

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THOMAS MacPHEE,

Appellant,

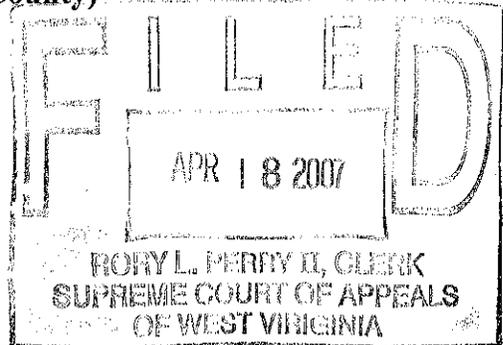
v.

Supreme Court No. 062264

**Circuit Court No. 03-F-153(M)
(McDowell County)**

STATE OF WEST VIRGINIA,

Appellee.



REPLY BRIEF OF APPELLANT

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POINT ONE: THE STATE HAS FAILED TO ADDRESS THE LAW OF EXCULPATORY STATEMENTS, THUS *SUB ROSA* CONCEDED THE LAW SUPPORTS MR. MacPHEE (Responding to State's Brief, 8 – 12)

The State has failed to address the considerable law provided to this Court by Mr. MacPhee, discussing the law of exculpatory statements. It instead discounts the situation by claiming Mr. MacPhee's statements are not exculpatory. State's Brief (SB) at 1. This is false and deficient for several reasons:

1. The legal definition of "exculpatory" is "evidence that is favorable to the accused." United States v. Bagley, 473 U.S. 667, 676 (1985). This is well-settled law. Sometimes, whether a statement is exculpatory might be a question on which reasonable minds could disagree. Mr. MacPhee's statement is not such a case. He said emphatically he did not kill Ms. Keaton, he had no idea Mr. England was going to kill her or commit any other crime, and he was not present at the moment Mr. England killed Ms. Keaton. *See generally*, States Exhibits 4, 5, 6, and 7, Tr. 489-491, 506. A statement a person was not involved in the commission of a crime is as exculpatory as a statement can possibly be. The Prosecuting Attorney's claim that this statement is not exculpatory is without merit.
2. The Prosecuting Attorney engages in this meritless argument and fails to address the law (and the concordant deficiencies in his proof provided at trial) provided by Mr. MacPhee to this Court. Appellant's Brief at 9 – 13. That proposition is simple: "[i]f 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." Black v. State, 21 P.3d 1047, 1062 (Okla. Crim., 2001); *accord* State v. Hurst, 93 W.Va. 222, 116 S.E. 248 (1923).

3. By failing to address the law on this issue, the State has *sub rosa* conceded the issue to Mr. MacPhee: the Prosecuting Attorney went out of his way to introduce into evidence Mr. MacPhee's statements, and then failed to provide any evidence to show the statement was false. He relied on a negative inference from the statement instead of providing evidence of the elements of the offense.

4. The following elements were not addressed in evidence by the Prosecuting Attorney, other than a negative inference from Mr. MacPhee's statements¹:

<u>#</u>	<u>Elements of Murder</u>	<u>Mr. MacPhee's Statement</u>	<u>Refuting Evidence</u>
	Ms. Keaton killed by Mr.		
1	MacPhee	Mr. England killed her	NONE
2	Presence at killing	He was outside the home	NONE
3	Premeditated killing	He did not know what Mr. England was going to do	NONE

<u>#</u>	<u>Elements of Conspiracy</u>	<u>Mr. MacPhee's Statement</u>	<u>Refuting Evidence</u>
1	Agreement with Mr. England	No agreement	NONE
2	Agreement before murder	No prior knowledge of crime	NONE

5. Beginning on page ten (10) of the State's Brief, the Prosecuting Attorney begins a long list of "facts"² that are intended to show that Mr. MacPhee's statements are not exculpatory and there was independent evidence to refute them.³ The insurmountable problem the Prosecuting

¹ The failure of a single element is all that is necessary for this Court to reverse. *State v. Fiske*, 216 W.Va. 365, 367, 607 S.E.2d 471, 473 (2004); *State v. Houdeyshell*, 174 W.Va. 688, 692, 329 S.E.2d 53, 57 (1985).

² Mr. MacPhee would note that these "facts" cited by the Prosecuting Attorney are highly suspect, and should be refused by the Court, as discussed more fully in Point Two below.

³ The State discusses Mr. MacPhee's participation in the Grand Larceny – an offense not appealed here. SB at 10. All of this occurred after the murder of Ms. Keaton by Mr. England and do not implicate Mr. MacPhee in that event. It also points out that Ms. Keaton was killed in Mr. MacPhee's home, but neglects to point out that all evidence shows that she came there alone of her own accord; that there is nothing showing Mr. MacPhee had prepared for her arrival. *Id.*

Attorney faces is that none of these “facts” address the above elements. They may show post-event knowledge of what had happened to Ms. Keaton, but they in no way address the critical hole in his evidence: the fact that in order for the State to prevail, the Prosecuting Attorney must show prior knowledge and assent between Mr. England (the murderer) and Mr. MacPhee. Not a single “fact” given shows that Mr. MacPhee had any idea that Mr. England intended any crime directed at Ms. Keaton prior to his arrival back inside the home to find her dead and Mr. England pointing a shotgun at him, demanding cooperation. All that the Prosecuting Attorney has is suspicion, suggesting that, since these events occurred after Mr. England murdered Ms. Keaton, we can assume Mr. MacPhee’s complicity prior to the murder. These “facts” do not disprove or explain Mr. MacPhee’s statements.

6. This is precisely the kind of misconduct this rule is intended to prevent; replacing fact with suspicion and calling on the jury to reject the defendant’s statement out of hand, to his prejudice. State v. Hurst, 93 W.Va. 222, 116 S.E. 248 (1923). 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). For this failure by the Prosecuting Attorney to produce evidence, the case must be reversed.

It points out his assistance to Mr. England in concealing the body, but neglects to show that this was done at the point of Mr. England’s shotgun, or that Mr. England apparently moved the body later without Mr. MacPhee’s knowledge, thus suggesting he was not considered a willing participant by Mr. England. SB at 10-11. He points out that Ms. Keaton is missing, a fact not in dispute. SB at 11. Finally, he makes statements about the DNA and hair of Ms. Keaton that are blatantly false. SB at 11-12; see Point Two below. None of these “facts” show how Mr. MacPhee had any participation in this murder or any agreement until AFTER Mr. England had already killed Ms. Keaton. These “facts” do not contradict Mr. MacPhee.

POINT TWO: THE STATE HAS IMPROPERLY INTERJECTED EXTENSIVE INFORMATION INTO ITS BRIEF NOT SUPPORTED BY THE RECORD OF TRIAL AND SHOULD BE DISREGARDED BY THIS COURT (Responding to State's Brief, 1 – 7)

The State provides extensive factual material in its brief not in evidence, being wildly twisted out of context, or provided without citation to the record of trial. These should be disregarded for several reasons:

1. The Prosecuting Attorney has continued his misconduct from Mr. MacPhee's trial by repeating in this court what he did in closing arguments: testifying himself and placing alleged "facts" before this Court that are unsupported by the record, in an improper attempt to convince this Court Mr. MacPhee is a bad actor, and thus, he should not be granted relief on appeal, regardless of the law. *See generally*, Tr. 732-767. In numerous places, the Prosecuting Attorney provides "facts", but does not provide citations to the record for them, making it virtually impossible for Mr. MacPhee and this Court to distinguish between matter not in the record and matter negligently not cited to the record.⁴ The entire thrust of the Prosecuting Attorney's brief is to cite little law, have no support for "facts" cited, and provide nothing addressing the law provided by Mr. MacPhee.

2. It is well-settled law in West Virginia that anything not contained within the record cannot be considered by this Court on appeal. *See, e.g., Pearson v. Pearson*, 200 W.Va. 139, 146 FN4, 488 S.E.2d 414, 421 FN4 (1997) (Davis, J.) (Supreme Court of Appeals will not consider evidence which was not in the record before the circuit court); *Proudfoot v. Proudfoot*, 214

⁴ This Court and Mr. MacPhee should not be required to canvass the record to locate items mentioned but not cited when the Prosecuting Attorney has failed to do so. This is basic legal writing and is reasonably expected of all attorneys.

W.Va. 841, 846, 591 S.E.2d 767, 772 (2003) (Maynard, J.), *citing* State v. Bosley, 159 W.Va. 67, 218 S.E.2d 894 (1975) (“The appellate review of the ruling of a circuit court is limited to the very record there made and will not take into consideration any matter which is not part of that record.”); Chandos, Inc. v. Samson, 150 W.Va. 428, 432, 146 S.E.2d 837, 840 (1966) (“This Court cannot, in the disposition of a case before it, consider anything which is not contained in the record.”).

3. Mr. MacPhee has been able to determine some items are completely outside the record, while he is unable to verify other alleged “facts”. These have been virtually impossible for counsel to locate in the six-inch thick record without citation by the Prosecuting Attorney. As Justice Albright and Chief Justice Davis have remarked from the bench recently, items that cannot be found in the record by the Court are useless. Michael Worley, et al. v. Beckley Mechanical, Inc., et al., No. 33190, 13 March 2007; Carole E. Damron Shortt v. Frederick Cecil Damron, No. 33185, 4 April 2007. It is easy to claim their presence, but impractical in the least to verify. Failure to address these “facts” within the record should result in their being disregarded by this Court. *Cf.* State v. Conrad, 167 W.Va. 906, 910, 280 S.E.2d 728, 731 (1981); Merrill v. West Virginia Dept. of Health and Human Resources, 219 W.Va. 151, 632 S.E.2d 307, 316 (2006).

4. Throughout his brief, the Prosecuting Attorney provides “facts”, but rarely cites to the record.⁵ They should be disregarded. The following “facts” are a non-exhaustive list of those improperly provided:

<u>#</u>	<u>"Fact"</u>	<u>Page of State's Brief</u>
1	Ms. Keaton's manner of arrival in West Virginia	1 - 2
2	Ms. Keaton was known to carry several thousand dollars	2
3	Mr. MacPhee's statements about trip to Georgia	3
4	Recovery of hair at gravesite	3
5	Statement showing location on floor of kitchen	5
6	DNA match with Ms. Keaton* ⁶	5-6
7	Cleanup of crime scene	6
8	Burn pile was where Mr. MacPhee burned Ms. Keaton's clothing	6
9	Mr. MacPhee's statement about car	7
10	Telephone records	7
11	Offer of plea bargain*	7
12	Sale of shotgun	7
13	Mr. England's death*	7
14	Mr. Keaton's death*	7
15	Mr. King's death*	7
16	Hair from gravesite matched to Ms. Keaton* ⁷	11
17	DNA match with Ms. Keaton* ⁸	12

⁵ Those items Mr. MacPhee is reasonably certain are outside the record or are clearly false are marked with an asterisk. As the record was received in a disorganized fashion, and the Prosecuting Attorney has not provided citations to the record, it is impossible to be certain, but Mr. MacPhee has made a good-faith review of the record in an attempt to discern between items negligently not cited and those that are completely outside the record.

⁶ See Footnote 7, below.

⁷ This item is clearly erroneous. The State's expert witness from the West Virginia State Police Laboratory testified that no testing was done on any of the recovered hair to compare it with Ms. Keaton. Tr. 552, 556.

⁸ This item is also a false statement by the Prosecuting Attorney. It was testified by the State's own independent expert at trial that the DNA found at the home where she had previously lived and at the gravesite was a match not only with Ms. Keaton, but also numerous other members of her family, including her daughter and all other female relatives. Tr. 574, 581.

5. In his brief, the Prosecuting Attorney goes out of his way to provide a “closing argument” to this Court, describing all the bad acts Mr. MacPhee is alleged to have done. What he fails to point out is that most of this was done under threat of death from Mr. England and none of it supports any conclusion other than an accessory after-the-fact, as it all is post-shooting; none of the evidence addresses anything happening before Mr. England murdered Ms. Keaton, nor provides anything to show Mr. MacPhee conspired with Mr. England prior to the murder. *See generally*, States Exhibits 4, 5, 6, and 7, Tr. 489-491, 506. The facts do not support the Prosecuting Attorney. The case must be reversed.

**POINT THREE: THE STATE'S DEFINITION OF "PRESENCE" IS
WITHOUT MERIT AND CANNOT SUSTAIN ITS
POSITION (Responding to State's Brief, 1, 9 – 10)**

The State claims Mr. MacPhee was present at the murder of Lori Keaton, by ignoring the simple definition of the word "presence". This is wrong for several reasons:

1. The State states it cannot be claimed Mr. MacPhee was not present when Ms. Keaton was murdered by Mr. England, because the act of departing the room where Mr. England and Ms. Keaton were arguing and going outside the home did not end his presence. The State provides no law to support its position.
2. This Court has defined "presence" in a similar context as "only when he sees it with his own eyes, or sees one or more of a series of acts constituting [the] offense, and is aided by his other senses or by information as to the others, when it may be said the offense was committed in his presence." State v. Forsythe, 194 W.Va. 496, 499, 460 S.E.2d 742, 745 (1995) (discussing offenses committed in the presence of a police officer) (internal citations omitted).
3. Further, the intent of the person must also be considered. Common sense suggests that when a person determines that his presence is unwise and walks away, once he has departed view, he is no longer present. To hold otherwise would attach liability to those who, sensing something is about to occur that they do not wish to be associated with, and attempt to separate themselves from it, terminate their presence.
4. With this definition in mind, Mr. MacPhee's assertion he was not present must prevail. He had departed the living room, where Mr. England and Ms. Keaton were arguing, moving outside the home where he was no longer able to see them. *See generally*, States Exhibits 4, 5, 6, and 7, Tr. 489-491, 506. At the moment he could no longer see them, no criminal acts had occurred. *Id.* He had no desire to be connected with Ms. Keaton and Mr. England's argument

and had no idea that either Mr. England or Ms. Keaton intended a criminal act toward the other. He simply was uncomfortable with the situation and desired to distance himself from it – a not uncommon reaction. *Id.* No evidence has ever been produced to show otherwise.

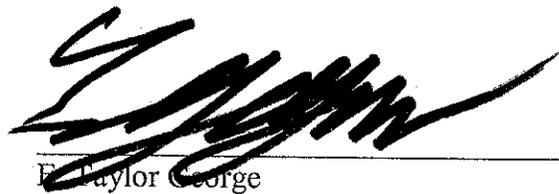
5. Without Mr. England or Ms. Keaton being in view of Mr. MacPhee, he does not meet the definition of presence, because, even though he sensed the shotgun blast by hearing, he did not observe any part of the crime until it had already been completed. Again, no evidence had ever been produced by the State to prove otherwise. The State's contention is without merit.

RELIEF REQUESTED

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

Respectfully submitted,

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By Counsel



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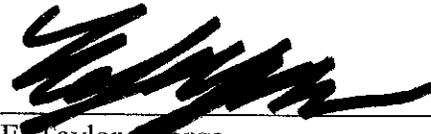
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CERTIFICATE OF SERVICE

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



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