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NO. 35041

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

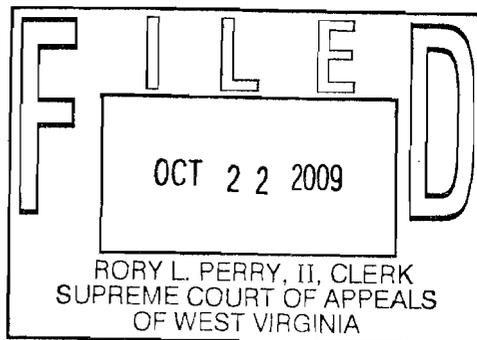
STATE OF WEST VIRGINIA,

*Appellee,*

v.

RAYMOND ELSWICK,

*Appellant.*



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BRIEF OF APPELLEE, 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**

This is an appeal by Raymond Elswick (hereinafter “Appellant”) from the December 29, 2008, order of the Circuit Court of Roane County (Evans, J.), which sentenced him to a term of life in the State penitentiary due to two previous felony convictions in accordance with West Virginia Code § 61-11-18 upon his conviction by a jury of one count of voluntary manslaughter in violation of West Virginia Code § 61-2-4. On appeal, Appellant claims that the circuit court committed various errors, denying him a fair trial.

II.

**STATEMENT OF FACTS**

The events of this case involve the beating death of Mr. Daniel Burns by Appellant, Joey Hicks, and Crystal Hicks on the evening of May 26, 2005. On the night in question, the victim,

Appellant, Joey Hicks, Crystal Hicks, Ms. Hicks' mother, and the four Hicks children were at the Hicks' residence in Spencer.<sup>1</sup> (Tr., 347, July 9, 2008.) The purpose of these people being at the Hicks' house was helping them remodel their home. (*Id.* at 348-49.) At some point during the evening, Crystal Hicks walked in a room and witnessed Mr. Burns putting his hands up her daughter's shirt and down her pants. (*Id.* at 349.) At this point, Ms. Hicks started yelling, grabbed Daniel Burns and started pushing him toward the front door. (*Id.*)

Upon hearing Ms. Hicks' yelling, Appellant and Mr. Hicks came in the room. Joey Hicks struck the victim in the face with his fist and knocked the latter out. (*Id.* at 351.) Ms. Hicks testified that she then obtained a bucket of water and dumped it on Mr. Burns so as to wake him up and get him out of the house. (*Id.*)

Jeffery Matthews, a neighbor, heard a child scream and went to his front porch. There, he witnessed Appellant, Joey Hicks, and Crystal Hicks kicking a man at 511 Market Street. (*Id.* at 266.) Mr. Matthews testified that he heard them screaming, "get off my f—ing porch!," while they continued to kick the victim. (*Id.* at 266.) He stated that he saw all three of these people kicking Mr. Burns, primarily in his upper body area. (*Id.* at 267.) With respect to Appellant, Mr. Matthews testified that he heard the latter yelling, "Get up man. Get off these people's porch." (*Id.* at 268.) He said that all three were kicking Mr. Burns for approximately 15 to 20 minutes. (*Id.*) Eventually, Joey Hicks dragged Mr. Burns into his front yard and proceeded to kick him in the upper body and head for about two to three minutes. At some point during this time, Appellant went to the front yard

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<sup>1</sup>Mr. Harry Reger was also at the Hicks' house but left earlier around 10:00 p.m. (Tr., 294-95, July 9, 2008.)

and kicked the victim either in the leg or upper body. (*Id.* at 270-71.) Then Mr. Matthews witnessed Joey Hicks dragging the victim into a green Ford Escort station wagon. (*Id.* at 271.)

Ms. Hicks testified that this vehicle was her car and that Joey Hicks and Appellant placed Mr. Burns in it. (*Id.* at 353.) Ms. Hicks stated that Lieutenant Roger Simons and Officer William Jeffries of the Spencer City Police Department arrived, and she and her husband got out of the vehicle without the policemen seeing the victim and spoke with them. They told the police officers what Mr. Burns had done and that the latter had left. (*Id.* at 356.) Once the officers spoke with the Hicks, they got in the cruiser and tried to find Mr. Burns. (*Id.* at 339.) While doing this, another dispatch was received regarding the fight that took place. In light of this, Lieutenant Simons and Officer Jeffries returned to Market Street, but the Hicks' and their vehicle were no longer there. (*Id.* at 229-40.) According to Ms. Hicks, she was in the driver's side, Mr. Hicks was in the front passenger side, Appellant was in the back passenger seat, and Mr. Burns was in the hatch. (*Id.* at 355.) At this point, the three of them went down the road with the victim in the hatch. (*Id.* at 357-58.)

While Ms. Hicks was driving, Mr. Burns regained consciousness. Ms. Hicks asked him why he was touching her daughter and what he was thinking. In response, Mr. Burns laughed and gave her his middle finger. (*Id.* at 359.) When Mr. Burns did this, Appellant hit him four or five times. (*Id.*) Mr. Burns then lost consciousness again. (*Id.* at 360.) Ms. Hicks testified that at this point, she wanted to take Mr. Burns back to his residence and file charges against him. However, her husband made her drive on Route 33 toward Lions Fork. (*Id.* at 361.) She drove to an area where there were two cabins, and Joey Hicks told her to stop the car. (*Id.* at 363.) Ms. Hicks got out of the vehicle, and Joey Hicks and Appellant took the victim outside and began beating him again. (*Id.* at

363.) She testified that at this time Joey Hicks was kicking and stomping Mr. Hicks and Appellant was kicking and hitting him. (*Id.* at 364.) After that, Joey Hicks and Appellant cut off one of Mr. Burns' fingers with a knife. (*Id.* at 366.) She testified that Appellant then held the finger up, looked at it and threw it in a field. She stated that they then burned the remaining part of the finger with a lighter in order to stop the bleeding. (*Id.*) Ms. Hicks testified that after Appellant hit Mr. Burns approximately four to five times in the car, the victim no longer responded to any more of the beating. (*Id.*) They put the victim back in the car to take him to his residence, and that is when they discovered he had died. (*Id.* at 367-68.) Ms. Hicks then drove down Lick Fork, they stopped again and Joey Hicks and Appellant got rid of the body by dumping it in a creek. (*Id.* at 368-69.)

The West Virginia State Police began an investigation. According to Sergeant John Elmore, Crystal Hicks pointed out the area to him where Mr. Burns' body could be found. (*Id.* at 392.) The sergeant found a red substance from the road when he removed some hay from the location, and he then notified the crime scene unit. (*Id.* at 393.) On May 27, 2005, Lieutenant Simmons, Corporal Grover Anderson and Police Chief Gary Williams of the Spencer Police Department conducted an investigation. (*Id.* at 396.) They went to the Hicks' residence, and Joey Hicks directed them to where the body could be found. (*Id.* at 398.) The officers went down to Lick Fork and found Mr. Burns' dead body in a culvert. (*Id.* at 398-99.)

An autopsy was conducted on May 30, 2006, by Dr. Nabila Haikal, First Deputy Chief Medial Examiner of the State of West Virginia. (Tr., 464, July 10, 2008.) Dr. Haikal testified that she discovered several soft tissue injuries to Mr. Burns' forehead region and cheeks. (*Id.* at 469.) She found an imprint pattern in Mr. Burns' cheeks that would resemble the imprint of a sole of a shoe. (*Id.* at 469-70.) She discovered a tear in his nose and lip. (*Id.* at 471.) There was also a

missing upper front tooth. (*Id.* 472.) The medical examiner also testified that she discovered a bruise on the top of the victim's head. (*Id.* at 473.)

She stated that she found a small tear on the left wrist and hand region. (*Id.* at 473.) There were also small tears on the back side of the left hand. (*Id.* at 474.) Dr. Haikal stated that part of the small finger on the left hand was missing. (*Id.*)

With respect to the torso, Dr. Haikal found abrasions on the lower chest and upper abdomen. (*Id.* at 477.) There was also evidence of rib fracture. (*Id.*) The left lung had an area of bruising. (*Id.* at 478.) She stated that there was an area of scraping and bruising on the right upper back near the arm pit. (*Id.* at 479.) There were also bruises and scrapes on the mid to upper back region.

On the upper thigh and buttocks region, there was also evidence of scrapes and bruising. (*Id.* at 480.) There were also scrapes to the lower legs. (*Id.* at 481.)

Internally, the medical examiner found bruising on the inside of the scalp and on the surface of the brain. (*Id.* at 482.) There was also bruising to the soft tissue around the left kidney. (*Id.* at 484.) Dr. Haikal testified that the victim's nose was fractured. (*Id.* at 483.) Dr. Haikal testified that the cause of death was multiple blunt force injuries to the body, the most fatal being the internal injuries to the brain. (*Id.* at 484.) The death certificate listed the cause of death to be blunt force injury to the head, trunk and torso. (*Id.* at 489-90.)

On July 11, 2008, the jury convicted Appellant of voluntary manslaughter. (Tr., 877-78, July 11, 2009.)

### III.

#### **RESPONSE TO ASSIGNMENTS OF ERROR**

Appellants' assignments of error are quoted below, followed by the State's responses:

- A. The Trial Court Erred on July 20, 2007, in Denying Elswick's Motion to Dismiss Based upon Double Jeopardy When the Prosecuting Attorney Caused a Mistrial by Commenting on the Fact That Elswick Did Not Testify Violating Elswick's Constitutional Privilege Against Self-incrimination.
- B. The Trial Court Erred on July 8, 2008, in Denying Elswick's Renewed Motion to Dismiss Based upon Double Jeopardy When the Prosecuting Attorney Caused a Mistrial by Commenting on the Fact That Elswick Did Not Testify Violating Elswick's Constitutional Privilege Against Self-incrimination.

**State's Response:**

There was no double jeopardy violation in the reprosecution of Appellant after the initial mistrial because the improper comment made by the prosecutor was not made in order to provoke such motion.

- C. The Trial Court Erred in Denying Elswick's Motion to Dismiss Based upon Prosecutorial Misconduct When the Prosecutor Did Not Disclose a Plea Agreement Entered into by the State of West Virginia and John Richards to Secure His Testimony in Violation of Rule 16 of the Rules of Criminal Procedure and *Brady*.

**State's Response:**

There was no prosecutorial misconduct in this matter, and the circuit court properly applied West Virginia Rule of Criminal Procedure 16(d)(2).

- D. The Trial Court Erred on December 10, 2007 in Denying Elswick's Request for Motion to Dismiss for Numerous and Ongoing Discovery Violations.

**State's Response:**

The circuit court did not abuse its discretion in denying Appellant's motion in this matter, and the latter has failed to properly brief this issue.

- E. The Trial Court Erred in Denying Elswick's Motion to Dismiss for Failure to Provide a Speedy Trial in Violation of the United States and West Virginia Constitutions and for Violation of the Statutory (3 Term Rule) Contained in West Virginia Code § 62-3-21.

**State's Response:**

There was no abuse of discretion on the part of the circuit court in the denial of this motion. In particular, there was no violation of the three-term rule, and Appellant was not prejudiced in his defense due to the delays.

- F. The Trial Court Erred in Denying Elswick's Motion to Dismiss for Destruction of Evidence Wherein the State Admittedly Disposed of Rule 16 Materials Without Disclosing Such Materials to the Defense Thereby Violating His Constitutional Right to Due Process of Law.

**State's Response:**

As with Appellant's argument regarding his motion to dismiss based on numerous and ongoing discovery violations, the circuit court did not abuse its discretion in denying the motion and there was no Due Process violation.

- G. The Trial Court Erred in Refusing to Give Elswick's Theory of Defense Instruction as Offered Thereby Violating His Constitutional Right to Due Process of Law.

**State's Response:**

The circuit court did not abuse its discretion in denying Appellant his defense theory instruction. When taken as a whole, the instructions given were accurate and fair to both parties.

- H. The Trial Court Erred in Refusing to Give Elswick's Jury Instruction on Battery as a Lesser Included Offense Thereby Violating His Constitutional Right to Due Process of Law.

**State's Response:**

There was no abuse of discretion on the part of the circuit court with respect to this refusal. This Court has long held that battery is not a lesser-included offense of murder, and Appellant was not entitled to have this instruction given to the jury.

- I. The Trial Court Erred in Granting the State's Motion to Continue over Objection of the Appellant on July 9, 2009 [*Sic*] Thereby Violating His Constitutional Right to Due Process of Law.

**State's Response:**

The decision to grant the State's continuance was within the sound discretion of the circuit court, and Appellant presents another argument that is not well-briefed on the issue.

- J. The Trial Court Erred in Refusing to Employ the Use of Juror Questionnaires as Requested by Elswick Thereby Violating His Constitutional Right to Due Process of Law.

**State's Response:**

The circuit court's denial of Appellant's request to utilize a jury questionnaire was no abuse of discretion. Yet again, Appellant presents another argument that is not well-briefed in an attempt to assert that the circuit court erred in this matter.

- K. The Trial Court Erred in Refusing to Grant Appellant's Motion to Dismiss the Recidivist Motion.

**State's Response:**

The circuit court did not abuse its discretion in denying Appellant's motion to dismiss the recidivist information. The State did not violate the statutory language of West Virginia Code § 61-11-19.

## IV.

### ARGUMENT

- A. **THERE WAS NO DOUBLE JEOPARDY VIOLATION IN THE DECISION TO RETRY APPELLANT A SECOND TIME AFTER A MISTRIAL. ALTHOUGH THE INITIAL MISTRIAL WAS THE FAULT OF THE STATE, THE REFERENCE THAT TRIGGERED THE MISTRIAL WAS NOT AN ATTEMPT TO PROVOKE THE MOTION BY APPELLANT.**

Appellant wrongly makes the claim that his retrial after the initial one concluded in a mistrial was a violation of the prohibition against double jeopardy. Although courts have ruled that a retrial after a mistrial could be a double jeopardy violation in rare circumstances, it requires an intent by the prosecutor to provoke the defendant into making such a motion. Although the mistrial in the first trial was solely the fault of the State, it was not a case of the prosecutor attempting to provoke a motion by Appellant. The mistrial was the result of a misstatement made by the prosecution during closing argument. The circuit court's decision to find no double jeopardy violation and retrying the case was not clearly wrong.

1. **The Standard of Review.**

But we do hold that the circumstances under which such a defendant may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial.

*Oregon v. Kennedy*, 456 U.S. 667, 679, 102 S. Ct. 2083, 2091 (1982).

When a mistrial is granted on motion of the defendant, unless the defendant was provoked into moving for the mistrial because of prosecutorial or judicial conduct, a retrial may not be barred on the basis of jeopardy principles. *Oregon v. Kennedy*, 456 U.S. 667, 679, 102 S.Ct. 2083, 2091, 72 L.Ed.2d 416, 427 (1982).

Syl. Pt. 8, *State v. Pennington*, 179 W. Va. 139, 365 S.E.2d 803 (1988).

The determination of ‘intention’ in the test for the application of double jeopardy when a defendant successfully moves for a mistrial is a question of fact, and the trial court’s finding on this factual issue will not be set aside unless it is clearly wrong.

Syl. Pt. 2, *State ex rel. Bass v. Abbot*, 180 W. Va. 119, 375 S.E.2d 590 (1988).

2. **Upon a Thorough Hearing Being Conducted on This Matter, the Circuit Court Determined That There Was No Intention on the Part of the State to Provoke Appellant to Move for a Mistrial During the Initial Trial When the Prosecutor Made an Improper Remark in Closing. Therefore, a Retrial Did Not Violate the Prohibition Against Double Jeopardy.**

Appellant wrongly asserts that his being retried after an initial mistrial amounted to a violation of the prohibition against double jeopardy because the ruling in the initial trial was due to improper references made by the State during its closing argument. During the State’s closing argument in the initial trial, the prosecutor made the remark, “I can’t call Mr. Elswick as a witness, he has a right to remain silent—.” (Closing Argument, 19, Apr. 27, 2007.) Upon an objection and motion for mistrial by Appellant, the latter was granted. On July 20, 2007, Appellant filed a motion to dismiss with prejudice based on double jeopardy grounds. (R. 417-18.)

On July 20, 2007, a motion hearing was held on this matter. During this hearing, the prosecutor took the stand to testify regarding the remark that led to the mistrial. (Motion Hr’g, 35, July 20, 2007.) During the examination, the prosecutor, Mr. Mark Sergent, testified that he said this to explain why the Hicks (co-defendants) were called as witnesses and given plea agreements. (*Id.* at 42.) The prosecutor stated that in this process, he inadvertently made the statement in question. (*Id.*) After being initially examined by Appellant, Mr. Sergent gave the following statement:

Your Honor, I did not purposefully make a statement to cause a mistrial. The State’s evidence was in, in its entirety. The jury, a qualified panel of jurors was here, heard the entire case, there was no reason for me to throw a jury.

(*Id.* at 45.) He further stated that he was just inartfully explaining why Mr. and Ms. Hicks were testifying, which had been subject to comments made by the defense. He characterized the reference as one “off-the-cuff.” (*Id.* at 45.) He described this statement as being an inadvertent one while explaining the plea agreements of the witnesses, the Hicks. (*Id.* at 46.) He further testified that he had no missing evidence or witnesses and would have no reason to have the trial conclude in a mistrial. (*Id.* at 59.) He also pointed out that he inartfully said that he could not call Appellant as a witness rather than stating that the latter did not take the stand. (*Id.* at 50.)

The circuit court stated that, although this was reversible error by the State, there was no evil intent, there was no motivation to harass or prejudice Appellant, there was no bad faith and it was an isolated event. (*Id.* at 58; 61-63.) Based on this, the circuit judge denied Appellant’s motion to dismiss. (*Id.* at 64.)

There is absolutely no possibility that the improper reference made by the State during its closing argument in the initial trial falls under the small exception where reprosecution would be barred by the prohibition against double jeopardy as established in *Kennedy, supra*. In *Wassall v. Ryan*, 705 F.2d 570 (5th Cir. 1983), the Fifth Circuit Court of Appeals held the following:

Where a defendant successfully moves for a mistrial, the Double Jeopardy Clause generally does not bar reprosecution, even if the motion for a mistrial is necessitated by prosecutorial error. However, retrial is barred where the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial. (Citations omitted.)

*Id.* at 971.

It was established during this July 20, 2007, hearing that Mr. Sergent’s remark did not constitute an intent to provoke Appellant to move for a mistrial. This Court adopted the *Kennedy* standard in *Pennington, supra*. As was established in *Bass, supra*, the circuit judge made a

determination of fact that there was no intent on the prosecutor's part to provoke Appellant into moving for a mistrial. Based upon the record, it cannot be established that this finding was clearly wrong.

Appellant uses language such as overreach that occurred in this prosecutorial reference made in the initial trial similar to that established in *United States v. Dinitz*, 424 U.S. 600, 611, 96 S. Ct. 1075, 1081 (1976), to argue that retrial was barred on double jeopardy grounds. However, the United States Supreme Court narrowed this standard in *Oregon, supra*, and held,

Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, therefore, does not bar retrial absent intention on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause.

*Id.* at 675-76, 102 S.Ct. 2083, 2089. Additionally, the Fifth Circuit held in *Wassall, supra*, "The Supreme Court in *Kennedy, supra*, announced that the language used in *United States v. Dinitz*, 424 U.S. 600, 611, 96 S. Ct. 1075, 1081 (1976) is no longer a proper standard to determine whether the Double Jeopardy Clause bars reprosecution." *Id.* When applying this more narrow standard of intent on the part of the prosecutor, it was well established that retrial should not have been barred on double jeopardy grounds.

Appellant cites the Georgia Court of Appeals case of *Anderson v. Georgia*, 645 S.E.2d 647 (Ga. 2007), as persuasive argument to help further his claim. However, in this case, the appellate court in Georgia ruled that the trial court erred in barring a retrial on double jeopardy grounds where the prosecutor introduced documentary evidence at trial that indicated the defendant exercised his right to remain silent upon request in order to establish his guilt. The appellate court found that the prosecutorial action was so blatant and against procedure that the prosecutor must have intended for

a mistrial to result. *Id.* at 648-49. This blatant act which established intent by the prosecutor is clearly distinguishable from the inadvertent reference made by the State in the case at bar. Similar to the case at bar, in *Connecticut v. Butler*, 810 A.2d 791 (Conn. 2002), the Supreme Court of Connecticut upheld a lower court denial of a motion to dismiss on double jeopardy grounds where improper statements were made by the prosecutor during closing argument. The court used the *Kennedy* standard where no intent was found by the trial court on the part of the prosecutor to goad the defendant into moving for mistrial. *Id.* at 798-99. Similarity, in *Bass, supra*, this Court denied a writ of prohibition where the defendant sought the same to prohibit retrial on double jeopardy grounds when the State mistakenly gave him the wrong offense date where an alibi defense was being pursued due to the trial court finding no intent to provoke a mistrial motion by the prosecution. *Id.* at 120-21, 375 S.E.2d at 591-92.

In light of all of this, Appellant's argument fails on this ground.

**B. THERE WAS NO ERROR IN THE CIRCUIT COURT'S DENIAL OF APPELLANT'S MOTION TO DISMISS BASED ON SPEEDY TRIAL VIOLATIONS. THERE WAS NO PREJUDICE TO APPELLANT BY THE CONTINUANCES THAT WERE GRANTED.**

Appellant wrongly contends that the circuit court erred in denying his motion to dismiss due to speedy trial violations. This is primarily because he fails to establish that he suffered any prejudice with the continuances that were granted. In fact, various continuances were requested by Appellant, and the granting of the motions actually benefitted him in his defense. Therefore, there was no abuse of discretion on the part of the circuit court.

**1. The Standard of Review.**

“In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and

the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review." Syl. Pt. 2, *Walker v. West Virginia Ethics Comm'n*, 201 W.Va. 108, 492 S.E.2d 167 (1997).

Syl. Pt. 2, *State v. Hinchman*, 214 W. Va. 624, 591 S.E.2d 182 (2003).

A balancing test necessarily compels courts to approach speedy trial on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a certain defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.

*Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192 (1972).

2. **There Was No Abuse of Discretion in the Circuit Court's Denial of Appellant's Motion to Dismiss for Speedy Trial Violations. The Circuit Court Correctly Found That the Delays Did Not Prejudice Him, and in Fact, Helped his Defense.**

The circuit court did not abuse its discretion in denying Appellant's motion to dismiss due to a violation of his right to a speedy trial. Appellant provides a thorough outline of the relatively long time period that occurred between the indictment and the trial. However, there was no violation here.

West Virginia Code § 62-3-1, in pertinent part, states the following:

When an indictment is found in any county, against a person for a felony or misdemeanor, the accused, if in custody, or if he appear in discharge of his recognizance, or voluntarily, shall, *unless good cause be shown for a continuance*, be tried at the same term.

(Emphasis added.) However, regarding the right to a speedy trial, this Court held the following:

"Whereas W. Va. Code, 62-3-1, provides a defendant with a statutory right to a trial in the term of his indictment, it is W. Va. Code 62-3-21, rather than W. Va. Code 62-3-1, which is the legislative adoption or declaration of what ordinarily constitutes a speedy trial within the meaning of U.S. Const., amend. VI, and W.Va. Const., art. III, § 14. *State ex rel. Smith v. DeBerry*, 146 W.Va. 534, 538, 120 S.E.2d

504, 506 (1961).” Syl. Pt. 1, *State ex rel. Shorter v. Hey*, 170 W.Va. 249, 294 S.E.2d 51 (1981).

Syl. Pt. 1, *State v. Lambert*, 175 W. Va. 141, 331 S.E.2d 873 (1985). According to West Virginia Code § 62-3-21,

Every person charged by presentment or indictment with a felony or misdemeanor, and remanded to a court of competent jurisdiction for trial, shall be forever discharged from prosecution for the offense, if there be three regular terms of such court, after the presentment is made or the indictment is found against him, without a trial, unless the failure to try him was caused by his insanity; or by the witnesses for the State being enticed or kept away, or prevented from attending by sickness or inevitable accident; or *by a continuance granted on the motion of the accused*; or by reason of his escaping from jail, or failing to appear according to his recognizance, or of the inability of the jury to agree in their verdict; and every person charged with a misdemeanor before a justice of the peace, city police judge, or any other inferior tribunal, and who has therein been found guilty and has appealed his conviction of guilt and sentence to a court of record, shall be forever discharged from further prosecution for the offense set forth in the warrant against him, if after his having appealed such conviction and sentence, there be three regular terms of such court without a trial, unless the failure to try him was for one of the causes hereinabove set forth relating to proceedings on indictment.

(Emphasis added.) Despite the fact that more than three terms elapsed from the indictment until Appellant went to trial, there was no speedy trial violation. As the State pointed out, it moved to continue the case during the January 2006 term of the court due to the unavailability of DNA results. However, all other continuances were due to motions by Appellant. (R. 800.) As the State further noted, if all of the continuances requested by Appellant are removed, he would have been tried within three terms. (*Id.* at 801.) Specifically to this issue, this Court has held the following:

“Any term at which a defendant procures a continuance of a trial on his own motion after an indictment is returned, or otherwise prevents a trial from being held, is not counted as one of the three terms in favor of discharge from prosecution under the provisions of Code, 62-3-21, as amended.” Syl. Pt. 2, *State ex rel. Spadafore v. Fox*, 155 W.Va. 674, 186 S.E.2d 833 (1972).

Syl. Pt. 3, *State v. Fender*, 165 W. Va. 440, 268 S.E.2d 120 (1980). Due to Appellant's motions for continuance, there was no violation with respect to the three-term rule.

The circuit court conducted a four-prong test as established in *Barker, supra*, and found that there was no speedy trial violation. The circuit judge did note that many motions by Appellant were precipitated by late production of discoverable material such as the State Crime Lab being late with forensic testing and where the State Police did not deliver to the prosecutor the crime report and photographs in a timely manner. (R. 845.) With respect to reasons for a delay, the United States Supreme Court held the following in *Barker, supra*:

“A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.”

*Id.* at 531, 92 S. Ct. at 2192. The circuit court found that the reasons for delay could not be solely attributable to the State, and some delays that were due to requests by Appellant were to his benefit in the form of further forensic investigations, obtaining favorable expert testimony and further searching for exculpatory information. (R. 850-51.)

Similar to the reason for the delay, this Court held the following in *Pitsenbarger v. Nuzun*, 172 W. Va. 27, 303 S.E.2d 255 (1993):

“Where the trial court is of the opinion that the state has deliberately or oppressively sought to delay a trial beyond the term of indictment and such delay has resulted in substantial prejudice to the accused, the trial court may, pursuant to W.Va.Code, 62-3-1, finding that no good cause was shown to continue the trial, dismiss the indictment with prejudice, and in so doing the trial court should exercise extreme caution and should dismiss an indictment pursuant to W.Va.Code, 62-3-1, only in furtherance of the prompt administration of justice.” Syl. Pt. 4, *State ex rel. Shorter v. Hey*, 170 W.Va. 249, 294 S.E.2d 51 (1981).

*Id.*, Syl. Pt. 1. It is quite apparent that deliberate delays on the part of the prosecution did not occur here. The prosecution explicitly states that there was no deliberate or oppressive engagement of delays sought on its part. (R. 801.) This in addition to the fact that Appellant moved for various continuances to help in his defense establishes that the situation mentioned in *Pitsenbarger* did not occur, and there was no improper reason for the delays.

But again, the circuit judge also noted in his order that many delays were due to requests by Appellant and they actually benefitted him. (R. 850-51.) The circuit judge noted this in evaluating this matter by using the fourth prong of analysis in *Barker, supra*; the prejudice to the defendant. In light of the fact that various continuances that were granted benefitted Appellant's defense, the circuit court found that no prejudice took place. (*Id.* at 852-54.) It is worth noting that in *Barker*, the United States Supreme Court found no speedy trial violation where a five-and-one-half year delay occurred with all but seven months attributable to the government, where the defendant did not assert such a right until the day of trial, and no actual prejudice was found. 307 U.S. at 532.

In using the four-prong test established in *Barker*, the circuit judge denied Appellant's motion to dismiss based on alleged speedy trial violations. (*Id.* at 854.)

For all of these reasons, Appellant's argument fails on this ground.

**C. THERE WAS NO PROSECUTORIAL MISCONDUCT WITH RESPECT TO THE JOHN RICHARDS STATEMENT FROM A CASE IN CALHOUN COUNTY, AND THE CIRCUIT COURT PROPERLY APPLIED WEST VIRGINIA RULE OF CRIMINAL PROCEDURE 16(d)(2). ADDITIONALLY, THIS DID NOT CONSTITUTE A VIOLATION OF *BRADY v. MARYLAND*, 373 U.S. 83, 83 S. CT. 194 (1963).**

The circuit court provided the correct remedy for the nondisclosure of the statement of John Richards from a case in the adjoining county of Calhoun. The exculpatory and even impeachment

value of this statement in Appellant's defense was highly questionable at best, and it was not in the possession of the Roane County prosecutor in order to be disclosed to Appellant for quite a long time. Additionally, there was no violation of *Brady, supra*. This was a rare example of where the prosecutor had no knowledge of its existence during the period of nondisclosure and would not be able to obtain it with due diligence.

**1. The Standard of Review.**

“In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review.” Syl. Pt. 3, *State v. Vance*, 207 W.Va. 640, 535 S.E.2d 484 (2000).

Syl. Pt. 2. *State v. Keesecker*, 222 W. Va. 138, 663 S.E.2d 593 (2008).

The preferred relief where the party responsible for the violation [nondisclosure] has not acted in bad faith is to grant the defendant a continuance giving him or her an opportunity to prepare for trial once the discovery materials have been made available.

*State ex rel. Rusen v. Hill*, 193 W. Va. 133, 134, 454 S.E.2d 427, 434 (1994).

**2. There Was No Error on the Part of the Circuit Court in Remediating This Nondisclosure of the Richards Statement by Granting a Continuance. Additionally, This Falls Short of Being a Violation of *Brady, Supra*, on the Part of the State.**

Appellant incorrectly asserts that the circuit court erred in denying his motion to dismiss based on prosecutorial misconduct. On July 27, Appellant filed a motion to dismiss on the basis of prosecutorial misconduct due to the non-disclosure of a statement of John Richards from a case in Calhoun County which he gave as part of a plea agreement. The statement was based on conversations he had with Joey Hicks, a co-defendant of Appellant and witness of the State, while

they were cellmates. (R. 600-03.) The statement of Mr. Richards was to be used as impeachment evidence against the testimony of Mr. Hicks in the case at bar. (*Id.* at 603.) In this hearing, it was discovered that a copy of the Richards statement was faxed from the Calhoun County Prosecutor's Office to the Roane County Prosecutor's Office on July 27, 2005. (*Id.* at 602.) On the day of the trial, July 24, 2007, Appellant informed the circuit court that he was given notice of this statement the day before by the Calhoun County Prosecutor's Office. Based on this, the circuit court eventually granted Appellant's motion to continue the trial until November 27, 2007. (*Id.* at 599-600.)

As noted by Appellant, West Virginia Rule of Criminal Procedure 16(d)(2) states:

*Failure to Comply With a Request.* If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, *grant a continuance*, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

(Emphasis added.) From an initial examination of this rule, the circuit court was perfectly within its authority in its decision and did not err in denying Appellant's motion to dismiss and granting a continuance.

During the motion hearing, Mr. Sergent testified that he did not recall ever receiving a faxed copy of the John Richards statement or any accompanying letter from the Calhoun County Prosecuting Attorney's Office. (R. 605-06.) Additionally, he testified that he was out of town on the date when the fax came to his office. He stated that the usual procedure for faxes is that he personally gets them or they are placed in a designated area for him to retrieve. (*Id.* at 606.) He stated that he had terminated the employment of a clerk at that time for not following protocol

regarding faxes. Further, he testified that he had checked his entire file of the case and none of this material was found. (*Id.*) At the hearing, the circuit court ruled that it was unable to find, based on a preponderance of the evidence, that the prosecutor had actual knowledge of the John Richards statement sent from the Calhoun County Prosecuting Attorney's Office until he was informed of this by Appellant's counsel on July 23, 2007. (*Id.* at 605.) In light of this, the circuit court acted properly and did not err in granting the continuance as a means of relief where Mr. Sergent did not act in bad faith with respect to the nondisclosure in accordance with *Rusen, supra*.

As previously mentioned, the Richards statement was probative in impeaching the testimony of Joey Hicks, an accomplice and witness for the State, based on a conversation heard in a jail cell given by the latter. However, as the circuit court pointed out in the order denying the motion to dismiss, Joey Hicks' testimony was impeached by prior inconsistent statements made to law enforcement and to the court as well as by testimony from his wife, Crystal Hicks, during he initial trial. (R. 604.) In fact, the circuit court stated that during the initial trial, Joey Hicks' testimony was so utterly discredited that the question arose as to why the prosecutor even bothered calling him as a witness. (*Id.* at 610.) For this reason, the circuit judge ruled that "[T]he omission of *additional* impeachment evidence of John Manis Richards would not 'in any reasonable likelihood have affected the judgment of the jury' with respect to the weight and credit it would attach to the testimony of the alleged accomplice, Joey Hicks, nor the outcome of the trial." (Emphasis in original.) (*Id.* at 611.) What makes Appellant's argument further questionable in this matter is that Joey Hicks was not even called as a witness for the State in the second trial, the case-at-bar.

The circuit court ruled that, as a preliminary assessment, the Richards testimony would not have been excluded as being "needless presentation of cumulative evidence"; but having said that,

excluding it on these grounds would be a credible argument. (*Id.* at 604-05.) According to Rule 403 of the West Virginia Rules of Evidence,

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or *needless presentation of cumulative evidence*.

(Emphasis added.) In light of this, Appellant's argument is weakened and could indeed fail on Rule 403 grounds.

Additionally, regarding discovery violations, this Court has ruled the following:

"The traditional appellate standard for determining prejudice for discovery violations under Rule 16 of the West Virginia Rules of Criminal Procedure involves a two-pronged analysis: (1) did the non-disclosure surprise the defendant on a material fact, and (2) did it hamper the preparation and presentation of the defendant's case." Syl. pt. 2, *State ex rel. Rusen v. Hill*, 193 W.Va. 133, 454 S.E.2d 427 (1994).

Syl. Pt. 2, *State v. Smith*, 220 W. Va. 565, 648 S.E.2d 71 (2007). Since the Appellant initially brought this matter to the attention of the circuit court and the prosecutor as well as the cumulative nature of this evidence, Appellant has failed to meet this standard. Additionally, this Court also held the following in *Rusen, supra*:

A circuit court may choose dismissal for egregious and repeated violations where lesser sanctions such as a continuance would be disruptive to the administration of justice or where the lesser sanctions cannot provide the same degree of assurance that the prejudice to the defendant will be dissipated.

*Id.*, Syl. Pt. 3. However, in looking at the ruling on Appellant's motion to dismiss, he fails to meet this standard as well; in particular, the lack of egregiousness and disruption of the administration of justice since he was eventually given the statement, there was ample impeachment evidence of Joey Hicks presented in the initial trial and a continuance was granted.

Appellant also asserts that the State committed a violation of *Brady, supra*, in its failure to disclose. Initially, it is worth noting that this is not well pled in that Appellant only mentions this in passing, without stating the holding of *Brady* that was violated or even giving a case citation. Regarding issues mentioned merely in passing, this Court has held, “Although we liberally construe briefs in determining issues presented for review, issues which are not raised, and those mentioned only in passing but are not supported with pertinent authority, are not considered on appeal.” *State v. LaRock*, 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996). In light of this, this Court need not examine the issue of a potential *Brady* violation.

However, regarding exculpatory and impeachment evidence not disclosed to the defense, the United States Supreme Court has held the following:

“A *Brady* violation occurs when the government fails to disclose evidence materially favorable to the accused. *See* 373 U.S. at 87, 83 S.Ct. 1194. This Court has held that the *Brady* duty extends to impeachment evidence as well as exculpatory evidence, *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), and *Brady* suppression occurs when the government fails to turn over even evidence that is “known only to police investigators and not to the prosecutor,” *Kyles [v. Whitley]*, 514 U.S. [419] at 438, 115 S.Ct. 1555. *See id.*, at 437, 115 S.Ct. 1555 (“[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police”). “Such evidence is material ‘if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,’” *Strickler v. Greene*, 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (quoting *Bagley, supra*, at 682, 105 S.Ct. 3375 (opinion of Blackmun, J.)), although 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*, 514 U.S., at 434, 115 S.Ct. 1555. The reversal of a conviction is required upon a “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. 1555.

*Youngblood v. West Virginia*, 547 U.S. 867, 869, 126 S. Ct. 2188, 2190 (2006).

In light of the fact that there was so much impeachment evidence against the testimony of Joey Hicks, it is impossible to argue that the Richards statement could have reasonably been taken to put the whole case in such a different light as to undermine the confidence in the verdict. Additionally, this may be a rare case where the prosecutor did not know and could not have known about the evidence since it came from a prosecutor in another county where the fax was misplaced by a clerk in the office. The fact that Joey Hicks was not called a as witness for the State in the instant case—thereby calling the impeachment value of the Richards statement into question—further weakens this argument based on a *Brady* violation.

In light of all of this, Appellant’s argument fails on this ground.

**D. APPELLANT MAKES A CLAIM THAT THE CIRCUIT COURT ERRED IN DENYING A MOTION TO DISMISS BASED ON ONGOING DISCOVERY VIOLATIONS; YET HIS ARGUMENT IS NOT WELL PLED, AND HE FAILS TO STATE WHY CONTINUANCES WERE NOT A PROPER REMEDY.**

Appellant asserts that the circuit court erred in denying his motion to dismiss based on ongoing discovery motions; yet he fails to apply pertinent authority to the facts he is alleging, and his claim is not well pled. However, a thorough hearing was conducted on this matter, and the evidence in question was found to have absolutely no inculpatory or exculpatory value. Therefore, the circuit court did not abuse its discretion on this ruling.

**1. The Standard of Review.**

“In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court’s underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review.” Syl. Pt. 3, *State v. Vance*, 207 W.Va. 640, 535 S.E.2d 484 (2000).

Syl. Pt. 2. *State v. Keesecker, supra.*

“Although we liberally construe briefs in determining issues presented for review, issues which are not raised, and those mentioned only in passing but are not supported with pertinent authority, are not considered on appeal.”

*State v. LaRock*, 196 W. Va. at 302, 470 S.E.2d at 621.

“Concerning our standard of review of the circuit court’s exclusion of the evidence at issue, we note that ‘[r]ulings on the admissibility of evidence are largely within a trial court’s sound discretion and should not be disturbed unless there has been an abuse of discretion.’”

*State v. Guthrie*, 205 W. Va. 326, 332, 518 S.E.2d 83, 89 (1999), quoting *State v. Louk*, 171 W. Va. 639, 643, 301 S.E.2d 596, 599 (1983), citing Syl. Pt. 2, *State v. Peyatt*, 173 W. Va. 317, 315 S.E.2d 574 (1983).

2. **Appellant’s Argument on This Ground Is Not Well Pled, and He Gives Absolutely No Legal or Factual Reasoning as to Why Continuances Were Not a Proper Remedy for the Discovery Problems That Arose.**

In Appellant’s brief, he asserts that the circuit court erred on December 10, 2007, in denying a motion to dismiss based on ongoing discovery violations by the State. (*See* Appellant’s Brief at 20.) However, Appellant gives absolutely no detail regarding what evidence he is referring to or how the circuit court erred. In essence, all Appellant does in this argument is repeat the various holdings he outlined in his previous argument regarding prosecutorial misconduct. The holdings he repeats in this argument are not applied to what occurred regarding the hearing or the accompanying order on the matter. It appears from an initial glance that the issues regarding his motion to dismiss based on ongoing discovery violations are not properly raised and not well pled based on *LaRock, supra.*

Appellant filed a motion to dismiss based on ongoing discovery violations on December 10, 2007. (R. 698-702.) A hearing occurred on this issue on the same day, which was continued to

December 14, 2007. (Motion Hr'g, 14, Dec. 10, 2007.) Despite the fact that Appellant mentions no items that were withheld from him by the State on which he bases his motion, it appears from the December 10, 2007, hearing that he is referring to his wallet that was in the possession of Joey Hicks' mother. (*Id.* at 4-5.) Appellant also made the motion to dismiss based on various photographs and papers that contained telephone numbers that were believed to be his property. (Motion H'rg, 63-64, Dec. 14, 2007.) Senior Trooper Fisher of the West Virginia State Police testified that upon obtaining a warrant for a knife and lighter that was believed to be in the possession of Ms. Debra Hall Stewart, Joey Hicks' mother, the latter gave he and his sergeant a bag with photographs and what appeared to be a paper with telephone numbers on it that belonged to Appellant. (*Id.* at 51.) Trooper Kitzmiller testified to Ms. Stewart giving them the same items. (*Id.* at 20.) Ms. Stewart believed that the wallet may have contained a Social Security card. (*Id.* at 31, 33.) However, Trooper Kitzmiller testified that he did not remember a Social Security card being a part of Appellant's property given away by Ms. Stewart. (*Id.* at 47.) Additionally, none of the State Police officers testified that they were given a wallet belonging to Appellant. Regardless, both State Police officers testified that they found these photographs and papers of absolutely no evidentiary value whatsoever, either exculpatory or inculpatory. (*Id.* at 19-20; 54.) Trooper Kitzmiller testified that, based on his training, he believed that this did not constitute evidence. (*Id.* at 20.)

Based on the reasoning that none of this could be characterized as useful evidence, the circuit judge denied the motion to dismiss based on numerous and ongoing discovery motions. (*Id.* at 67-68.) Based on the rulings of *Keesecker, supra*, and *Guthrie, supra*, there is no doubt that the circuit court did not abuse its discretion in this matter. A thorough hearing was conducted where this

material that Appellant bases discovery violations on was deemed irrelevant and not useful to either side in the case.

As was outlined in the above argument and pointed out by Appellant, this Court has held the following regarding discovery violations:

“The traditional appellate standard for determining prejudice for discovery violations under Rule 16 of the West Virginia Rules of Criminal Procedure involves a two-pronged analysis: (1) did the non-disclosure surprise the defendant on a material fact, and (2) did it hamper the preparation and presentation of the defendant’s case.” Syl. pt. 2, *State ex rel. Rusen v. Hill*, 193 W.Va. 133, 454 S.E.2d 427 (1994).

Syl. Pt. 2, *State v. Smith*, 220 W. Va. 565, 648 S.E.2d 71 (2007). Based on this two-pronged standard, there was no discovery violation. Again, if one looks at the holding of *Youngblood*, *supra*, the non-disclosure of this material in no way falls under any category of a *Brady* violation as well.

In light of all of this, Appellant’s argument fails.

**E. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT’S MOTION TO DISMISS DUE TO THE STATE’S DESTRUCTION OF RULE 16 EVIDENCE, AND THERE WAS NO DUE PROCESS VIOLATION.**

Appellant also filed a motion to dismiss based on the State’s destruction of Rule 16 evidence with respect to the photographs and papers with phone numbers on them. The circuit court denied this motion as well. As with the motion to dismiss based on numerous and ongoing discovery violations, this was denied due to the material being of no useful evidentiary value. There was no abuse of discretion with this ruling.

**1. The Standard of Review.**

“In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible

error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review.” Syl. Pt. 3, *State v. Vance*, 207 W.Va. 640, 535 S.E.2d 484 (2000).

Syl. Pt. 2. *State v. Keesecker*, 222 W. Va. 138, 663 S.E.2d 593 (2008).

“Concerning our standard of review of the circuit court’s exclusion of the evidence at issue, we note that “[r]ulings on the admissibility of evidence are largely within a trial court’s sound discretion and should not be disturbed unless there has been an abuse of discretion.”

*State v. Guthrie*, 205 W. Va. at 332, 518 S.E.2d at 89, quoting *State v. Louk*, 171 W. Va. at 643, 301 S.E.2d at 599, citing Syl. Pt. 2, *State v. Peyatt*, *supra*.

2. **As With Appellant’s Assertion That the Circuit Court Erred in Denying His Motion to Dismiss for Numerous and Ongoing Discovery Violations, There Was No Abuse of Discretion in the Denial of His Motion to Dismiss for Destruction of Evidence. The Material Was Useless as an Evidentiary Matter.**

Again, Appellant wrongfully asserts that the circuit court erred in denying a motion to dismiss; this one on the grounds of destruction of evidence. This motion dealt with the same photographs and paper containing telephone numbers given to the State Police by Joey Hicks’ mother.<sup>2</sup>

Appellant filed this motion on December 14, 2007. (R. 728-36.) A hearing on this motion occurred on the same day. It is true that State Trooper Kitzmiller testified that they discarded this material. (Motion H’rg, 46, Dec. 14, 2007.) But as previously discussed, the State Police officers testified that they found these items to have absolutely no evidentiary value to the case whatsoever.

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<sup>2</sup>As in Appellant’s argument regarding his motion to dismiss based on numerous and ongoing discovery violations, this argumentation is not well pled with no real legal standards being applied to the facts. Thus, this Court could disregard this argument based on *LaRock*, *supra*, as well.

(*Id.* at 19-20; 54.) Again, the circuit judge agreed and ruled accordingly by denying the motion. (*Id.* at 61-62.)

In applying the standards established in *Keesecker, supra*, and *Guthrie, supra*, the circuit court in no way abused its discretion in ruling on this evidentiary matter. Also, by examining *Youngblood, supra*, there is no way the destruction of this material could be classified as a *Brady* violation (no exculpatory or impeachment value, and it would have no bearing on the outcome of the case).

In light of all of this, Appellant's argument also fails on this ground.

**F. THERE WAS NO ERROR IN THE CIRCUIT COURT'S DENIAL OF APPELLANT'S DEFENSE THEORY INSTRUCTION, AND IT WAS WITHIN ITS SOUND DISCRETION.**

Appellant fails to establish how the circuit court's denial of his theory of defense instruction violated his due process rights. He completely fails to establish how this denial constituted an abuse of discretion. The circuit court was well within its sound discretion in making this ruling.

**1. The Standard of Review.**

"The formulation of jury instructions is within the broad discretion of a circuit court, and a circuit court's giving of an instruction is reviewed under an abuse of discretion standard. A verdict should not be disturbed based on the formulation of the language of the jury instructions so long as the instructions given as a whole are accurate and fair to both parties." Syl. Pt. 6, *Tennant v. Marion Health Care Foundation, Inc.*, 194 W. Va. 97, 459 S.E.2d 374 (1995).

Syl. Pt. 1, *Gillingham v. Stephenson*, 209 W. Va. 741, 551 S.E.2d 663 (2001).

2. **The Decision to Refuse Appellant's Defense Theory Instruction Was Not An Abuse of Discretion. The Instructions Given to the Jury Were Accurate and Fair to Both Parties When Examined as a Whole.**

Appellant fails to meet the standard that the circuit court committed error and denied his due process rights in its refusal to include his defense theory instruction as part of the charge to the jury. Appellant submitted an instruction to the jury which stated that it was his position that the co-defendants, Joey and Crystal Hicks, were giving false testimony regarding his involvement in the crime for reasons such as obtaining favorable plea bargains, to which the circuit judge refused. (R. 1160.)

As was held in *Gillingham, supra*, trial courts are given very broad discretion with respect to decisions involving jury instructions, and a verdict is not to be disturbed if the instructions given as a whole are accurate and fair to both parties.. Similarly, this Court held the following in *State v. Guthrie*, 199 W. Va. 657, 461 S.E.2d 163 (1995), regarding jury instructions:

“The court’s instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. The trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to the [trial] court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.”

*Id.* at 671, 461 S.E.2d at 177, quoting *State v. Bradshaw*, 193 W. Va. 519, 543, 457 S.E.2d 456, 480 (1995). Utilizing this deferential standard, the circuit court committed no error.

The instructions approved and given by the circuit court were accurate and fair to both parties. The instructions thoroughly defined and covered all elements of the offenses charged in the

indictment under the beyond a reasonable doubt standard as required. (R. 1212.) The instructions also included a thorough section dealing with witness credibility and weighing the evidence presented. (*Id.*) This seems to cover what Appellant was attempting to convey in his proposed instruction without stating that he believes the co-defendants were giving false testimony to achieve such things as a favorable plea bargain. In fact, Appellant admits that the instruction at issue was a modified version of that given by him. (*See* Appellant's Brief at 45.) In light of this, there was no abuse of discretion by the circuit court in this matter.

Appellant correctly cites the ruling of *United States v. Mason*, 902 F.2d 1434, 1438 (9th Cir., 1990), which held, "A defendant is entitled to have the judge instruct the jury on his theory of defense, provided that it is supported by law and has some foundation in the evidence." (Citation omitted.) However, the Ninth Circuit also held in this case, "A failure to give this instruction is reversible error; but it is not reversible error to reject a defendant's proposed instruction on the theory of the case if other instructions, in their entirety, adequately cover the defense theory." *See id.* (Citation omitted.) This was exactly what happened when the circuit court gave a thorough instruction regarding witness credibility and weighing evidence with less biased rhetoric which was fair to both parties.

In light of all of this, Appellant's argument fails on this ground.

**G. THE CIRCUIT COURT DID NOT ERR IN DENYING APPELLANT INSTRUCTIONS ON BATTERY AS A LESSER-INCLUDED OFFENSE. THERE WAS NO ABUSE OF DISCRETION, AND HE WAS NOT ENTITLED TO THE INSTRUCTION.**

Appellant wrongfully contends that he was entitled to have the jury be given an instruction on battery as a lesser-included offense where he was convicted of voluntary manslaughter. However,

he was not entitled to this instruction. The circuit court did not abuse its discretion in denying him the instruction.

**1. The Standard of Review.**

“The formulation of jury instructions is within the broad discretion of a circuit court, and a circuit court’s giving of an instruction is reviewed under an abuse of discretion standard. A verdict should not be disturbed based on the formulation of the language of the jury instructions so long as the instructions given as a whole are accurate and fair to both parties.” Syl. Pt. 6, *Tennant v. Marion Health Care Foundation, Inc.*, 194 W. Va. 97, 459 S.E.2d 374 (1995).

Syl. Pt. 1, *Gillingham v. Stephenson, supra*.

**2. Appellant Was Not Entitled to the Battery Instruction, and the Circuit Court Did Not Abuse Its Discretion in the Decision to Deny the Same.**

Despite Appellant’s assertion, he was not entitled to have the jury instructed on the offense of battery as a lesser-included one to the charge of murder. As mentioned previously, Appellant was eventually convicted of voluntary manslaughter. According to the instruction to the jury, it was to convict Appellant of voluntary manslaughter if it found beyond a reasonable doubt the following: 1) the Defendant, RAYMOND ELSWICK 2) in Roane County 3) on a day in May 2005 did unlawfully and intentionally 4) but without premeditation, deliberation, or malice, 5) kill and slay Daniel Burns. (R. 1212.)

This Court has long held that battery is not to be given as a lesser-included offense to murder in jury instructions. In *State v. Watson*, 99 W. Va. 34, 127 S.E. 637 (1925), it was held “[U]nder an indictment for murder, in the form prescribed by section 1, of chapter 144 of the Code, which indictment did not also aver facts constituting assault or assault and battery, it was error in giving an instruction defining the offenses of which accused might be found guilty under the indictment,

to tell the jury, if they did not find him guilty of the graver offenses covered by the indictment, they might find him guilty of assault and battery.” (citing, *State v. Lutz*, 85 W.Va. 330, 101 S.E. 434 (1919)). The circuit court recognized that battery is not a lesser-included offense of murder or felony murder under West Virginia case law when it denied Appellant this instruction. (R. 1120.)

Additionally, this Court held in *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982), the following:

Where there is no evidentiary dispute or insufficiency on the elements of the greater offense which are different from the elements of the lesser included offense, then the defendant is not entitled to a lesser included offense instruction.

*Id.*, Syl. Pt. 2. Appellant does assert that all he did was kick the victim. However, as was previously detailed, this is factually untrue, and Appellant did substantially more physical damage to Mr. Burns than he contends in his brief. Additionally, he cites nothing that disputes that this did not contribute to the killing, though without premeditation, deliberation, or malice, of Mr. Burns. There is nothing that disputes what the jury found regarding Appellant being guilty of voluntary manslaughter and there is no insufficiency of evidence cited regarding the offense. Even if Appellant’s assertion that all he did was kick the victim is taken to be true—and the State does not concede this to be true—that does not dispute that it contributed to the crime of voluntary manslaughter, committed by he and the co-defendants. Therefore, there was no abuse of discretion in the circuit court’s decision on this matter.

In light of this, Appellant’s argument fails on this ground.

**H. THERE WAS NO ABUSE OF DISCRETION IN THE CIRCUIT COURT'S GRANTING OF THE STATE'S MOTION TO CONTINUE. APPELLANT FAILS TO MEET THIS STANDARD, AND HIS BRIEF IS NOT WELL PLED ON THIS ISSUE AS WELL.**

Appellant fails to meet the standard to establish that the circuit court erred and violated his due process rights in its granting of the State's motion to continue. Nothing in Appellant's brief remotely establishes that the circuit court abused its discretion in this ruling. In fact, Appellant again fails to provide any pertinent authority to support his claim, constituting another argument that is not properly briefed.

**1. The Standard of Review.**

"A motion for continuance is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless there is a showing that there has been an abuse of discretion." Syl. Pt. 2, *State v. Bush*, 163 W.Va. 168, 255 S.E.2d 539 (1979).

Syl. Pt., *State v. Wilkinson*, 181 W. Va. 126, 381 S.E.2d 241 (1989).

"Although we liberally construe briefs in determining issues presented for review, issues which are not raised, and those mentioned only in passing but are not supported with pertinent authority, are not considered on appeal."

*State v. LaRock*, 196 W. Va. at 302, 470 S.E.2d at 621.

**2. Appellant Completely Fails to Establish How the Circuit Court Abused Its Discretion in Granting the State's Motion to Continue, and Again Fails to Make a Well-Pled Argument Meriting Any Consideration.**

Appellant asserts that the circuit court abused its discretion in granting a continuance to the State during the recidivist trial on December 9, 2008, yet there are absolutely no facts or pertinent authority cited to establish this. The circuit court granted a recess for the State to be able to call Lieutenant Michael Corsaro to bring in original fingerprint cards as evidence and testify regarding

the same. ( R. 3781.) As Appellant points out a recess was granted for this purpose until the next day. (*Id.* at 3783.)

As was held in *Wilkinson, supra*, the granting of a continuance is within the sound discretion of a trial court and the ruling will not be disturbed unless an abuse of discretion has been shown. Granting a continuance or recess until the following day so as to allow the prosecutor to call Lieutenant Corsaro to testify and to introduce original fingerprint cards does not give rise to an abuse of discretion on the part of the circuit court. Appellant fails to give any facts or legal authority as to how this would constitute an abuse. In fact, Appellant fails to support his claim with any facts or pertinent legal authority, asserting another claim not properly briefed in violation of *LaRock, supra*. Therefore, this Court need not examine this matter further as well.

Thus, Appellant's argument fails on this ground.

**I. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT THE USE OF A JURY QUESTIONNAIRE, AND APPELLANT'S ARGUMENT REGARDING THIS ISSUE IS, YET AGAIN, NOT WELL PLED.**

Appellant did submit a jury questionnaire for voir dire purposes in which the circuit court denied its use. There is absolutely no evidence that the circuit court abused its discretion in making this ruling. Appellant fails to show in any way how the trial judge abused his discretion, or how the applicable law favors him regarding this, and his claim is not well pled.

**1. The Standard of Review.**

“In a criminal case, the inquiry made of a jury on its voir dire is within the sound discretion of the trial court and not subject to review, except when the discretion is clearly abused.” Syl. Pt. 2, *State v. Beacraft*, 126 W.Va. 895, 30 S.E.2d 541 (1944), *overruled on another point*, Syl. Pt. 8, *State v. Dolin*, 176 W.Va. 188, 347 S.E.2d 208 (1986).

Syl. Pt. 9, *State v. Dietz*, 182 W. Va. 544, 390 S.E.2d 15 (1889).

“Although we liberally construe briefs in determining issues presented for review, issues which are not raised, and those mentioned only in passing but are not supported with pertinent authority, are not considered on appeal.”

*State v. LaRock*, 196 W. Va. at 302, 470 S.E.2d at 621.

**2. Appellant Fails to Establish That the Circuit Court Abused Its Discretion in Denying Him the Use of a Jury Questionnaire for Voir Dire. This Argument Is also Not Properly Briefed..**

Appellant wrongly asserts that the circuit court erred in denying him the ability to use a jury questionnaire during voir dire. Appellant cites absolutely nothing that mandates the use of such a questionnaire when requested by a party. Additionally, he fails to apply any case law to the facts of the case as to how or why the trial court erred or as to why this would have been the proper method of questioning jurors regarding qualifications to serve on the panel. Appellant filed a motion for use of a jury questionnaire on February 23, 2007. (R. 269-87.) The circuit court denied this motion on March 27, 2007, ruling that written jury questionnaires are not necessary to seat a qualified, fair and impartial jury. (*Id.* at 327-39.)

As was held in *Dietz, supra*, matters regarding jury inquiries during voir dire are within the sound discretion of the circuit court. These decisions are not to be reviewed unless there has clearly been an abuse of discretion. Appellant completely fails to show that the circuit court engaged in any abuse of discretion in this matter. There is no mandate that jury questionnaires be utilized upon such a request, or that to refuse its use constitutes any error. Therefore, Appellant fails to meet the *Dietz* standard.

Along these lines, yet again Appellant completely fails to apply the facts to any legal authority to establish that the circuit court erred in its decision. In fact, all he does is simply state

that a jury questionnaire would have served to assure that a fair and impartial jury was seated and cites the same abuse of discretion standard. (*See* Appellant's Brief at 46-47.) In light of this, Appellant has yet again failed to assert a well-pled argument in his brief. According to *LaRock, supra*, this Court need not review this matter.

Therefore, Appellant's argument fails on this ground.

**J. THE CIRCUIT COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO DISMISS THE RECIDIVIST INFORMATION. THERE WAS NO VIOLATION OF WEST VIRGINIA CODE § 61-11-19.**

Although the prosecutor did not immediately give information of past convictions of Appellant upon the jury convicting him for the purpose of an enhanced sentence, it was given within the meaning and timeline provided in West Virginia Code § 61-11-19. There was no abuse of discretion in the circuit court's denial of Appellant's motion to dismiss.

**1. The Standard of Review.**

"In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review." Syl. Pt. 2, *Walker v. West Virginia Ethics Com'n*, 201 W.Va. 108, 492 S.E.2d 167 (1997).

Syl. Pt. 1, *State v. Waugh*, 221 W. Va. 50, 650 S.E.2d 149 (2007).

**2. There Was No Abuse of Discretion on the Part of the Circuit Court in Denying Appellant's Motion to Dismiss the Information Regarding a Recidivist Sentence for Multiple Convictions Because the State Did Not Violate the Statutory Language in This Matter.**

It is true that the State provided prior felony convictions information regarding Appellant at a post-trial motion hearing on August 18, 2008. (Motion Hr'g, 9, Aug. 18, 2008.) This did not

immediately follow the jury verdict on July 11, 2008. However the State did not violate the statutory language contained in West Virginia Code § 61-11-19.

Appellant filed a motion to dismiss due to the information not being given immediately after the verdict on November 6, 2008. (R. 1337-41.) The circuit court denied this motion on December 1, 2008. (*Id.* at 1369-71.)

West Virginia Code § 61-11-19 states, in pertinent part,

It shall be the duty of the prosecuting attorney *when he has knowledge* of former sentence or sentences to the penitentiary of any person convicted of an offense punishable by confinement in the penitentiary to give information thereof to the court *immediately upon conviction and before sentence*. Said court shall, before expiration of the term at which such person was convicted, cause such person or prisoner to be brought before it, and upon an information filed by the prosecuting attorney, setting forth the records of conviction and sentence, or convictions and sentences, as the case may be, and alleging the identity of the prisoner with the person named in each, shall require the prisoner to say whether he is the same person or not.

(Emphasis added.)

As the circuit court reasoned, although the prosecutor did not immediately give this information upon a jury verdict, Appellant was deemed convicted on August 18, 2008 (when the information of additional convictions was given), when his post-trial motions for new trial and judgment as a matter of law were denied and he was adjudged guilty. Additionally and as the circuit court pointed out, the term “immediately” must be read in conjunction with the phrase “and before sentence.” (*Id.* at 1371.) In doing this, the State did not violate this statute. Further and as the State pointed out in its Memorandum of Law in Response to the Defendant’s Motion to Dismiss, the statute reads, “when he has knowledge of former sentence or sentences” with respect to the information. (*Id.* at 1356.) Thus, the time between the date of the jury verdict and that of the

post-trial motions hearing gave the prosecutor time to examine Appellant's record to determine if there were additional convictions.

In light of this, there was no abuse of discretion in the circuit court's denial of Appellant's motion to dismiss. Therefore, Appellant's argument fails on this ground.

V.

**CONCLUSION**

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

Respectfully submitted,

State of West Virginia,  
*Appellee,*

By counsel

DARRELL V. MCGRAW, JR.  
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**CERTIFICATE OF SERVICE**

The undersigned counsel for Appellee hereby certified that a true and correct copy of the foregoing *Brief of Appellee, State of West Virginia* was mailed to counsel for the Appellant by depositing it in the United States mail, first-class postage prepaid, on this 22nd day of October, 2009, addressed as follows:

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A handwritten signature in black ink, appearing to read "R. Christopher Smith", written over a horizontal line.

R. CHRISTOPHER SMITH