Unsurprisingly, given all of this emotional pressure, without any evidence to contradict Mr. MacPhee’s version of events, the jury succumbed and found Mr. MacPhee guilty of first degree murder with mercy, guilty of grand larceny, and conspiracy to commit murder.

All of this resulted in convictions that cannot stand legally for the following reason:

- The evidence was insufficient to sustain a verdict of guilt under the facts and law presented at trial for either the murder or conspiracy counts, violating the Due Process Clauses of the United States and West Virginia Constitutions.

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PROCEEDINGS AND RULINGS BELOW

Thomas MacPhee was indicted by the October 2003 term of the McDowell County Grand Jury for Murder of the First Degree in violation of W.Va. Code § 61-2-1 (1991) (2005 Repl. Vol.), Grand Larceny in violation of W.Va. Code § 61-3-13 (1994) (2005 Repl. Vol.), and Conspiracy to Commit First Degree Murder in violation of W.Va. Code § 61-10-31 (1971) (2005 Repl. Vol.).

During the trial, the State presented Mr. MacPhee's statements to the jury: that he had not been present at the moment of the shooting, that he had no idea that Danny England intended to shoot Ms. Keaton, that he saw Mr. England holding the shotgun when he came inside at the sound of the shotgun blast, and was forced to assist Mr. England in the cleanup of the crime scene. No direct evidence otherwise linked him to the crime. States Exhibits 4, 5, 6 and 7, Trial Transcript¹ (Tr.) 489-491, 506. None of the paucity of physical evidence presented showed Mr. MacPhee had participated in the murder, or even a murder had actually occurred.

The State did present one witness, Jerry Massey, an informant from the South Western Regional Jail, who, in the hopes of getting a deal, claimed Mr. MacPhee had confessed to him in pretrial detention, but this alleged "confession" did not match with either Mr. MacPhee's statement to the police, or any physical evidence in the case. Tr. 630-631, 624-637. Further, the Prosecuting Attorney apparently recognized the inherent incredibility of Mr. Massey's statements, in that he never again referred to them before the jury, not even during closing.

A motion for a judgment of acquittal was made at the close of the State's evidence and it was renewed at the close of the case. Tr. 665, 691.

¹ Appellant would note that the record of trial was not paginated and was disorganized when forwarded to this Court by the Circuit Clerk of McDowell County, West Virginia. Due to this difficulty, Appellant will cite to the page numbers of the trial transcript.

At closing arguments, the Prosecuting Attorney engaged in misconduct by expounding at length on the family of Ms. Keaton and their suffering as a result of her death — a death that had not been legally proven to have occurred. *See generally*, Tr. 732-762. His comments were wide-ranging, bringing into the case his own mother, the prestige of his office, and included vouching for his own case. *Id.* None of this argument was based on anything properly brought into evidence. He concluded by calling for “justice”, demanding that the only way justice is served is through convictions. *Id.*

Thomas MacPhee was convicted of Murder in the First Degree with a recommendation of mercy, Grand Larceny, and Conspiracy. Tr. 775-776. Mr. MacPhee was sentenced to life in prison with mercy, an indeterminate sentence of one to ten years for the Grand Larceny, and an indeterminate sentence of one to five years for Conspiracy. Sentencing Hearing Transcript 17-18. All of these sentences were ordered to run consecutively.

Mr. MacPhee appeals only his convictions of murder and conspiracy. He does not appeal the grand larceny conviction.

STATEMENT OF FACTS

On January 30, 2003, Lori Keaton became a missing person. Since then, no one has seen her, and absent the statement of Thomas MacPhee, nothing has ever been found to prove she is anything other than a missing person. Most importantly, Mr. MacPhee's statement of what happened to Ms. Keaton has never been contradicted.

Her dog was found in Salem, Virginia. Tr. 214. Her car was found in McDowell County. Tr. 229. Some of her clothes and effects were found in the woods, also in McDowell County. Tr. 222. The only real evidence of her fate is the statement by Thomas MacPhee, in which he claims to have arrived at the scene moments after Lori Keaton's murder, and then out of fear of becoming the next victim, helping her murderer, Danny England, a man who had been jealous over Ms. Keaton's affections² and would be suspected as being involved with her disappearance by Lori's husband, conceal the body at the place where her effects were found. States Exhibits 4, 5, 6, and 7, Tr. 489-491, 506, 167-168. No body or proof a death had occurred was found at that location. Tr. 339.

According to Mr. MacPhee's videotaped statement, Lori Keaton and Danny England were having an argument at MacPhee's residence in the Hensley Hollow area of McDowell County. States Exhibits 4, 5, 6, and 7, Tr. 489-491, 506. Ms. Keaton was estranged from her husband and leaving town that day. At some point the argument became quite heated, causing Mr. MacPhee to exit the home and walk out to his porch to get away. Soon after, Mr. MacPhee heard what sounded like a shotgun blast. Mr. MacPhee was not present when Mr. England killed Ms. Keaton. Mr. MacPhee hustled into the house and saw the body of Lori Keaton, with an

² Mr. England's attentions to Ms. Keaton were cogently described by her husband as "he was trying to screw my wife." Tr. 168.

obvious chest wound, lying on the floor. He hurried to call 911 to get her help, but was stopped by the armed Danny England. Confronted with the choice of either doing what Mr. England told him to do, or facing the business end of the shotgun, he reluctantly complied with Mr. England's demands to help him clean up the murder. Out of fear, Mr. MacPhee helped Mr. England wrap the body in blankets and plastic sheeting, clean the blood from the house, and ultimately bury the body in a secluded area several miles away. Mr. MacPhee also helped in the disposition of Ms. Keaton's automobile, by driving it to the residence of Kenneth Wood, and covering it with a tarp. Finally, Mr. MacPhee, instructed by England to "dispose" of Ms. Keaton's dog, instead mercifully released the animal near Salem, Virginia, where it was quickly found and returned to Ms. Keaton's family. *Id.* Mr. MacPhee's statement has never been contradicted.

Lori Keaton's body was never found, because when the police went to the site, there were some personal effects and disturbed ground, but no body. No other witness account of her death, other than Mr. MacPhee's statements he merely witnessed and then helped cover up her murder, has ever been brought forward, including Mr. England. There is no direct evidence as to whether Ms. Keaton was actually dead, or whether her death was caused by a criminal act. Only two small bits of DNA evidence from Ms. Keaton have been found; one on a scrap of clothing at the site where Ms. Keaton's effects were found, the other on the floor at Mr. MacPhee's house, a house she used to live in. Tr. 218. Neither spot shows she was killed or who killed her. Tr. 554, 573.

There was no evidence of any discussion or agreement on a killing between Mr. England and Mr. MacPhee, no evidence that Mr. MacPhee was present when Mr. England killed Ms. Keaton, or that Mr. MacPhee had any knowledge Mr. England would kill Lori Keaton or commit any other crime. Even Mr. MacPhee's statement denies any agreement.

Only Mr. MacPhee was tried for this offense. He is originally a "Yankee" from New Jersey – so much of a "Yankee" that one witness couldn't even pronounce his name. Tr. 364, 230, 755, 191. The Prosecuting Attorney went out of his way to get the fact that he is from New Jersey before the jury. Tr. 145, 271. Danny England, a native of McDowell County, has never faced a court for his role in these crimes. His charges were dismissed by the Prosecuting Attorney.

At trial, the State produced Mr. MacPhee's statement and the two DNA spots. Then, in an apparent attempt to bolster its case, the State presented the testimony of an inmate from the South Western Regional Jail named Jerry Massey. Tr. 626-627. Mr. Massey came to the Prosecuting Attorney with hope of assistance on the disposition of pending drug charges. Tr. 629-630. Mr. Massey testified as to a supposed "confession" by Mr. MacPhee which conflicted with several facets of the State's other evidence and did not serve as contradiction to Mr. MacPhee's previous statement; rather, it was clearly a fantasy concocted by Mr. Massey in an attempt to secure a deal for leniency. Tr. 630-631. He tendered a story to the court that Mr. MacPhee and another person went to the house of some unnamed woman, beat her to death in the course of robbing her for drug money, and dumped her body in a mineshaft. Tr. 626-627. This testimony is inconsistent with what little independent evidence was presented in this case, and was apparently inherently incredible to the Prosecuting Attorney, as he never addressed it again in the case. It does not contradict the only testimony showing Ms. Keaton's death, the perpetrator, and the aftermath: the testimony of Mr. MacPhee.

During closing arguments, the prosecutor made seven separate references to the family of Ms. Keaton, some of whom were present in the courtroom for the trial. He pontificated to the jury what kind of pain the family must have gone through, with Ms. Keaton missing, describing

their feelings about her body being in the woods, and even suggesting, out of respect for the family, the police and courts might have to be put in the position of disrespecting the family because an accused did not want to speak to the police. *See generally*, Tr. 732-762

The prosecutor continued by referencing his own mother, suggesting Mr. MacPhee ought to be found guilty because the Keaton family would not be able to see her reach the same age his own mother had, despite not having any evidence Ms. Keaton was actually dead. *Id.*

He claimed to the jury that he and the police had done everything in the case they could, and there was no reason to consider any problems in the case. He suggested that he, as the Prosecuting Attorney for McDowell County, and the police had done all they could, and that was sufficient to convict, vouching for his own case. *Id.*

Finally, the Prosecuting Attorney went on to demand "justice." He made it clear the only way the jury could provide "justice" was to find Mr. MacPhee guilty. "Justice" could only come from holding someone responsible to the family, and since Mr. MacPhee was conveniently available, he ought to be the scapegoat. The prosecutor abandoned his role as an arbiter of justice and became a partisan, intent only on conviction, whatever the cost to the legal system. *See generally*, Tr. 732-762

None of the above comments the prosecutor made were supported by any evidence at trial from any witness; the Prosecuting Attorney produced it totally from whole cloth. It clearly was intended to divert attention away from the weakness of his case; instead subjecting the jury to a veritable emotional assault, playing on their sympathies for the family, and distorting their duty and role in the legal process.

As a result, Mr. MacPhee was found guilty of murder in the first degree, grand larceny, and conspiracy to commit murder. Tr. 775-776. This occurred without any evidence beyond his

uncontradicted statement, which legally is not enough to convict, substituted instead for by forbidden, emotional appeals to nullify the law, and convict to appease a family.

ASSIGNMENTS OF ERROR

- I. THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO CONVICT MR. MacPHEE OF FIRST DEGREE MURDER AS THE STATE PRESENTED TWO CONTRADICTORY THEORIES OF GUILT, NEITHER OF WHICH IS SUFFICIENT TO PROVE PREMEDITATION.

- II. THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT TRIAL THAT MR. MacPHEE WAS INVOLVED IN A CONSPIRACY TO MURDER AS THE STATE PRESENTED TWO CONTRADICTORY THEORIES OF GUILT, NEITHER OF WHICH INCLUDED EVIDENCE OF AN AGREEMENT BETWEEN MR. MacPHEE AND ANOTHER PERSON TO COMMIT MURDER.

DISCUSSION OF LAW

I. THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO CONVICT MR. MacPHEE OF FIRST DEGREE MURDER AS THE STATE PRESENTED TWO CONTRADICTORY THEORIES OF GUILT, NEITHER OF WHICH TAKEN ALONE IS SUFFICIENT TO PROVE PREMEDITATION.

A denial of due process of law occurs when the jury does not have sufficient evidence to find guilt beyond a reasonable doubt, yet nonetheless returns a verdict of guilty, violating the 14th Amendment of the United States Constitution and Article III, § 10 of the West Virginia Constitution. This Constitutional violation occurred in Mr. MacPhee's case.

A. STANDARD OF REVIEW

The sufficiency of the evidence is judged by two standards. Decisions made by the trial court are reviewed *de novo*, while questions of the jury's verdict are decided under a more deferential review. State v. Guthrie, 194 W.Va. 657, 668, 461 S.E.2d 163, 174 (1995). That standard is inquiry beyond a reasonable doubt, that 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." *Id.*

B. THE STATE MUST PROVE EVERY ELEMENT OF THE OFFENSE, AND THE STATEMENT OF THE DEFENDANT ALONE IS INSUFFICIENT TO MEET THIS BURDEN

It is incumbent upon the State to prove, by legal and competent evidence, each and every element of the offense for which the accused has been charged. State v. Fiske, 216 W.Va. 365, 367, 607 S.E.2d 471, 473 (2004). Failure to do so must necessarily result in an acquittal. State v. Houdeyshell, 174 W.Va. 688, 692, 329 S.E.2d 53, 57 (1985).

It is well-settled law that the statement of the defendant, standing alone, is insufficient to meet this burden. State v. Garrett, 195 W.Va. 630, 641, 466 S.E.2d 481, 492 (1995). A conviction in a criminal case is not warranted by the extrajudicial confession of the accused alone. The confession must be corroborated in a material and substantial manner by independent evidence. This corroborating evidence need not of itself be conclusive; it is sufficient if, when taken in connection with the confession, the crime is established beyond reasonable doubt. State v. Taylor, 174 W.Va. 225, 229, 324 S.E.2d 267, 371 (1984).

The reasoning for this is simple: to reduce the possibility of punishing someone for a crime that has not actually occurred. Garrett, 195 W.Va. at 641, 466 S.E.2d at 492. "Firmer ground" is necessary to rest a conviction upon: unless the elements of the crime can be shown independent of the confession, then the State has not met its burden and an acquittal must result. A confession does not relieve the State of the burden of proving the all the essential elements of the offense. *Id.*

C. THE UNCONTRADICTED EXCULPATORY STATEMENT OF THE DEFENDANT, INTRODUCED BY THE STATE, IS INSUFFICIENT EVIDENCE TO SUPPORT A FINDING OF GUILT

All of the above assumes that the statement of the accused is inculpatory; that it is a confession to the elements of the crime and an admission of guilt. But when the statement presented by the State is an exculpatory one; one admitting no elements of the charged offenses, the State is left with even less proof. For while it is possible for the State to introduce the confession of the accused and then corroborate enough details to confirm the story as a whole, when the accused in his statement denies the elements of the offense, the State is left with a

situation wherein it has to produce its own evidence proving each element of the offense, since the defendant has not conveniently provided any already in his statement.

This Court long ago settled the issue of the uncontradicted testimony of the defendant on elements of the crime. In State v. Hurst, 93 W.Va. 222, 116 S.E. 248 (1923), this Court pointed out that, when the Defendant's statement is presented in evidence, especially when he is not contradicted, the jury cannot reject that statement to the defendant's manifest injustice. Hurst, 116 S.E. at 250. That case's facts were remarkably similar to Mr. MacPhee's case: there had been a homicide, and the key evidence produced at trial concerning the involvement of the accused was his statement.³ The Supreme Court of Appeals held that, in the absence of any evidence contradicting the statement of the accused, the jury could not reject it and any verdict to the contrary cannot stand for lack of sufficient evidence. *Id.*

This rule of law is in concord with the weight of the authority throughout the country; that the State, while not bound by exculpatory statements of the accused that it enters into evidence, does still have the burden of proving the elements of the offense and thus, necessarily, must introduce evidence to rebut his claims, because the only evidence on that element is a denial, resulting in failure of evidence on that element and a consequential acquittal. *See Black v. State*, 21 P.3d 1047, 1062 (Okla. Crim., 2001) ("If the State introduces a defendant's exculpatory statement, which, if true, would entitle the defendant to an acquittal, he must be acquitted unless the statement has been disproved or shown to be false...."); State v. Flowers, 489 S.E.2d 391, 402 (N.C., 1997) ("[T]he State is not bound by all statements contained in a defendant's confession which the State introduces into evidence if the State also introduces

³ In that case, the defendant claimed self-defense. There were some witnesses that testified to the events, but the key facts -- the impressions of the accused of the deceased's actions, based on his knowledge of the aggressor, came only from the defendant.

other evidence tending to contradict those statements.”); State v. Irby, 439 S.E.2d 226, 231 (N.C. Ct. App., 1994) (“When evidence introduced by the State consists of exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by those statements.”); State v. Turnage, 402 S.E.2d 568, 572 (N.C., 1991) (“When the State introduces uncontradicted exculpatory evidence in its case-in-chief, the State is bound by those statements, and the defendant is entitled to a dismissal of the charges.”); State v. Freeman, 387 S.E.2d, 158, 159 (N.C., 1990) (“When the State introduces exculpatory statements of a defendant which are not contradicted or shown to be false by any other facts or circumstances, the State is bound by these statements. The introduction by the State of exculpatory statements by the defendant, however, does not prevent the State from introducing evidence which shows facts concerning the crime to be different from the incident as described by the exculpatory statements.”) (internal citation omitted); Gray v. State, 726 S.W.2d 640, 642 (Tex. Ct. App., 1987) (“[W]hen the State produces an appellant’s exculpatory statement and does not refute it, either directly or indirectly, the appellant is entitled to an acquittal.”); Gonzales v. State, 685 S.W.2d 385, 387 (Tex. Ct. App., 1985) (“Where the State puts in evidence a statement or admission of the accused party which exculpates the accused, and does not directly or indirectly disprove them, the accused is entitled to an acquittal.”); *c.f.*, United States v. Riggs, 547 F.2d 1219 (4th Cir., 1976) (Government is not bound by exculpatory statement of defendant it introduces, if sufficient evidence is available independent of the statement to show it is incredible.).

This line of cases produces two key points that must be kept firmly in mind to prevent the rule from being abused. First, it must be clearly understood that the State is not barred from producing evidence that disproves the defendant’s statement. If it does produce such evidence

for each element of the offense implicated by the statement, the hurdle of this rule is cleared and the State meets its *prima facie* case. Indeed, many of the cases cited above proceed from the pronouncement of the rule to a finding that the State did indeed meet that burden.

Second, the exculpatory statement must be introduced by the State. Only then is the rule requiring the State to disprove it implicated. The reason for this is simple: if the defendant produces the statement, then it is a matter for the jury to weigh in comparison with the evidence produced by the State. But if introduced as evidence against the accused, the State has assumed the burden of proving its untruth.

The State may have many legitimate reasons for introducing such a statement, but when it does so, it must provide additional evidence to controvert the claims made by the defendant. The State cannot, without evidence, merely rely on a negative inference claimed by the prosecutor that the accused is lying, that this is suspicious, and thus the defendant must be guilty. It is well-settled law in this State that suspicion alone, however strong, is insufficient to sustain a criminal conviction. State v. Maley, 151 W.Va. 593, 598, 153 S.E.2d 827, 830 (1967). Replacing fact with suspicion shifts the burden to the accused to prove his statement is true; an action that relieves the State of its burden of proving each element of the offense and thus is unconstitutional. State v. Meyers, 163 W.Va. 37, 39, 245 S.E.2d, 631, 633 (1978).

D. THE STATE PRODUCED MR. MacPHEE'S EXCULPATORY STATEMENT
IN ITS CASE-IN-CHIEF, BUT PRODUCED NO COMPETENT EVIDENCE
TO CONTRADICT THE STATEMENT, INSTEAD SUBSTITUTING
SUSPICION FOR EVIDENCE

What happened in Mr. MacPhee's case is that the Prosecuting Attorney substituted suspicion and an inference that Mr. MacPhee was lying in his statement for any evidence to disprove the statement. The reason for this is simple: he had no proof. His only other witness,

Danny England, was the son of McDowell County, and there was no way, absent other evidence, he could be implicated when there was a convenient "Yankee" to blame.

The State's evidence in this case can only be coherently explained as an attempt to prove two separate theories of Mr. MacPhee's guilt. These two theories are consistent only in they both involve a murder in which a body was never found. The first and more developed of the theories is Lori Keaton was seeking out Danny England regarding money owed her by England. She was then shot at MacPhee's residence by Mr. England, and Mr. MacPhee, after the fact, helped conceal the crime.

The core evidence the State presented to support this theory consisted of Mr. MacPhee's statements. In these statements Mr. MacPhee said Danny England shot Ms. Keaton with a shotgun, while arguing with her over money. Mr. MacPhee said he did not know Danny England was going to kill Lori Keaton, but he admitted helping Danny England conceal the crime. States Exhibits 4, 5, 6, and 7, Tr. 489-491, 506. It is important to notice here that the State introduced these exculpatory statements against Mr. MacPhee in its case-in-chief. The State relied on discrepancies between Mr. MacPhee's several statements to create an inference and suspicion of greater involvement.

At best, the sum of the statements shows that Mr. MacPhee was an accessory after the fact, and not a principal, in the commission of this crime.⁴ No evidence was ever produced at trial to show that he had a greater role than this. This mere suspicion contains no evidence that Mr. MacPhee acted in the manner required to be a principal in a homicide under W.Va. Code 61-2-1 (1991) (2005 Repl. Vol.), that is, that he killed Ms. Keaton, and says nothing of the requirement of “some period between the formation of intent to kill and the actual killing,” on

⁴ There has been some question of the difference between an accessory after-the-fact and a principal in the second degree. In State v. Bradford, 199 W.Va. 338, 484 S.E.2d 221 (1997), Justice Maynard provided an excellent description of the difference between the two theories of liability. He describes the common law rule that “accessories after the fact [are those] who rendered assistance after the crime was completed. R. Perkins, *Criminal Law* 643-44 (1969); W. LaFave & A. Scott, *Criminal Law* § 63 (1972); 4. W. Blackstone, *Commentaries on the Laws of England* 33 (1765); and, State v. Scott, 80 Conn. 317, 68 A. 258 (1907).” He continues: “The distinction between principals and accessories after the fact is maintained because an “accessory after the fact, by virtue of his involvement after the completion of the felony, is not treated as a participant in the felony but rather as one who obstructed justice.” [State v. Petry 166 W.Va. 153, 157, 273 S.E.2d 346, 349 (1980)]. In fact, “[t]hree things are requisite to constitute one an accessory after the fact: (1) The felony must be completed; (2) he must know that the felon is guilty; and (3) he must receive, relieve, comfort or assist him.” 1A M.J. *Accomplices and Accessories* § 5 (1993)... An accessory is one not present at the commission of the offense, but who is in some way concerned therein, either before or after, as contriver, instigator or advisor or as a receiver or protector of the perpetrator. There can be no accessory to a crime not committed by a principal... An accessory after the fact is a person who knowing a felony to have been committed by another, receives, relieves, comforts or assists the felon. The accessory after the fact, by virtue of his involvement after the completion of the felony, is not treated as a participant in the felony but rather as one who obstructed justice.... It is necessary that the accessory have notice, direct or implied, at the time he assists or comforts the felon, that he has committed a felony. 1A M.J. *Accomplices and Accessories* § 5 (1993).” Bradford, 199 W.Va. at 229, 484 S.E.2d at 346 In Mr. MacPhee’s case, the evidence, elicited by the State and without contradiction by any competent evidence, meets the test of an accessory after-the-fact. Mr. MacPhee was not present when the offense was committed – he was outside the home on the porch. The felony of murder had already been completed by Mr. England prior to his presence in the room or knowledge that a crime was about to occur. Mr. MacPhee was clearly on notice that Mr. England had committed this felony, considering that he was standing in the room with the shotgun in hand. Finally, he did assist Mr. England in disposing of the body and evidence, albeit under the duress of Mr. England’s shotgun barrel. Under this test, Mr. MacPhee may be an accomplice after-the-fact, but he is not a principal.

the part of Mr. MacPhee as required by this Court in Guthrie, 194 W.Va. at 676, 461 S.E.2d at 182.

The State's second theory of guilt is Mr. MacPhee and another unknown person went to Lori Keaton's house and beat her to death during the commission of a robbery for the purposes of obtaining money to buy drugs. The only evidence supporting this theory was the testimony of Jerry Massey, a jailhouse informant who claimed Thomas MacPhee made a statement to this effect, in an attempt to secure a deal. Tr. 624-637, 630-631. This statement is obviously a ploy created from the fantasies of Mr. Massey to obtain leniency from the Prosecuting Attorney and inherently incredible.⁵ There was never any evidence found by the police at any time or presented at trial that Mr. MacPhee needed money for any reason, nor was there the slightest suggestion at any time that Mr. MacPhee had any involvement with drugs. It also is inconsistent with the very evidence introduced by the State that bolstered Mr. MacPhee's statements, that of the discovery of some of Ms. Keaton's belongings where he admitted helping Mr. England, under duress, hide Ms. Keaton's body. It is further inconsistent with the State's other evidence as to the location of the alleged murder in that under the first theory the murder occurred in MacPhee's house, and under the second it took place in the unnamed victim's house. Tr. 222, 624-637.

This second theory also contains nothing indicating premeditation. Tr. 624-637. The jury was not instructed as to felony murder in this case, and while a death by beating can clearly be a second degree murder even if the intent is only to injure, such a beating absent evidence of

⁵ As previously discussed, Mr. Massey's statements are certain fabrications. While Mr. MacPhee cannot say with certainty the prosecutor knew before Mr. Massey testified that his testimony was perjured, he would note that the prosecutor is responsible for false testimony on the part of his witnesses, even if he is unaware of the falsity. Matter of the Investigation of the West Virginia State Police Crime Laboratory, 190 W.Va. 321, 325, 438 S.E.2d 501, 505 (1993).

intent to kill formed before the fatal blow constitutes only second degree murder. As such, the Massey "confession" is of itself not sufficient to show premeditation, as there is no evidence of same. Therefore no reasonable juror could conclude the State proved the element of premeditation beyond a reasonable doubt.

At the end of the day, all the State is left with is Mr. MacPhee's own exculpatory statement, unquestioned by competent evidence and was, in fact, bolstered by the State's own evidence. Nothing was ever produced by the State to show that Mr. MacPhee had committed any of the necessary elements to find him guilty of any degree of homicide. Instead, there is only suspicion that he might not be telling the truth, by being an outsider and a "Yankee" implicating a native son of McDowell County, and thus, if he would do this, he must be covering up for himself, so he must be guilty. This is all the State has – suspicion, not facts.

E. CONCLUSION

Neither theory espoused by the State meets the requirements of first-degree murder. There simply is no evidence or even so much as a single piece of physical evidence, tying Mr. MacPhee to the killing in this case from the evidence provided by the State, much less a showing premeditation. There is insufficient evidence to sustain the conviction and it must be reversed.

II. THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT TRIAL THAT MR. MacPHEE WAS INVOLVED IN A CONSPIRACY TO MURDER AS THE STATE PRESENTED TWO CONTRADICTORY THEORIES OF GUILT, NEITHER OF WHICH INCLUDED EVIDENCE OF AN AGREEMENT BETWEEN MR. MacPHEE AND ANOTHER PERSON TO COMMIT MURDER.

For the State to prove a conspiracy it must prove there was an agreement to commit a crime, and there was an overt act towards the commission of a crime. W.Va. Code § 61-10-31 (1971) (2005 Repl. Vol.). Failure to do so results in an insufficiency of the evidence, a fatally defective verdict, and a denial of due process in violation of the 14th Amendment of the United States Constitution and Article III, § 10 of the West Virginia Constitution.

A. STANDARD OF REVIEW

As previously discussed, sufficiency is judged by two standards. Decisions made by the trial court are reviewed *de novo*, while questions of the jury's verdict are decided under a more deferential review. State v. Guthrie, 194 W.Va. 657, 668, 461 S.E.2d 163, 174 (1995). The standard is inquiry beyond a reasonable doubt, that 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." *Id.*

B. THE UNCONTRADICTED EXCULPATORY STATEMENT OF THE DEFENDANT, INTRODUCED BY THE STATE, IS INSUFFICIENT EVIDENCE TO SUPPORT A FINDING OF GUILT

In the previous section, Mr. MacPhee discussed the relevant law regarding the introduction by the State of his exculpatory statement and the consequences thereof. Noting that

claimed Thomas MacPhee made a statement to this effect. Trial Tr. 624-637. This statement contradicts the first theory as to the manner and place of the killing. Mr. Massey's statement contains no evidence of any intent to commit murder, much less the two alleged assailants reached an agreement to commit such a crime. The jury was not instructed as to felony murder, and such a story, if believed, would suffice only to support a conviction for felony murder as there is no evidence of intent to kill. Where there is not even an allegation the would-be conspirators formed the intent to kill, there obviously is not sufficient evidence to support they formed some sort of before the fact agreement to kill.

D. CONCLUSION

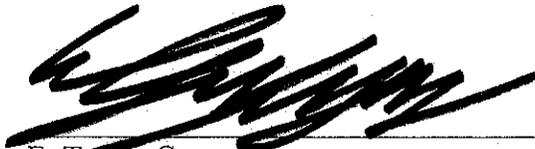
The State, under both theories, failed to show any evidence of an agreement to commit murder. Therefore no reasonable juror could conclude the State proved the element of pre-meditation beyond a reasonable doubt.

RELIEF REQUESTED

Mr. MacPhee respectfully requests this Court to reverse his conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, E. Taylor George, hereby certify that on 8 March 2007, a copy of the foregoing **Brief for Appellant** was mailed to Mr. Sidney H. Bell, Prosecuting Attorney, McDowell County, 93 Wyoming Street, Welch, West Virginia 24801.



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