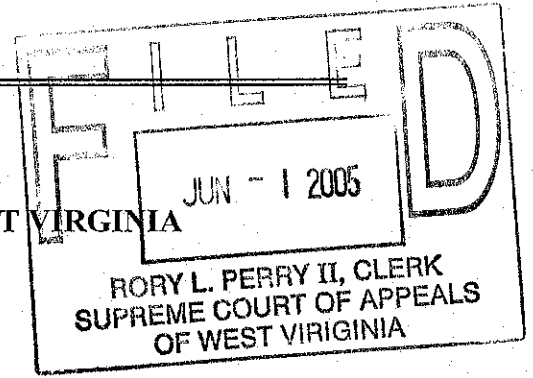


NO. 32290

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Appellee,

v.

MATTHEW S. FLANDERS,

Appellant.

BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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TABLE OF CONTENTS

	Page
I. STATEMENT OF THE CASE	1
II. STATEMENT OF FACTS	2
A. FACTUAL HISTORY	2
B. PROCEDURAL HISTORY	4
III. ASSIGNMENTS OF ERROR	6
IV. ARGUMENT	7
A. COUNTS 4 AND 11 ARE NOT FATALLY FLAWED, AND THE CIRCUIT COURT DID NOT ERR BY REFUSING TO DISMISS THEM	7
1. The Standard of Review	7
2. Discussion	7
B. BECAUSE APPELLANT WAIVED ANY ISSUE HE MAY HAVE HAD REGARDING ROBERT SHAFFER, JR.'S STATEMENT, THIS COURT NEED NOT DETERMINE THE EFFECT OF ANY ALLEGED ERROR	10
1. The Standard of Review	10
2. Discussion	10
C. THIS IS NOT A <i>BRADY</i> ISSUE, AND THE CIRCUIT COURT DID NOT ERR BY DENYING APPELLANT'S MOTION FOR A NEW TRIAL	15
1. The Standard of Review	15
2. Discussion	15
V. CONCLUSION	20

TABLE OF AUTHORITIES

	Page
Cases:	
<i>Brady v. Maryland</i> , 373 U.S. 83, 83 S. Ct. 1194 (1963)	17, 18, 19
<i>State v. Criss</i> , 125 W. Va. 225, 23 S.E.2d 613 (1942)	8
<i>State v. Kearns</i> , 210 W. Va. 167, 556 S.E.2d 812 (2001)	18
<i>State v. Miller</i> , 194 W. Va. 3, 459 S.E.2d 114 (1995)	10
<i>State v. Schoolcraft</i> , 183 W. Va. 579, 396 S.E.2d 760 (1990)	14, 15
<i>State v. Vance</i> , 207 W. Va. 640, 535 S.E.2d 484 (2000)	15
<i>State v. Wallace</i> , 205 W. Va. 155, 517 S.E.2d 20 (1999)	7, 8, 9
Statutes:	
W. Va. Code § 60A-4-401(a)	5
W. Va. Code § 60A-4-401(b)	5
W. Va. Code § 61-3-12	4
W. Va. Code § 61-3-13(a)	4
W. Va. Code § 61-3-13(b)	4
W. Va. Code § 61-10-31	5
Other:	
W. Va. R. Evid. 613(b)	14
W. Va. R. Evid. 803(5)	11, 13

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I.

STATEMENT OF THE CASE

This is an appeal by Matthew Star Flanders (“Appellant”) from his convictions and sentences stemming from his sentencing order¹ after having had a two-day jury trial in the Circuit Court of Roane County with the Honorable Judge Evans presiding.

On appeal, Appellant alleges four assignments of error. Appellant complains the circuit court “abused its discretion” by A) “refusing to dismiss faulty counts of the indictment returned against the Appellant”; B) “allowing the State to read a witness’s out-of-court statement to the jury, when the witness was in court to testify and did not clearly claim the statement as own”; and C) denying the Appellant[]’s Motion for a New Trial.”

¹Record (“R.”) 127-131.

II.

STATEMENT OF FACTS

A. FACTUAL HISTORY.

In the early morning hours of July 5, 2002, Spencer residents Appellant Matthew Star Flanders and Samuel McClung decided to break into a local veterinary clinic to steal a controlled substance, Ketamine.² Ketamine is a liquid cat tranquilizer,³ and when cooked down into powder is known by the street name of "Special K."⁴

Appellant and McClung drove to the clinic in the car of an acquaintance, parked the vehicle in a hidden location, and walked to the clinic.⁵ Upon arrival at the clinic, Appellant "busted the glass" of the door, opened the door, and entered the clinic.⁶

Once inside, Appellant and McClung rummaged through cabinets until they found the drug they went there to get—Ketamine.⁷

During their search of the clinic, Appellant and McClung also found a cash box⁸ which they took with them. They also discovered a door that led to an adjoining bowling alley, and so they

²R. 451.

³R. 452.

⁴R. 470.

⁵R. 453.

⁶R. 454.

⁷R. 454.

⁸R. 456.

entered that place as well.⁹ After searching the bowling alley and finding nothing of interest, Appellant and McClung returned to the clinic and then left the clinic through the door which they had originally entered.¹⁰

Approximately two hours later, Appellant and McClung returned to the clinic and looked through it again.¹¹ Leaving the clinic for the second time, Appellant and McClung drove to a local used car lot, Reid's Used Cars.¹²

Upon arrival at Reid's Used Cars, Appellant went to the back door, and when Appellant returned "he had keys and everything."¹³ Appellant and McClung then traveled to a location in downtown Spencer and met an individual named Matt Thomas,¹⁴ whose vehicle they were driving. Appellant, McClung, and two others—Matt Thomas and Rachel Flanders (Appellant's sister)—then returned to Reid's Used Car Lot to make their vehicle selections.

Appellant selected a Monte Carlo, Matt Thomas picked out a Pontiac Sunfire, and McClung drove away in a Ford Explorer.¹⁵ This caravan of stolen cars then commenced a two-county excursion, described by one participant thusly, "We went toward Calhoun [County] and we came

⁹R. 457.

¹⁰R. 458-459.

¹¹R. 460.

¹²R. 462.

¹³R. 463.

¹⁴R. 465.

¹⁵R. 466-467.

back. And we went like through back roads and everything like that.”¹⁶ The vehicles were later abandoned at various rural locations.¹⁷

Before abandoning the vehicles, the participants managed to demolish one of them and damage the other two. As described by the owner of the used car lot, “[T]hey just completely trashed the ‘97 Chevrolet Monte Carlo from one end to the other. Ran it through chain link fences and mud and grass and dirt and rolled it over and smashed it to pieces.”¹⁸

The participants in this crime spree then reassembled at the McDonald’s in Spencer and split up the money from the clinic cash box.¹⁹ (It must be said, however, it is unclear from the record how the participants traveled to McDonald’s after abandoning the stolen vehicles.) The Ketamine was distributed among Appellant, McClung, and Matt Thomas,²⁰ and some of it was cooked by Appellant, McClung, and Matt Thomas at Matt Thomas’ house.²¹

B. PROCEDURAL HISTORY.

The January 2003 Term of the Grand Jury for Roane County returned an indictment charging Appellant in a 14-count indictment: *Breaking and Entering a Building Other than a Dwelling*, in violation of W. Va. Code § 61-3-12 (Counts 1-3); *Grand Larceny*, in violation of W. Va. Code § 61-3-13(a) (Count 4); *Petit Larceny*, in violation of W. Va. Code § 61-3-13(b) (Count 5);

¹⁶R. 466-467.

¹⁷R. 468.

¹⁸R. 381.

¹⁹R. 469.

²⁰R. 469.

²¹R. 472.

Possession with Intent to Deliver a Controlled Substance, in violation of W. Va. Code § 60A-4-401(a) (Count 6); *Possession of a Controlled Substance*, in violation of W. Va. Code § 60A-4-401(b) (Count 7); *Conspiracy to Commit a Felony*, in violation of W. Va. Code § 61-10-31 (Counts 8-12); and *Conspiracy to Commit a Misdemeanor*, in violation of W. Va. Code § 61-10-31 (Counts 13-14).²²

At the conclusion of his jury trial in the Circuit Court of Roane County on November 13, 2003, Appellant was found guilty of all counts.²³ However, before sentencing, the circuit court dismissed Counts 7 and 13 (without objection) because they violated double jeopardy principles. Ultimately, the court sentenced Appellant by order dated March 12, 2004.²⁴ Counts 1, 2, and 3, *Breaking and Entering of a Building Other Than a Dwelling*, one to ten years for each count and no fines, with the sentences to be served concurrently; Count 4, *Grand Larceny*, one to ten years and no fine, with the sentence to be served consecutively to Counts 1, 2, and 3; Count 6, *Possession With Intent To Deliver a Controlled Substance*, one to five years and no fine, with the sentence to be served consecutively to Counts 1, 2, 3, and 4; Counts 8, 9, 10, 11, and 12, *Conspiracy To Commit a Felony*, one to five years and be fined the costs of this action, with the sentences to be served concurrently with each other and concurrently with Counts 1, 2, 3, 4, and 6. Appellant was also found guilty of two misdemeanor convictions: Count 5, *Petit Larceny*, 219 days and no fine; and Count 14, *Conspiracy to Commit a Misdemeanor*, 219 days and no fine. Both sentences for Counts

²²R. 1-6.

²³R. 659-662.

²⁴R. 127.

5 and 14 to be served concurrently and Appellant given credit for time served in the amount of 219 days, thus discharging the two misdemeanor convictions.²⁵

The court further ordered Appellant make restitution to Cain's Veterinary Clinic in the amount of \$170.00²⁶ and to William Reid Porter, III, the owner of Reid's Used Cars, in the amount of \$11,895.00.²⁷

It is from these convictions and sentences that Appellant brings this appeal.

III.

ASSIGNMENTS OF ERROR

Appellant assigns the following grounds as error:

- A. The Trial Court erred and abused its discretion by refusing to dismiss faulty counts of the indictment returned against the Appellant/Defendant in this case.
- B. The Trial Court erred and abused its discretion by allowing the State to read a witness's out-of-court statement to the jury, when the witness was in court to testify and did not clearly claim the statement as his own.
- C. The Trial Court erred and abused its [sic] discretion by denying the Appellant/Defendant's Motion for a New Trial.

²⁵R. 127-130.

²⁶R. 130.

²⁷R. 728.

IV.

ARGUMENT

A. COUNTS 4 AND 11 ARE NOT FATALLY FLAWED, AND THE CIRCUIT COURT DID NOT ERR BY REFUSING TO DISMISS THEM.

1. The Standard of Review.

“Generally, the sufficiency of an indictment is reviewed *de novo*. An indictment need only meet minimal constitutional standards, and the sufficiency of an indictment is determined by practical rather than technical considerations.”²⁸

2. Discussion.

Appellant complains Count 4 (the Grand Larceny conviction) and Count 11 (the corresponding Conspiracy to Commit a Felony conviction) of the indictment are fatally defective, because Count 4 “alleges the vales [sic] as ‘approximately[.]’”²⁹ Unfortunately, Appellant neglected to quote the entire *values* placed upon the automobiles he stole. Below are the two relevant counts of the indictment in their entirety.

Count 4

That MATTHEW s. FLANDERS, on the ____ day of July, 2002, in the said County of Roane, State of West Virgnian, committed the offense of “GRAND LARCENY”, in that MATTHEW S. FLANDERS, did unlawfully, intentionally, knowingly and feloniously committed simple larceny of goods or chattels of the value of one thousand dollars or more, with the intent to permanently deprive the owner Reids Auto Sales thereof, to-wit: one (1) 1993 Ford Explorer valued at approximately Four Thousand Dollars (\$4,000.00); one (1) 1997 Pontiac Sunfire valued at approximately Four Thousand Five Hundred Dollars (\$4,500.00); one (1) 1997 Chevy Monte Carlo valued at approximately Five Thousand Nine Hundred

²⁸Syl. Pt. 3, *State v. Wallace*, 205 W. Va. 155, 517 S.E.2d 20 (1999) (quoting Syl. Pt. 2, *State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996)).

²⁹Brief, p. 10.

Dollars (\$5,900.00); one (1) set of keys to a 1991 Pontiac Gand Prix; one (1) set of keys to a 1992 Chevy Cavalier; one (1) set of keys to a 1988 Jeep Cherokee; one (1) set of keys to a 1988 Ford Ranger; one (1) set of keys to a 1984 Ford truck; one (1) set of keys to a 1995 Dodge Neon; one (1) dealer plate #DUC2 1604; and one (1) dealer plate #DUC3 1604; with a grand total of Fourteen Thousand Four Hundred (\$14,400.00) from the goods and chattels belonging to Reids Auto Sales in violation of the West Virginia Code 61-3-13(a), against the peace and dignity of the State.³⁰

Count 11

That MATTHEW S. FLANDERS, on the ____ day of July, 2002, in the said County of Roane, State of West Virginia, committed the offense of "CONSPIRACY TO COMMIT A FELONY", in that MATTHEW S. FLANDERS, intentionally and feloniously conspired with Samuel G. McClung, a juvenile M. T., and a Juvenile R. F., to commit a felony offense against the State of West Virginia, namely Grand Larceny as alleged in Count 4, and in pursuit of the Conspiracy, MATTHEW S. FLANDERS did unlawfully and feloniously commit the overt act of Grand Larceny, in violation of the West Virginia Code 61-10-31, against the peace and dignity of the State.³¹

Essentially, Appellant makes this non-issue appear to be an issue by conveniently excluding words contained in the indictment and using law rather off-point which speaks to *petit* rather than *grand* larceny. Furthermore, Appellant relies on a 63 year-old case, *State v. Criss*,³² and while it may be true that the case has not been *explicitly* overruled, its law has certainly been called into question with the advent of much more recent case law.

Syllabus Point 2 of *Criss* states: "The allegation in an indictment for grand larceny that the property charged to have been stolen is of 'the approximate value of Fifty Dollars, (\$50.00)' renders such indictment fatally defective, on demurrer or motion to quash." However, Syllabus Points 4, 5, and 6 of *State v. Wallace, supra*, states:

³⁰R. 3.

³¹R. 5.

³²125 W. Va. 225, 23 S.E.2d 613 (1942).

4. The requirements set forth in W. Va. R. Crim. P. 7 were designed to eliminate technicalities in criminal pleading and are to be construed to secure simplicity in procedure.

5. The West Virginia Rules of Criminal Procedure are the paramount authority controlling criminal proceedings before the circuit courts of this jurisdiction; any statutory or common-law procedural rule that conflicts with these Rules is presumptively without force or effect.

6. An indictment is sufficient under Article III, § 14 of the West Virginia Constitution and W. Va. R. Crim. P. 7(c)(1) if it (1) states the elements of the offense charged; (2) puts a defendant on fair notice of the charge against which he or she must defend; and (3) enables a defendant to assert an acquittal or conviction in order to prevent being placed twice in jeopardy.

Thus, *Wallace* has already, without explicitly saying so, overruled *Criss* and any other cases which have made similar claims.

Counts 4 and 11 of Appellant's indictment are not fatally flawed because, following the language contained in Syllabus Point 6, *supra*, it states the elements of the offense charged, put Appellant on fair notice of the charges for which he had to defend, and enabled him to assert an acquittal or conviction in order to prevent being twice placed in jeopardy.

Therefore, for all of the reasons stated above, this Court should find that the circuit court did not commit reversible error by refusing to dismiss the alleged faulty counts of Appellant's indictment.

B. BECAUSE APPELLANT WAIVED ANY ISSUE HE MAY HAVE HAD REGARDING ROBERT SHAFFER, JR.'S STATEMENT, THIS COURT NEED NOT DETERMINE THE EFFECT OF ANY ALLEGED ERROR.

1. The Standard of Review.

“When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined.”³³

2. Discussion.

Appellant complains the circuit court erred by allowing the Prosecutor to read Robert Shaffer, Jr.'s handwritten statement³⁴ to the jury. However, before the prosecution moved to do so, counsel for Appellant suggested it be done.

[DEFENSE COUNSEL]: If this statement was already authenticated by [Robert Shaffer, Jr.] why not just have it read again into the record.

THE COURT: That's what the Court is going to order. [Mr. Prosecutor,] you can make your offer in front of the Jury. The Court is of the opinion that it's been sufficiently authenticated by the witness, Shaffer, Junior.³⁵

And when the Prosecutor offered the statement as evidence, the following exchange took place:

THE COURT: Is there an objection?

[DEFENSE COUNSEL]: *No objection.*

THE COURT: *Without objection* the Court will order admitted into evidence the statement of Robert Shaffer, Jr. identified as State's Exhibit 49.

³³Syl. Pt. 8, in part, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

³⁴R. 188-89.

³⁵R. 548.

.....

THE COURT: Mr. [Prosecutor], you may read this statement to the Jury but it may not be otherwise published to the Jury.³⁶

Because Appellant *knowingly and intentionally relinquished the right to object* to the Prosecutor reading Robert Shaffer, Jr.'s statement to the jury, the circuit court committed no error, and this Court need not determine the effect of any alleged deviation from any rule of law.

However, should this Court decide further examination is necessary, the State offers the following argument for consideration.

The circuit court granted the Prosecutor's motion to read Robert Shaffer, Jr.'s statement to the jury via the West Virginia Rules of Evidence, Rule 803(5).

Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him or her to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

Initially, Robert Shaffer, Jr. felt comfortable enough to make that infamous statement to the police, whether he later "remembered" what he wrote on those two sheets of paper or not. He was also originally willing to testify on behalf of the State, but something spooked him, or perhaps he felt he owed someone something. In any case, Robert Shaffer, Jr. later refused to testify, and the circuit court held him in contempt and locked him up.³⁷ So Robert discussed his options with a court-appointed attorney, then decided to take the stand; and he remembered just enough about his

³⁶R. 549-50.

³⁷R. 93.

statement to recognize his own handwriting and mark, oh—and the fact that he told the truth when he wrote it.³⁸ But he couldn't be sure about—couldn't “remember”—any of what he had written, that is, while the lawyers were asking him about his statement on the stand.

According to the Adjudication Order,³⁹ Robert Shaffer, Jr. “announced to the Court that he did not want to testify due to the fact that his future employment was with the [Appellant's] mother.”⁴⁰ And before Shaffer, Jr. eventually testified before the jury, the circuit court opined out of the presence of the jury regarding the possible intimidation of witnesses.

THE COURT: I want to make a statement here on the record. Of course, I can't help but note the attitude of the witness, Robert Shaffer, Jr., both at the time of the hearing this morning where he was advised about what a subpoena means and what his duty is if he's called as a witness and so forth, and then his attitude which was plainly apparent to me when he walked in the courtroom, to be advised to return tomorrow.

And I've heard testimony from Samuel McClung that Shaffer, Jr. might be a friend, or at least an acquaintance, of both he and the defendant. Those facts, combined with a witness who was attempting to intimidate McClung by staring through the glass of the courtroom door here during McClung's testimony, causes me some concern.

[DEFENSE COUNSEL]: Who was staring, your Honor? I think I was questioning at the time.

THE COURT: I don't know who he was, but it was a glare more than a stare. And I had the Sheriff run him off. I don't know the identity of the person. He was a young person. I can just tell everyone here that if witnesses are intimidated, jurors are intimidated, that'll be dealt with harshly by the Court, and I'm not going to say anything more.⁴¹

³⁸R. 534.

³⁹R. 93-97.

⁴⁰*Id.* at 93.

⁴¹R. 495-96.

After Robert Schaffer, Jr.'s testimony, wherein he testified both that he signed the statement in question, and that he told the truth,⁴² the circuit court held a lengthy discussion with Appellant and the Prosecutor outside the purview of the jury concerning the admissibility of Shaffer, Jr.'s statement.⁴³ Eventually, the discussion boiled down to whether the document had been "authenticated." Ultimately, the circuit court restated what Shaffer, Jr. had already testified to: That he signed the statement and was truthful, thus "authenticating" the document for the court's purposes.⁴⁴ Even defense counsel seemed to acquiesce as much before she suggested reading the statement into the record.⁴⁵

And so, with all their chickens in a row, the Prosecutor moved to read Robert Schaffer, Jr.'s statement in its entirety to the jury, and thus, into the record. Appellant, when specifically asked by the court, did *not* object to the reading of this statement. And so the circuit court ordered it admitted into evidence under W. Va. R. Evid. 803(5)—*not* as an exhibit, nor did it publish the document in any other manner—the court only ordered it to be read to the jury—once.

Lastly, during a post-trial motions hearing,⁴⁶ Appellant began argument for a motion for a new trial. One of the grounds he raised was based on the alleged improper admission of Robert Schaffer, Jr.'s statement.⁴⁷ During this argument, Appellant admits, "I wouldn't have a problem using

⁴²R. 534.

⁴³*See, e.g.*, 542-543.

⁴⁴R. 544.

⁴⁵R. 548.

⁴⁶R. 683-703.

⁴⁷R. 683-685.

[the statement] as impeachment and I think that's what the prosecutor did. The problem that we have is using that as evidence."⁴⁸

If Appellant thinks the Prosecutor used the statement as evidence to impeach his own witness, then that certainly may be *possible* under *State v. Schoolcraft*.⁴⁹

3. Where a witness testifies about events which are covered in a prior out-of-court statement and the witness denies making the out-of-court statement or indicates no present recollection of its contents, then impeachment by a prior statement is permissible.

4. Where the witness cannot recall the prior statement or denies making it, then under W. Va. R. Evid. 613(b), extrinsic evidence as to the out-of-court statement may be shown--that is, the out-of-court statement itself may be introduced or, if oral, through the third party to whom it was made. However, the impeached witness must be afforded an opportunity to explain the inconsistency.⁵⁰

Robert Schaffer, Jr. testified that the signature on the statement was his and he told the truth at the time he made the statement.⁵¹ But, he maintained he had no present recollection of either the events in question or the contents of the statement, therefore impeachment would have been possible under *Schoolcraft* and under the West Virginia Rules of Evidence, Rule 613(b), which states in pertinent part:

(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible *unless* the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

⁴⁸R. 685.

⁴⁹183 W. Va. 579, 396 S.E.2d 760 (1990).

⁵⁰*Id.*, Syl. Pts. 3 & 4.

⁵¹R. 534.

If the prosecution had impeached his own witness (which is certainly acceptable and often done), then after having done so, the document itself could have been admitted into evidence under Syllabus Point Four of *Schoolcraft*. That is, instead of just having read Robert Schaffer, Jr.'s statement *once* to the jury during testimony, the statement would have been published as an exhibit and gone back to the jury room. But that wasn't done. The statement was only read once to the jury during testimony.

In any case, this Court should find that it was not an abuse of discretion for the circuit court to admit the statement of Robert Schaffer, Jr. into evidence under Hearsay Exception Rule 803(5), wherein the availability of the declarant is immaterial.

C. THIS IS NOT A *BRADY* ISSUE, AND THE CIRCUIT COURT DID NOT ERR BY DENYING APPELLANT'S MOTION FOR A NEW TRIAL.

1. The Standard of Review.

"Although the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court's ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence."⁵²

2. Discussion.

Appellant asserts the circuit court erred denying his motion for a new trial, based upon defense counsel's somewhat distorted view of the actions of the prosecution regarding fingerprint evidence. Some factual background is necessary to discuss this issue.

As part of the investigation of this case, attempts were made by the investigating officers to obtain fingerprint and palm print evidence at the scene of the crime. Having done this, the

⁵²Syl. Pt. 1, *State v. Vance*, 207 W. Va. 640, 535 S.E.2d 484 (2000) (internal citations omitted).

investigating officers transmitted the latent lifts to the forensic laboratory of the West Virginia Department of Public Safety, where the latent lifts were examined by Stephen C. King, a latent prints examiner. Mr. King's report,⁵³ dated October 28, 2003, was inconclusive as related to "Matthew S. Flanders"—the Appellant—and so, he requested a new exemplar print card for "Flanders," observing that the exemplar print card for "Flanders" was "not suitable for this examination." It should be noted that the report was made some ten days before trial.

By letter dated November 3, 2003,⁵⁴ the Prosecuting Attorney in charge of the case wrote to defense counsel and asked that she have Appellant report to the Roane County Sheriff's Department to provide fingerprint and palm print exemplars. This letter was personally delivered to defense counsel by an employee of the prosecutor's office.⁵⁵ Defense counsel denied receipt of this letter,⁵⁶ and no fingerprint evidence was ever introduced at trial.

Appellant testified at trial. During cross-examination, the Prosecutor and Appellant had the following exchange:

[BY THE PROSECUTOR]: Okay. Were you asked to provide additional fingerprints –

[BY APPELLANT]: No, sir; I was not.

Q: – in this case?

A: I was not approached by anybody, sent a letter or anything.

⁵³R. 117.

⁵⁴R. 112.

⁵⁵R. 111.

⁵⁶R. 582.

Q. Okay. Have you talked to your lawyer?

A. Yes, I did.

Q. Did she ever ask you?

A. No, she did not.⁵⁷

The Prosecutor then had the November 3 letter described above marked as an exhibit. But before the letter was admitted into evidence, published to the jury, or employed to cross-examine Appellant, the circuit court intervened.⁵⁸ A bench conference took place, during which the circuit court denied the introduction of the letter and refused to allow the Prosecutor to cross-examine the witness regarding the issue. All of this took place during a bench conference, out of the hearing of the jury.

It is against this factual background that we now address Appellant's argument that the circuit court somehow erred and that the prosecution somehow violated the principles of *Brady v. Maryland*.⁵⁹ Apparently counsel takes the position that the finding by the forensic lab that the fingerprint exemplar card for Appellant was of poor quality is somehow exculpatory. Counsel for Appellant argues, "The State violated the principles of *Brady v. Maryland* . . . by not informing the Appellant[] that new fingerprints were needed to complete the fingerprint analysis at the scene."⁶⁰ It is difficult to address such an allegation, since it patently foolish. The undersigned can find no cases that address such an issue. This is not surprising, given the circumstances.

⁵⁷R. 581-582.

⁵⁸R. 582-585.

⁵⁹373 U.S. 83, 83 S. Ct. 1194 (1963).

⁶⁰Brief, p. 13.

Counsel for the Appellant then argues as follows: “At trial, the State tried to use a letter supposedly sent to Defense Counsel, against the Appellant[.]”⁶¹ As noted above, this letter was never seen by the jury, a fact known to appellate counsel. Nor did the Prosecutor “indicate to the jury” that Appellant did not cooperate with a request for new fingerprints. Please refer to the exchange set forth above, which is the *only* reference in the record to this letter.

The “fingerprint” issue is, frankly, a non-issue. No evidence was obtained, no fingerprint evidence existed, and no fingerprint evidence was introduced.

Although not articulated by appellate counsel, perhaps she claims that *if* fingerprint exemplars by Appellant were provided, and *if* the forensic lab determined that Appellant’s prints did not match those from the crime scene, then they would be exculpatory—in which case, they should have been provided to counsel. Assuming, *arguendo*, that all of the above happened (which it did not), Appellant still fails to present any recognizable *Brady* issue. In *State v. Kearns*⁶² this Court articulated the *Brady* standard in this jurisdiction, holding that a prosecution that withholds evidence that would “tend to exculpate an accused by creating a reasonable doubt as to his guilt[.]” violates the due process rights of the accused.

Analyzing the instant case in light of the foregoing, one must determine if there was any evidence in existence that creates a reasonable doubt as to Appellant’s guilt. The “fingerprint issue,” according to Appellant, seems to be this—if there is no fingerprint evidence to place the Appellant at the scene, then this creates a reasonable doubt as to the guilt of the accused, and consequently this

⁶¹Brief, p. 13.

⁶²Syl., 210 W. Va. 167, 556 S.E.2d 812 (2001) (quoting Syl. Pt. 4, *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982)).

evidence is exculpatory. If this is true, then the prosecution's failure to disclose such information violated *Brady*. Unfortunately for Appellant, this is just not so, because there was also no fingerprint evidence of a host of other people who both had and had not been to Cain's Veterinary Clinic.

In other words, there was no fingerprint evidence of anything. In light of the overwhelming evidence of Appellant's guilt, proof that his fingerprints were not found at the scene is meaningless. There was direct testimony by accomplices of Appellant's guilt. To argue that lack of fingerprints is fuel for reasonable doubt is ludicrous. There is no evidence that the fingerprint issue violates any *Brady* standards.

Therefore, for all of the reasons stated above, this Court should find that the circuit court did not commit reversible error by denying Appellant's motion for a new trial.

V.

CONCLUSION

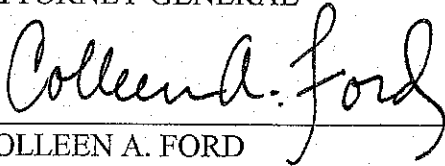
For the foregoing reasons, this Court should affirm the judgment of the Circuit Court of
Roane County.

Respectfully submitted,

State of West Virginia,
Appellee.

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

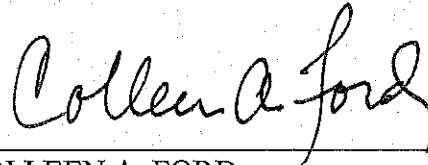


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CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of Appellee State of West Virginia* was mailed to counsel for Appellant by depositing it in the United States mail, with first-class postage prepaid, on this 1 day of June, 2005, addressed as follows:

To: Teresa C. Monk, Esq.
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