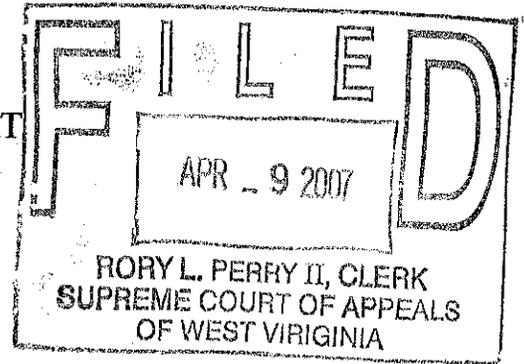


IN THE SUPREME COURT  
OF APPEALS  
OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

APPELLEE,

V.

APPEAL NO. 33297

THOMAS JOSEPH MACPHEE,

APPELLANT.

**BRIEF OF APPELLEE**

PRESENTED BY:

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**RESPONSE TO ASSIGNMENTS OF ERROR**  
**AND STATEMENT OF THE CASE**

The appellant, Thomas Joseph MacPhee, contends that he was merely an accessory after the fact to the murder of 46-year-old Lori Ann Keaton, that his videotaped statements to the police were exculpatory, and that he was unfairly charged and prosecuted because he was the "Yankee" from New Jersey and the real killer, Danny Wade England, was "the son of McDowell County." (*Appellant's Brief, p. iii*)

While appellee's counsel recognizes the important role of the Office of the Public Defender, he suggests that only a public defender would characterize Mr. MacPhee's statements as exculpatory. For several months after Ms. Keaton's disappearance, MacPhee continued to deny any knowledge of what had happened to her. Only when her stolen car was found, and MacPhee was identified as the person who took it to an isolated hiding place at 4 a.m. on the night of the murder, did the appellant begin to talk about her death and his efforts to conceal the evidence, including her body. (*Trial transcript, pages 261-263*)

After acknowledging that an accessory before or after the fact must be someone who was not present at the scene of the crime, the appellant's counsel makes the ludicrous statement that MacPhee was absent from the scene because he stepped outside his kitchen door just before the shot was fired that killed Ms. Keaton. According to his counsel, he then was forced at gunpoint to assist the killer. The real facts of the case strip those claims of any credibility.

About two years before her death, Lori Ann Keaton came to McDowell County, West Virginia, from Michigan with a female friend to look at some real estate that they

had found on the internet. She decided to buy the home and move to West Virginia. She and her husband, Jeffrey Tallman, divorced in Michigan and she married James Keaton shortly after moving to McDowell County. For \$10,000.00, she and Mr. Keaton purchased the house at Hensley Hollow that they sold to the appellant and his wife in early December, 2002, for \$18,500.00. When Ms. Keaton was murdered in the house at Hensley, the appellant was staying there alone. His wife and children were in New Jersey.

Ms. Keaton decided in late January, 2003, that she was leaving Mr. Keaton and driving to Michigan to be with her daughter, Rose Marie Meister, who was six months pregnant with Ms. Keaton's first grandchild, and to visit her son. Ms. Keaton packed her car with clothes and all of her jewelry and had with her Tonka, her beloved dog who was her constant companion. *(Trial transcript, pages 96-113)*

She was known to carry several thousand dollars in cash with her. There was evidence presented through the testimony of a mutual friend, Belinda Carr, that Ms. Keaton had been pressuring Danny England to give her several thousand dollars that he had been holding for her. Ms. Carr also said that Ms. Keaton and Danny England were expected to attend a birthday party for Karen Clark, operator of a Welch tavern called Elkhorn Street Lounge, the evening of January 30, 2003, before Ms. Keaton was to leave to go to Michigan. Neither Ms. Keaton nor Mr. England made it to the party. *(Trial transcript, pages 608-623)*

Ms. Keaton's daughter, Ms. Meister, testified that she last talked with her mother by telephone on January 29, 2003, at which time she asked her to make a medical

appointment and motel reservations in Michigan for the following few days. Ms. Meister never talked with or saw her mother again. (*Trial transcript, pages 105, 106*)

On January 31, 2003, Ms. Keaton's dog, Tonka, jumped into Omelet Shoppe employees' maintenance van just off the interstate at Salem, Virginia, which is a two-and-a-half hour drive southeast of McDowell County, West Virginia. An animal control officer was called to take possession of Tonka. When he called a veterinarian's telephone number that was on Tonka's collar, he was directed to Ms. Keaton's relatives. Her ex-husband, Mr. Tallman, drove immediately to Salem, Virginia, to get Tonka. (*Trial transcript, pages 382-385*)

When the appellant was questioned in late February, 2003, about Ms. Keaton's disappearance, he claimed to know nothing about it. He later told police that he believed she was planning to drive to Georgia, a trip that would have taken her through Salem, Virginia.

The first big break in the investigation occurred on April 29, 2003, when a turkey hunter alerted a sheriff's deputy to a shallow grave in a remote area above the Wilmore Dam, a site approximately 10 miles from the appellant's home at Hensley. State police investigators and their "Crime Scene Response Team" quickly responded to this report and combed the area for possible evidence. They located a belt buckle and coat that were identified by Mr. Keaton as his wife's. They also recovered hair that matched her hair color and pieces of denim material similar in color to the bluejeans that Ms. Keaton normally wore.

On May 8, 2003, again acting in response to a tip from a private citizen, police went to the home of Kenny Wood, a reclusive person who lives in a secluded area known

as Westchester Hollow, which is described as "one hollow over" from Hensley Hollow where the appellant was living. Police found Ms. Keaton's car covered with a tarp at Wood's residence. The license plate and other items, including the speakers from the doors, had been removed.

Mr. Wood is uneducated but very observant and cautious. Concerned about why this man would bring the car to his home at 4 a.m. in the middle of the winter, Wood told police that he had written down the license plate number before it was removed by the appellant and that he wrote the appellant's name and telephone number on the kitchen wall in his home. He further told police that the appellant gave him a shotgun that had been in the car and asked him not to tell anyone about the car. (*Trial transcript, pages 175-199*)

The appellant, according to Wood, removed all of the personal property from the car. Investigators obtained the note on which Wood recorded the license plate number and photographed the wall on which he wrote Tom MacPhee's telephone number. The numbers recorded by Wood matched the true license plate number of Ms. Keaton's car and the telephone number of MacPhee.

On May 13, 2003, state police officers Bruce Rogers and Tim Bradley traveled again to the appellant's home at Hensley to see if he had returned from New Jersey. The appellant's son advised them that his parents had gone to the store and would return soon. The officers waited there for MacPhee and then confronted him with the developing evidence. He continued to deny knowledge of Ms. Keaton's disappearance until they had Kenny Wood brought to his home where he identified MacPhee as the person who concealed the car to his home.

MacPhee then began to talk after being *Mirandized* and agreed to have the interviews videotaped. He first told police that he was home at Hensley when Danny England pulled up in his car the evening of January 30, 2003, and got out carrying the body of Lori Keaton wrapped in a blanket. He then changed his story to state that both Mr. England and Ms. Keaton arrived at his home that evening in separate cars. He stated that he knew she had been pressuring England to return her money even though England had told her that MacPhee was with him when he returned the money. England had told the police that Ms. Keaton was too drunk at the time to remember meeting with him and MacPhee and getting her money back.

In his statements on May 13 and May 14, 2003, MacPhee said that both England and Keaton entered his home and continued to argue about the money. MacPhee then claimed that just after he stepped outside his kitchen door he heard a shotgun blast. When he stepped back into the kitchen, England was standing over Ms. Keaton's body with a shotgun in his hands. When pressed about where the shotgun came from, the appellant said that it just happened to be placed inside his kitchen door.

Despite appellant's counsel's assertions to the contrary, there was no evidence from MacPhee or anyone else that he decided not to call 911 to request aid for Ms. Keaton because of threats from England. In addition, there was no evidence or claim by the defendant that his actions immediately after the murder were in response to threats or fear.

When Lt. Bradley asked MacPhee to point out exactly where Ms. Keaton was when she was shot, he pointed to a specific area of the kitchen floor near the doorway between the kitchen and the living room. The "Crime Scene Response Team" then

removed that section of the linoleum flooring and had it sent to the forensic laboratory where a chemist detected the presence of blood. DNA from the blood later matched the known DNA of Lori Keaton.

Immediately after Ms. Keaton's death, MacPhee, by his own admissions, got a roll of plastic from a storage building and pulled her body out of the house. He then used towels and "Formula 409" cleaner to clean the kitchen floor. After wrapping her body in the plastic and using rope and duct tape to secure the covering, he and England loaded her body into the back of his Jeep Wrangler, from which he had removed the back seat.

Ms. Keaton's body was driven under cover of darkness to the remote area at Wilmore where the appellant concealed it with rocks and sticks. He then returned home to take her car to Westchester Hollow where he concealed it with a tarp after removing Ms. Keaton's personal effects. Two young men who were camping nearby saw the car go up to Kenny Wood's home while someone in a black Jeep Wrangler waited at the bottom of the hill. (*Trial transcript, pages 515-525*)

On May 14, 2003, state police recovered the "rolled up" license plate from Ms. Keaton's car in MacPhee's yard after examining the burn pile in which MacPhee had burned Ms. Keaton's clothing.

The appellant told the police that he and England first discussed killing Ms. Keaton's dog but MacPhee decided to drop him off at Salem, Virginia, the day after she was murdered in order to mislead her family and investigators.

While he was incarcerated at the Southwestern Regional Jail, MacPhee confided in fellow inmate Jerry Massey that he and England had robbed Ms. Keaton and disposed of her body in an old coal mine shaft so that it would never be found. That evidence was

significant at trial because MacPhee told police that he and England attempted to do that but the car they were in would not make it over the rough terrain to reach the mine shaft.

MacPhee admitted that he continued his friendship with Danny England after the murder. Telephone records confirmed that they continued to call each other on a regular basis. MacPhee told police that he traded or sold his shotgun to a stranger at a flea market. Police learned in the middle of May, 2003, that the shotgun had actually been sold in April, 2003, by MacPhee to Melvin Bolden, an elderly man who lived a short distance from MacPhee's home at Hensley.

After the recovery of the physical evidence at Wilmore on April 29, 2003, and the car on May 8, 2003, and the May 13 and 14 interviews of MacPhee, state police arrested both MacPhee and Danny England for the murder of Lori Keaton and the theft of her car. The McDowell County Grand Jury indicted both of them for murder, grand larceny and conspiracy to commit murder.

With the case against England resting largely on MacPhee's statements, the state offered a plea agreement under which MacPhee would have been allowed to plead guilty to second degree murder in exchange for his testimony against England. MacPhee rejected the offer and said he would not testify against England. Hoping that MacPhee would change his mind if his appeal were not successful, the state moved the circuit court to dismiss without prejudice the indictment against England, which motion the court granted.

In the past year, both Danny England and James Keaton, the victim's husband, have died from illness. In addition, Duke King, the man who introduced Lori Keaton to James Keaton, died from what appeared to be a self-inflicted gunshot wound.

## **TABLE OF AUTHORITIES**

**State v. Bradford, 199 W. Va. 338, 484 S.E.2d 221 (1997)**

**State v. Fortner, 182 W. Va. 345, 387 S.E.2d 812 (1989)**

**State v. Garrett, 195 W. Va. 630, 466 S.E.2d 481 (1995)**

**State v. Guthrie, 194 W. Va. 657, 461 S.E.2d 163 (1995)**

## DISCUSSION OF LAW

### **EVIDENCE WAS SUFFICIENT TO CONVINCING REASONABLE PERSON OF DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT.**

Even though their reference was very brief, appellant's counsel correctly pointed out that they have a tough hill to climb to convince this Court that the state's evidence was insufficient to support the convictions for murder of the first degree and conspiracy to commit murder. The standard of review that this Court must apply was clearly established in State v. Guthrie, 194 S.E.2d 657, 668, 461 S.E.2d 163, 174 (1995):

Our function 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.

Observing that the Court in Guthrie "has some doubt as to whether this is a first degree murder case," the Court held, "It makes absolutely no difference whether we on the appellate bench as jurors would have voted to convict the defendant of a lesser-included offense or whether we would have thought there was some reasonable doubt." Id., 194 S.E.2d at 670, 461 S.E.2d at 176. The Court held that the jury's verdicts should be respected and affirmed unless there is no evidence upon which verdicts of guilty beyond a reasonable doubt could be based. (*Syllabus Point 2*)

The Guthrie opinion is also important in the consideration of the case at bar because the Court clearly held that circumstantial evidence is as valuable as direct evidence and does not have to exclude every other reasonable hypothesis.

Contrary to the argument of the appellant, the state presented at trial a great deal of direct and circumstantial evidence, obtained before and after the appellant was interviewed by the police, that would convince a reasonable person that Lori Ann Keaton was murdered on January 30, 2003, and that her murder was the result of the concerted action of Thomas Joseph MacPhee and Danny Wade England.

The appellant contends in his brief that he was merely an accessory after the fact to the murder of Lori Keaton. This argument is easily overcome by the clear holdings of this Court in State v. Bradford, 199 W. Va. 338, 484 S.E.2d 221 (1997), and State v. Fortner, 182 W. Va. 345, 387 S.E.2d 812 (1989), that an accessory after the fact is someone who was not present at the crime scene. MacPhee was clearly at the scene of the murder of Ms. Keaton which took place in the kitchen of his home based on the DNA evidence, MacPhee's admissions and the concealment of her stolen car in the adjacent hollow.

In both Bradford and Fortner, *supra*, this Court explained the differences between accessories and principals in the first and second degree. The bottom line is that accessories before or after the fact are persons who are not present at the crime scene. Principals in the second degree are persons who are present at the crime scene and aiding and abetting the commission of the crime.

"Proof that the defendant was present at the time and place the crime was committed is a factor to be considered by the jury in determining guilt, along with other circumstances, such as the defendant's association with or relation to the perpetrator and his conduct before and after the commission of the crime," the Court held in Fortner (*Syllabus Point 10*)

The Court further explained in Fortner that under the “concerted action principle” an accused who is present at the crime scene and by acting with another person “contributes to the criminal act” is as guilty of the offense as the principal in the first degree. (*See Syllabus Point 11*)

In addition, the contentions of the appellant that his statements were exculpatory and that no independent evidence was presented to contradict his exculpatory claims are without merit. His statements clearly place him at the scene of the crime. He specifically directed the police to small area where blood with the victim’s DNA was detected. He led the police directly to the remote area where her body had been concealed after he removed it from the crime scene. In that area, the police had already found the victim’s belt buckle, coat and hair, along with blood-stained bluejean material that had DNA matching the victim’s.

There are obvious reasons why the appellant is not challenging his grand larceny conviction and hardly mentions some of the most damaging evidence in the case. At 4 a.m. the night of the murder, the appellant drove the victim’s car to Westchester Hollow and hid it at Kenny Wood’s home. He then gave the victim’s shotgun to Wood to keep him quiet and removed all of the personal property from the car before removing the license plate and burying it in his yard.

Can it be argued in good faith that no rational trier of fact could conclude beyond a reasonable doubt that the appellant was a principal actor in the murder of Lori Keaton? She was murdered in his home. He immediately removed her body and wrapped her plastic from his storage building. He immediately cleaned the crime scene with Formula 409 and burned her clothes in the yard. Having already removed the back seat from his

Jeep, he transported her body to the remote area near Wilmore where he concealed the body. The very next day he drove the victim's beloved dog, Tonka, to Salem, Virginia, where he put him out to deliberately mislead her family and the police into believing she had made it that far and met with foul play in another state.

This Court affirmed the murder conviction in State v. Garrett, 195 W. Va. 630, 466 S.E.2d 481 (1995), despite the argument of the appellant that his admissions were not corroborated by independent evidence. As in the case at bar, the state had presented strong circumstantial evidence to sufficiently substantiate the defendant's statement that the victim had been shot to death. Only skeletal remains of the victim were found in the Garrett investigation.

Recognizing that the state must rely on more than a defendant's "uncorroborated extrajudicial confession or admission", this Court said in Garrett, "We hold, therefore, that the corpus delicti may not be established solely with an accused's extrajudicial confession or admission. The confession or admission must be corroborated in a material and substantial manner by independent evidence. The corroborating evidence need not of itself be conclusive but, rather, is sufficient if, when taken in connection with the confession or admission, the crime is established beyond a reasonable doubt." Id., 195 W. Va. at 641, 466 S.E.2d at 492.

In the case at bar, the state clearly proved that Lori Keaton disappeared on January 30, 2003. She has not been seen or heard from since that date. Even though she had thousands of dollars in her bank account, she never made any attempt to access that money after January 30, 2003. Her belt buckle, coat and large amounts of her hair were found at a shallow grave site on April 29, 2003. Blood found on denim material at that

site was found to contain her DNA. Her stolen car was found on May 8, 2003, hidden under a tarp at Kenny Wood's home by the appellant who removed her personal effects and her license plate. Blood with her DNA was detected on linoleum taken from the appellant's kitchen floor. Her beloved dog, Tonka, who was her constant companion, was found in Salem, Virginia, on January 31, 2003.

All of that evidence convincingly corroborated the appellant's admissions.

### **CONCLUSION**

The State of West Virginia, the appellee herein, respectfully asks this Honorable Court to affirm the jury's verdicts convicting the appellant of murder of the first degree, with a recommendation of mercy, grand larceny and conspiracy to commit the murder of Lori Ann Keaton.



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**CERTIFICATE OF SERVICE**

I, Sidney H. Bell, Prosecuting Attorney of McDowell County and counsel for the appellee in State of West Virginia v. Thomas Joseph MacPhee, Appeal No. 33297, hereby certify that a true copy of the appellee's brief was served upon counsel for the appellant by depositing said copy into the United States mail, postage prepaid, addressed to his counsel of record, E. Taylor George and Robert C. Catlett, Assistant Public Defenders, P. O. Box 2827, Charleston, WV 25330-2827, on this the 6<sup>th</sup> day of April, 2007.



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