IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

STATE OF WEST VIRGINIA

Supreme Court No. _____

v.

Circuit Court No. 09-F-~~396~~ 393
(Kanawha County)

#4

RHONDA K. STEWART,

Petitioner.

FILED
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

PETITION FOR APPEAL

Gregory L. Ayers
Deputy Public Defender
W.Va. Bar No. 7824
Office of the Public Defender
Kanawha County
Charleston, WV 25330
(304) 348-2323

Counsel for Petitioner

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PROCEEDINGS AND RULINGS BELOW

No one disputed Rhonda Stewart (Rhonda) is a battered woman, subjected to years of domestic violence and abuse by her husband, at her December 2009 trial in the Kanawha County Circuit Court for his murder. When the trial court sentenced Rhonda to life in prison with mercy, the trial court noted Rhonda was abused by her husband throughout their marriage, as were their daughters, Micky and Samantha. Rhonda's husband's domestic violence was further acknowledged by the State as the prosecutor filed a motion *in limine* to prevent defense counsel from presenting any lay or expert witness testimony Rhonda is a battered woman and a victim of domestic violence by her husband. The trial court granted the State's motion *in limine* over the objection of defense counsel. This ruling by the trial court denied Rhonda her constitutional rights to present a defense and compulsory process to call witnesses. Defense counsel was prohibited from calling lay and expert witnesses to testify to her husband's domestic violence and abuse which was relevant to her mental state and her testimony she intended to commit suicide at the hospital and that the shooting of her husband in his hospital bed was an accident.

Rhonda Stewart was further denied her due process right to a jury instruction on her theory of defense. As indicated above, Rhonda testified the shooting of her husband was an accident. The trial court, nevertheless, refused defense counsel's requested instruction on accident and did not instruct the jury on that defense.

Rhonda also was denied her right to a fair trial by the prosecutor's misconduct in closing argument. In a pretrial motion *in limine*, the prosecutor sought and obtained a ruling from the trial court the suicide note Rhonda wrote just prior to the shooting was inadmissible as evidence. The prosecutor, nonetheless, improperly asked the jury in closing argument why defense counsel did not introduce the suicide note into evidence. Defense counsel's objection to this improper

argument was sustained, but the trial court instructed the jury to disregard any motive ascribed to the suicide note.

The prosecutor further engaged in misconduct during closing argument when he asserted that even if the jury believed Rhonda intended to commit suicide when she went to her husband's hospital room, if she changed her mind and intended to kill him two seconds before she shot him, then that constituted first-degree murder. This misstatement of the law on which the jury likely relied denied Rhonda a fair trial.

Rhonda was further denied her rights to a fair trial and to trial by jury when the trial court failed to answer a significant jury question. During its deliberations, the jury sent the trial court a written question asking the court to give it a clear definition of premeditation, including a time element, and wanting to know whether it can be a few seconds. The trial court responded by telling the jury they were limited to the instructions they were already given.

The jury found Rhonda guilty of first-degree murder and recommended mercy. On March 2, 2010, the trial court imposed a life with mercy sentence.

STATEMENT OF FACTS

Rhonda Stewart (Rhonda) married her husband Sammy Stewart in 1971 when she was 16 and he was 19. (Trial Transcript (Tr.) 522) As the trial court noted at sentencing, Rhonda was abused by her husband "throughout her life" and their two daughters, Micky and Samantha, also were abused by him. (3/2/10 Sentencing Transcript (3/2/10 Tr.) Tr. 11-12). To keep the jury from hearing lay and expert witness testimony about Rhonda's husband's domestic violence and abuse during their many years of marriage, the prosecutor filed a pretrial motion *in limine* to exclude this evidence from the trial. (Tr. 46-49). The prosecutor argued this evidence is only admissible in cases of self-defense which is absent here because Rhonda shot her husband when he was lying in a hospital bed. (Tr. 47-48). Defense counsel argued that evidence Rhonda's husband abused her and threatened her life during their marriage was relevant to her mental state and particularly to the first-degree murder elements of intent, premeditation, and malice. (Tr. 54-56, 60-61, 74). The trial court granted the State's motion *in limine*, ruling the evidence of Rhonda's husband's domestic violence is irrelevant and that there is no West Virginia caselaw to support its admission. (Tr. 60, 64, 69,70-71, 85).

The trial court's ruling prohibited defense counsel from calling witnesses to testify about Rhonda's husband domestic violence and its effects upon Rhonda, including defense expert Dr. David Clayman, a psychologist. (Tr. 69-70). Dr. Clayman evaluated Rhonda and determined she "fits the model of a battered woman[,]" and is a "stereotyp[ical] battered spouse" (Tr. 46-47, 50-51), who "has a long history as a victim of verbal, emotional, physical, and sexual spousal abuse." (Tr. 76). Dr. Clayman further determined these factors which make her a battered woman might contribute to her mental state that led up to the shooting. (Tr. 76). The trial court

told defense counsel he should consider a bifurcated trial so this evidence could be presented in the sentencing phase. (Tr. 64-65).

The prosecutor also filed a pretrial motion *in limine* to exclude from the evidence a suicide note Rhonda wrote to her two daughters, Micky and Samantha, before going to the hospital. (Tr. 33-35). The trial court granted the State's motion and ruled the note inadmissible as evidence. (Tr. 40-41).

The State's evidence at trial indicated that on June 13, 2009, Rhonda's husband was in the medical intensive care unit of Charleston Area Medical Center, Memorial Division, being treated for pancreatitis and alcohol withdrawal. (Tr. 364, 395-96). He had been on a life-support breathing machine but the tube was taken out that day shortly before Rhonda and her daughter Micky Stewart arrived around 12:30 p.m. (Tr. 365-67, 368). When they arrived, Rhonda's husband called Rhonda by her maiden name, and asked Rhonda and Micky to leave, and they left. (Tr. 369-70). Rhonda returned to her husband's hospital room that afternoon and, according to one witness, shot him in the head. (Tr. 411, 426). Witnesses said Rhonda was screaming, "I am so sorry, I am so sorry," over and over again, became hysterical, and was screaming and crying uncontrollably on the floor. (Tr. 372-73, 382-83, 423-24, 471). Rhonda was described as wild-eyed, dazed, and in a state of shock. (Tr. 442, 452, 454, 468, 471).

Rhonda testified she and her husband had two daughters, Micky, 37, and Samantha, 33, and four grandchildren. (Tr. 523). Her husband had a timber and land business and she and Micky previously helped him with it. (Tr. 524). Rhonda and her husband were separated for about two years and she was very depressed, had seen a psychiatrist, and was prescribed antidepressant medication. (Tr. 525-26, 528, 603-04). Rhonda said she was reclusive the last five years and was so depressed she would stay in her house and not talk on the phone. (Tr. 524,

528-29). Even though she and her husband were living apart the last two years, she continued to see him regularly, twice a week or more, as he would visit her home when he needed business papers or she would cook food and take it to him. (Tr. 529). Although they were still married, her husband had a girlfriend the last two years and girlfriends before. (Tr. 535-36).

After her husband was hospitalized, Rhonda visited him probably six times between June 8 and June 13, 2009, although her husband was heavily sedated and basically "out of it" before he was taken off the ventilator on June 13. (Tr. 532-34).

On June 13, 2009, Rhonda and her daughter Micky visited her husband; he was off the ventilator and sitting up in bed. (Tr. 537). When Rhonda and Micky entered the room, her husband's nurse asked him who his visitors were and he said Micky and Rhonda K. Boyd, Rhonda's maiden name. (Tr. 538). Rhonda's husband previously told her their marriage would be over when he called her by her maiden name so Rhonda knew what he meant. (Tr. 538). Rhonda's husband said it one time before and she felt devastated and very hurt. (Tr. 538). Rhonda's husband also told Micky to leave his room which she did, and Rhonda also left after telling her husband not to worry, she was leaving. (Tr. 539).

Rhonda went to Micky's house to check on her but she was not home. (Tr. 539). Rhonda went home, got a gun her son-in-law previously gave her, put it in her purse, wrote a suicide note to her daughters, Micky and Samantha, and left it at the house for them to find. (Tr. 540-42). In the suicide note, Rhonda told Micky and Samantha she loved them and she was sorry; and told Micky she was sorry she had invited her (Micky) back into her (Micky) dad's life and he hurt her again. (Tr. 540-41). Rhonda blamed herself for that. (Tr. 541) Rhonda decided to take her own life because without her, her daughters would not have to be hurt by their father and she (Rhonda) would not feel the pain. (Tr. 541). Rhonda said she decided to commit suicide

at the hospital because she wanted her husband to know she would not bother him anymore. (Tr. 542). Rhonda returned to the hospital intending to kill herself, not her husband. (Tr. 543). Rhonda said she wanted to stop the pain as it had lasted too long and she wanted her husband to know he could not hurt her anymore. (Tr. 543-44, 576). Rhonda testified she went to her husband's bedside with the gun. (Tr. 544). She reached across and nudged him and he woke up. (Tr. 544). Her husband either pulled, pushed, or moved her elbow and the gun accidently went off. (Tr. 544-45, 569-72). Rhonda said she intended to kill herself, not her husband, and his shooting was an accident. (Tr. 567-68, 570, 575, 583). The gun fired at close range to her husband's head but Rhonda had no blood on her clothes. (Tr. 488-89, 490-91, 515-16.).

Alice Blackwell, Rhonda's older sister, and Micky Stewart, Rhonda's oldest daughter, related essentially the same testimony: that they had seen Rhonda daily the past five years; that Rhonda became very withdrawn and her condition worsened during that period; and they were afraid or thought she might commit suicide. (Tr. 594, 597-98, 601, 602-03). Ms. Blackwell also said she lived near Rhonda and would go check on Rhonda when she saw Rhonda's husband leave Rhonda's house to see if Rhonda had been hurt or had hurt herself. (Tr. 595). Rhonda, however, would not open the door and Ms. Blackwell would have to talk to Rhonda through a window. (Tr. 594).

Defense psychologist Dr. David Clayman evaluated Rhonda to determine her mental state at the time of the shooting. (Tr. 629). Dr. Clayman indicated her verbal intelligence was in the borderline range which is characteristic of someone who has not gone to school very long, who has limited vocabulary, and does not process formal information a lot. (Tr. 613). Rhonda told Dr. Clayman she was depressed, had been shut in, and was suicidal. (Tr. 614). Dr. Clayman

testified that based on the available data and his observations, he believed it is reasonable to assume Rhonda was suicidal that day. (Tr. 633).

Based on Rhonda's testimony, defense counsel requested a jury instruction on accident which the trial court refused to give. (Tr. 653-54). The trial court acknowledged Rhonda testified the shooting was an accident, but indicated accident or absence of intention was covered by the court's instruction on involuntary manslaughter. (Tr. 652-53).

In closing argument, the prosecutor asked the jury why defense counsel did not introduce the suicide note, which the trial court excluded from the evidence on the prosecutor's pretrial motion *in limine*. (Tr. 738-39). Defense counsel's objection to this comment was sustained and the trial court instructed the jury the suicide note is not in evidence and cannot be referred to. . . "[s]o the jury should disregard any motive ascribed to the suicide note." (Tr. 739).

The prosecution further commented in closing argument that even if Rhonda intended to commit suicide at the hospital, if she changed her mind two seconds before she shot her husband, she was guilty of first-degree murder. (Tr. 747).

During jury deliberations, the jury sent the following question to the trial court: "We would like a clear-cut definition of premeditation, including a time element. Can it be a few seconds?" The trial court did not answer this request for further instructions, but instead told the jury they were limited to the instructions already given.

ASSIGNMENT OF ERROR

I. The Trial Court Denied Rhonda Stewart Her Due Process Right To Present A Defense And Right To Compulsory Process To Present Witnesses By Refusing To Permit Lay and Expert Witness Testimony She Is A Battered Woman, Subjected To Many Years Of Physical, Sexual, And Verbal Abuse By Her Husband, Which Was Extremely Relevant To Her Mental State When She Shot Him And Her Defense At Trial.

II. The Trial Court's Refusal To Give Defense Counsel's Requested Jury Instruction On Accident Denied Rhonda Stewart Her Due Process Right To An Instruction On Her Theory Of Defense.

III. The Prosecutor's Improper, Prejudicial Closing Argument In Which He Commented (1) That Defense Counsel Did Not Introduce The Suicide Note When The Trial Court Granted The State's Motion In Limine To Exclude It, And (2) That Rhonda Stewart Could Commit First-Degree Murder In "Two Seconds," Denied Rhonda Her Due Process Right To A Fair Trial.

IV. The Trial Court's Failure To Answer The Jury's Question Requesting A Clear Definition Of The Essential Element Of Premeditation And Whether It Can Be Committed In A Few Seconds, Forced The Jury To Reach A Verdict Without Any Explanation Or Clarification Of That Element They Indicated They Did Not Understand.

DISCUSSION OF LAW

I. The Trial Court Denied Rhonda Stewart Her Due Process Right To Present A Defense And Right To Compulsory Process To Present Witnesses By Refusing To Permit Lay and Expert Witness Testimony She Is A Battered Woman, Subjected To Many Years Of Physical, Sexual, And Verbal Abuse By Her Husband, Which Was Extremely Relevant To Her Mental State When She Shot Him And Her Defense At Trial.

The trial court acknowledged Rhonda Stewart (Rhonda) is a battered woman when he sentenced her to life in prison. The court stated that "according to all reports" Rhonda was "abused throughout her life . . . by the man she killed[,]" and that her daughters Samantha and Micky Stewart "were abused too by the same man." (3/2/10 Sentencing Transcript (3/2/10 Tr.) 11-12).[1] The trial court, nevertheless, granted the prosecution's pretrial motion *in limine* and refused to permit defense counsel to present lay and expert witness testimony she is a battered woman who had been subjected to years of physical battering, sexual abuse, and verbal abuse which was relevant to her mental state when she shot her husband. Defense counsel sought to introduce evidence of this battering and abuse by her husband and its effects (1) to negate the elements of intent, malice, and premeditation, and (2) to support her defense that she did not intend to kill her husband but instead intended to commit suicide and accidentally shot him.

For the jury to render a fair and reliable verdict regarding Rhonda's state of mind and the elements of first-degree murder, the jury needed to understand the cumulative and psychological effects of violence inflicted upon her by her husband. Therefore, the trial court's refusal to permit defense counsel to present lay witnesses to show she is a battered woman and an expert witness to explain the effects of battering on her mental state denied Rhonda her fundamental

[1] This domestic violence and abuse of Rhonda and her daughters was reflected in the presentence report prepared by the Kanawha County Probation Department for the trial court.

due process right to present a defense and her right to compulsory process. Fourteenth and Sixth Amendments, U.S. Constitution; Article III, §§ 10 and 14, W.Va. Constitution.

Standard of Review

A trial court's rulings on the admission or exclusion of evidence are reviewed under an abuse of discretion standard. Syl. Pt. 1, State v. Harris, 216 W.Va. 237, 605 S.E.2d 809 (2004). However, "a trial judge may not make an evidentiary ruling which deprives a criminal defendant of certain rights, such as . . . the right to offer testimony in support of his or her defense . . . which [is] essential for a fair trial pursuant to the due process clause found in the Fourteenth Amendment of the Constitution of the United States and article III, § 14 of the West Virginia Constitution." State v. Guthrie, 205 W.Va. 326, 337 n.17, 518 S.E.2d 83, 94 n.17 (1999) (quoting Syl. Pt. 3, in part, of State v. Jenkins, 195 W.Va. 620, 466 S.E.2d 471 (1995)). This Court has further stated that it "will only overturn a conviction on evidentiary grounds if the error had a substantial influence over the jury." State v. Barnett, ___ W.Va. ___, ____ S.E.2d ___, 2010 W.Va. LEXIS 89, 19-20, July 13, 2010 (No. 34806) (quoting State v. Blake, 197 W.Va. 700, 705, 478 S.E.2d 550, 555 (1996)). This means that "[i]f, the error precludes or impairs the presentation of a defendant's best means of a defense, [the Court] will usually find the error had a substantial and injurious effect on the jury. When the harmlessness of the error is in grave doubt, relief must be granted. *O'Neal v. McAninch*, 513 U.S. 432, 438, 115 S.Ct. 992, 996, 130 L.Ed.2d 947, 955 (1995); *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995)." Id.

Rhonda's Constitutional Rights To Present A Complete Defense And Present Witnesses In Support

The Due Process Clause of the Fourteenth Amendment and Compulsory Process Clause of the Sixth Amendment guarantee criminal defendants '"a meaningful opportunity to present a

complete defense.'" State v. Jenkins, 195 W.Va. 620, 628, 466 S.E.2d 471, 479 (1995) (quoting Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 2146-47 (1986)). See also In re Oliver, 333 U.S. 257, 273, 68 S.Ct. 499, 507-08 (1984); Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049 (1973); Green v. Georgia, 442 U.S. 95, 97, 99 S.Ct. 2150, 2151-52 (1979); Rock v. Arkansas, 483 U.S. 44, 51-52, 107 S.Ct. 2704, 2708-09 (1987). This right includes the fundamental right to compulsory process for obtaining witnesses in the defendant's favor:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process law.

State v. Whitt, 220 W.Va. 685, 691, 649 S.E.2d 258, 264 (2007) (quoting Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923 (1967)).

Citing the above line of U.S. Supreme Court cases, this Court in State v. Jenkins, 195 W.Va. at 629, 466 S.E.2d at 480, held the rules of evidence should not be applied in such a mechanistic way as to prevent a defendant from being heard in his defense. In Jenkins, the defendant in an attempt to present her defense to an uttering charge, sought to enter a handwriting sample that she completed while on the witness stand, and the trial court ruled it to be inadmissible. This Court reversed stating that the handwriting sample was a critical piece of evidence in support of the defendant's defense and that the State had the ability to explore its concerns with the writing sample through cross-examination of the defendant. The Court held that an evidentiary ruling by a trial court that deprives a defendant of a constitutional right, such as the right to offer testimony in support of his or her defense, which is essential to a fair trial, is an abuse of discretion. Id.

The Trial Court's Ruling Excluding Lay and Expert Testimony Rhonda Is A Battered Woman And Its Effects Upon Her Denied Rhonda These Fundamental Constitutional Rights

In a pretrial motion *in limine*, the State asked the trial court to prohibit the defense from presenting any evidence, including expert testimony, of physical or domestic violence by Rhonda's husband during their marriage demonstrating she is a battered spouse. (Trial Transcript (Tr.) 46-49). The State contended such evidence is only used where there is a defense of self-defense, which is non-existent in this case because Rhonda shot her husband while he was lying in a hospital bed. (Tr. 47-78). Defense counsel, on the other hand, asserted that evidence Rhonda's husband abused her and threatened her life was relevant to Rhonda's mental state, particularly to negate the elements of intent, malice, and premeditation. (Tr. 54-56, 60-61, 74). The trial court granted the State's motion *in limine* to exclude evidence of domestic violence by Rhonda's husband. (Tr. 60, 64, 69). The court indicated this evidence is irrelevant in this case and there is no West Virginia caselaw to support its admission. (Tr. 70-71, 85).

The trial court's ruling prohibited defense counsel from calling witnesses to testify about Rhonda's husband's domestic violence or the effects of battering on her, including defense expert Dr. David Clayman, a psychologist. Defense counsel advised the court Dr. Clayman determined Rhonda "fits the model of a battered woman[,]" and is a "stereotyp[ical] battered spouse" (Tr. 46-47, 50-51), who "has a long history as a victim of verbal, emotional, physical, and sexual spousal abuse." (Tr. 76). Dr. Clayman further stated "[t]hese factors will justify consideration of the degree to which her status as a battered woman might be contributory to her mental state that led up to the shooting." (Tr. 76). The trial court told defense counsel he may

want to reconsider a bifurcated trial so counsel could present this testimony in the sentencing phase. (Tr. 64-65).[2]

Contrary to the trial court's ruling, West Virginia caselaw does support admission of domestic violence evidence the decedent abused or threatened the life of the defendant when it is relevant to her defense. In State v. Harden, 223 W.Va. 796, 679 S.E.2d 628 (2009), a case cited by defense counsel to the trial court (Tr. 54), the defendant was a victim of domestic violence and claimed self-defense in shooting her husband. The Court nonetheless stated that even where self-defense is not at issue, evidence the defendant suffered domestic violence by the decedent is relevant in a homicide case:

> Where it is determined that the defendant's actions were not reasonably made in self-defense, evidence that the decedent had abused or threatened the life of the defendant is nonetheless relevant and may negate or tend to negate a necessary element of the offense(s) charged, such as malice or intent.

Id. at Syl. Pt. 4. The Harden Court further recognized that evidence of prior violence and domestic abuse is relevant to negate intent, malice, or an element of the offense.

> We have similarly held that evidence of prior threats and violence is relevant to "negate criminal intent." *State v. Lambert, 173 W.Va. 60, 63-64, 312 S.E.2d 31, 35 (1984).* In *State v. Wyatt, 198 W.Va. 530, 542, 482 S.E.2d 147, 159 (1996)*, we explained that a defendant's domestic abuse was relevant "to establish either the lack of malice, intention, or awareness, and thus negate or tend to negate a necessary element of one or the other offenses charged."

Id. at 803, 679 S.E.2d at 635.

In Lambert, the defendant was convicted of welfare fraud and claimed lack of criminal intent because she was coerced by her husband's violence and physical abuse of her. Lambert,

[2] This statement by the trial court further demonstrates the error in the court's ruling. Defense counsel has an obligation to present mitigating evidence at a unitary trial the same as he does at a bifurcated trial. State ex rel. Leach v. Hamilton, 280 S.E.2d 62, 65 (W.Va. 1980).

173 W.Va. at 61-62, 312 S.E.2d at 32-33. In reversing Lambert's conviction due to the absence of a proper instruction on coercion, the Court stated:

> This Court recognized in *State v. Dozier, 255 S.E.2d at 555*, that where criminal intent is a element of the offense charged, a defendant is entitled "to elicit testimony about . . . .prior physical beatings. . . .in order that the jury may fully evaluate and consider that defendant's mental state at the time of the commission of the offense." Not only are defendants entitled to present evidence to support such theories as the battered spouse syndrome, which go to negate criminal intent, they are also entitled to receive proper instructions on those theories.

Id. at 63, 312 S.E.2d at 34-35.

Similarly, in State v. Wyatt, 198 W.Va. 530, 534, 540, 482 S.E.2d 147, 151, 157 (1996), the defendant, who was convicted of child abuse and neglect, malicious assault, and murder by failure to provide medical care, claimed she was a battered woman and due to that was afraid to seek medical attention for the child. The Court recognized "battered women's syndrome as a particularized version of post-traumatic stress disorder["] and "anticipate[d] that the testimony of a knowledgeable expert on those subjects may well meet the *Wilt [v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993)] standards and offer testimony that will assist the trier of fact in determining the issues of criminal intent. . ." Id. at 542, 482 S.E.2d at 159.

Subsequently, in State v. Riley, 201 W.Va. 708, 712, 500 S.E.2d 524, 528 (1997), the trial court in a murder case found no evidence of self-defense but nevertheless permitted the defendant to present expert testimony the defendant was "a classic battered spouse," including instances of physical and emotional abuse. The Riley Court stated that "[e]vidence of battered spouse syndrome has been found to be admissible for a criminal defendant in West Virginia for any of three purposes." Id. at 714, 500 S.E.2d at 530 n. 6.

> First, it can be used to determine the defendant's mental state where self-defense is asserted. See *State v. Dozier, 163 W.Va. 192, 197-98, 255 S.E.2d 552, 555 (1979)*. Second, it can be used to negate criminal intent. See *State v. Lambert, 173 W.Va. 60, 63-64, 312 S.E.2d 31, 35 (1984)*. Finally, in *State v. Wyatt, 198*

> *W.Va. 530, 482 S.E.2d 147 (1996)*, we discussed the potential use of the battered spouse syndrome "to establish either the lack of malice, intention, or awareness, and thus negate or tend to negate a necessary element of one or the other offenses charged." *Id. at 542, 482 S.E.2d at 147, 159.* (Emphasis added).

Id.

Likewise, other courts have found that evidence of battering and its effects are admissible to explain the battered woman defendant's behavior in situations not involving self-defense. See, e.g., United States v. Ramos-Oseguera, 120 F.3d 1028 (9th Cir. 1997) (expert testimony on battering admitted in federal drug case to support battered woman defendant's duress claim); State v. Cababag, 850 P.2d 716 (Haw. 1993) (expert testimony on battering admissible to explain seemingly "bizarre" conduct of domestic violence victims, including minimization of the abuse and other related behaviors, which is beyond knowledge of ordinary juror); United States v. Brown, 891 F.Supp. 1501 (D.Kan. 1995) (after-discovered evidence of battering warranted new trial since it would have explained defendant's state of mind and supported her compulsion defense in federal drug case); People v. Romero, 13 Cal.Rptr.2d 332 (Cal. App. 2d Dist. 1992), *rev'd on other grounds*, 35 Cal.Rptr.2d 270, 883 P.2d 388 (1994) (expert testimony on battering was relevant to duress defense of battered woman defendant convicted of second-degree robbery with abusive boyfriend); Carnahan v. State, 681 N.E.2d 1164, 1167 (Ind. App. 1997) (recognizing that battered wife syndrome evidence was admissible as it "was directly relevant to [prosecuting witness's] credibility which, because she testified, was an issue at trial."). State v. Williams, 937 P.2d 1052 (Wash. 1997) (expert testimony supported battered woman's duress claim in welfare fraud case).

Other courts have admitted such testimony to explain the defendant's state of mind and help determine if she possessed the specific intent for the crime. See, e.g., Commonwealth v. Pike, 726 N.E.2d 940, 948-49 (Mass. 2000) (recognizing expert testimony concerning battered

woman syndrome is not limited to instances where a defendant uses force against her batterer, but is admissible to explain a victim's erratic behavior, prove a defendant's statements were not voluntary, prove lack of criminal intent, and as newly discovered evidence where the defendant is unable to perceive herself as abused or to gain help by communicating the abuse to others); Fennell v. Goolsby, Warden, 630 F.Supp. 451, 459-61 (E.D.Pa. 1985) (federal habeas court found state defendant who attacked and killed her husband over six months after they had separated was improperly denied testimony of battered women expert who would have supported her credibility concerning her mental state, the nature of her relationship with her husband, and helped explain why she remained with her husband for so many years). United States v. Marenghi, 893 F.Supp. 85 (D.Me. 1995) (permitting defendant to present evidence of battered woman's syndrome to show duress at trial for conspiring to possess and distribute controlled substance); Pickle v. State, 635 S.E.2d 197, 203-05 (Ga. 2006) (holding battered person syndrome evidence is admissible to negate specific intent of crimes of child abuse, battery, and aggravated assault); Dunn v. Roberts, 963 F.2d 308, 309-10, 313-14 (10th Cir. 1992) (finding that defendant is entitled to battered woman expert to address issue of intent where defendant convicted of aiding and abetting her abuser in felony murder, kidnapping, battery, and robbery crimes); Barrett v. State, 675 N.E.2d 1112, 1116-17 (Ind. App. 1996), *superseded by statute,* Marley v. State, 747 N.E.2d 1123 (Ind. 2001) (holding that expert testimony regarding battered women syndrome is admissible in child neglect case to negate intent); Mott v. Stewart, 2002 U.S. Dist. LEXIS 23165, p. 5-6, 20 (D. Ariz. 2002) (federal habeas court held state defendant convicted of child abuse and murder was denied right to present a complete defense by trial court's refusal to permit testimony of battered woman expert which could have negated the element of knowledge or intent).

Lay And Expert Witness Testimony That Rhonda Was A Victim of Domestic Violence By Her Husband For Many Years Was Relevant To Her Mental State At The Time Of The Shooting And To Negate The Elements of First-Degree Murder

Rhonda's defense and testimony at trial was that she took a gun to the hospital to commit suicide, not to shoot her husband. (Tr. 541-44, 545). Whether the jurors believed she was really suicidal and intended to kill herself rather than her husband was therefore critical to the jurors' finding of the first-degree murder elements of intent, malice, and premeditation. Defense counsel, however, was prohibited by the trial court from presenting, and the jury never heard, the most important and convincing evidence that would have demonstrated why Rhonda was depressed and suicidal – lay witnesses and expert testimony that she was a victim of domestic violence by her husband for many years.

The prosecution contended at trial that evidence of domestic violence by the decedent is only relevant where the defendant acts in self-defense. As shown by the above caselaw, evidence that a defendant is a battered woman directly affects her mental state and may negate the elements of intent, malice, and premeditation. Thus, the relevance of lay and expert witness testimony in this case is that it not only lends credence to, but strongly supports Rhonda's testimony she went to the hospital with the intent of committing suicide, not homicide. See WVRE 401: '"Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." This Court has further recognized that "[u]nder Rule 401, evidence having any probative value whatsoever can satisfy the relevancy definition." McDougal v. McCammon, 193 W.Va. 229, 236, 455 S.E.2d 788, 795 (1995).

Evidence via lay witnesses and expert testimony that Rhonda is a battered woman is relevant to her defense she intended to commit suicide because it is well-established "[b]attered

women often experience severe stress reactions that produce many different physical and psychological effects." Rocco C. Cipparone, Jr., Comment: *The Defense of Battered Women Who Kill*, 135 U. Pa. L. Rev. 427, 443 (1987). "A significant number of the 6,000 or so women who commit suicide in the United States each year likely do so because of being abused by an intimate male partner." U.S. Department of Justice, National Institute of Justice, *Reviewing Domestic Violence Deaths*, by Neil Websdale, NCJ 250 (November 2003), at 30, http://www.ncjrs.gov/pdffilesl/jr000250g.pdf (accessed August 10, 2008). "Twenty-nine percent of all women who attempt suicide were battered." Evan Stark & Anne Flitcraft, *Killing the Beast Within: Woman Battering and Female Suicidality*, International Journal of Health Sciences, 1995, at 25(l). See also Stephanie Eisenstat & Lundy Bancroft, *Domestic Violence*, New Eng. J. of Med., September 16, 1999, Vol. 341 (12), at 886-892 (one in four women who attempt suicide is a victim of abuse); Charles Ewing, *Battered Women Who Kill* 67-70 (1987) (finding that learned helplessness often coexists with depression; the two mental states often combine so that a battered woman sees her only alternatives as suicide or homicide, and many battered women do choose suicide).

If the jury had been able to hear from witnesses that Rhonda was a battered woman and from an expert that such violence makes some women suicidal, the jury would have been much more inclined to believe her testimony she went to the hospital to commit suicide, not homicide. The elements of premeditation and deliberation require not only a cool mind capable of reflection, but one that did in fact reflect for a short period of time. State v. Guthrie, 194 W.Va. 657, 674, 461 S.E.2d 163, 180 (1995). If the prior physical, sexual, and emotional abuse inflicted on Rhonda by her husband mentally tormented her and made her suicidal, rather than homicidal, the evidence of battering and its effects would negate a premeditated, deliberate,

intentional, and malicious act. Thus, the evidence of battering and its effects provides an alternate explanation for Rhonda's actions the jury never heard.

As it was, the jury essentially only heard the State's side of the case, i.e., that Rhonda walked into her husband's hospital room and shot him. Rhonda did testify that she was depressed and was upset that her husband had mistreated her daughter Micky by telling her to leave his hospital room, but this testimony would hardly give the jury an understanding of her true mental state and why she would go home, get a gun, write a suicide note, and return to the hospital to commit suicide and end up shooting her husband. Also, Rhonda's sister, Alice Blackwell, and Dr. Clayman testified Rhonda was suicidal (Tr. 597, 633), but these witnesses were not allowed to testify about the domestic violence Rhonda suffered, which prevented the jury from understanding her suicidal ideation was a result of her husband's domestic abuse. On the other hand, if the jury understood the real reasons Rhonda was depressed and suicidal, the jury would have had a sufficient basis for determining her mental state and whether she possessed the necessary mental elements for first-degree murder. The trial court's prohibition of such evidence by her lay and expert witnesses denied Rhonda a meaningful opportunity to present her defense. See Crane, 476 U.S. at 690, 106 S.Ct. at 2146-47; Jenkins, 195 W.Va. at 628, 466 S.E.2d at 479.

Jurors in this case could not effectively understand or evaluate Rhonda's actions and mental state without fully understanding her experiences as a victim of domestic violence and her history with her batterer. Thus, the evidence of battering and its effects would have provided a context for her actions, was relevant to explain her actions and behavior, and was essential to rebut the prosecutor's argument regarding malice, premeditation, and intent to kill. The trial court's exclusion of this important evidence essential to Rhonda's defense "preclude[d] . . . the

presentation of [her] best means of a defense," and clearly "had a substantial and injurious effect on the jury." Barnett, ___ W.Va. at ___, ___ S.E.2d at ___, 2010 W.Va. LEXIS 89, at 20 (quoting Blake, 197 W.Va. at 705, 478 S.E.2d at 555).

The constitutional violation here is even more egregious than the exclusion of lay witness testimony in State v. McCoy, 219 W.Va. 130, 632 S.E.2d 70 (2006). In McCoy, the trial court excluded the testimony of lay witnesses who would have provided corroborating evidence to facts relied upon by the defendant's insanity defense experts. Id. at 136, 632 S.E.2d at 76. This Court found the trial court's exclusion of witnesses in McCoy an abuse of discretion as it excluded the testimony of witnesses who would have corroborated relevant facts, the veracity of which had been challenged by the prosecutor, when those facts were relied upon by the defendant's expert in giving his opinion regarding the defendant's insanity defense. Id. at 137, 632 S.E.2d at 77. Here, the trial court not only excluded lay testimony Rhonda is a battered woman, but also excluded her expert Dr. Clayman's opinion she is a battered woman. Evidence Rhonda is a battered woman was extremely relevant to her actions and mental state and would have corroborated Dr. Clayman's opinion she was suicidal.

By contrast, this is not a case like State v. Calloway, 207 W.Va. 43, 52-53, 528 S.E.2d 490, 500-01 (1999), or State v. Guthrie, 205 W.Va. 326, 340, 518 S.E.2d 83, 97 (1999), where the Court determined the excluded defense evidence was only marginally relevant. The lay and expert witnesses' evidence of battering and its effects in this case went to the heart of the defense case as it was critical to the jury's determination of Rhonda's mental state and the elements of premeditation, malice, and intent.

II. The Trial Court's Refusal To Give Defense Counsel's Requested Jury Instruction On Accident Denied Rhonda Stewart Her Due Process Right To An Instruction On Her Theory Of Defense.

Defense counsel requested a jury instruction on accident because Rhonda testified she shot her husband accidentally. The trial court, however, refused to instruct the jury on the defense of accident. This refusal denied Rhonda her due process right to an instruction on her theory of defense and to a fair trial. Fourteenth Amendment, U.S. Constitution; Article III, § 10, W.Va. Constitution.

Standard of Review

"As a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion." Syl. Pt. 1, in part, State v. Hinkle, 200 W.Va. 280, 489 S.E.2d 257 (1996). Accord Syl. Pt. 1, in part, State v. Shingleton, 222 W.Va. 647, 671 S.E.2d 478 (2008). "A trial court's refusal to give a requested instruction is reversible error only if: (1) the instruction is a correct statement of the law; (2) it is not substantially covered in charge actually given to the jury; and (3) it concerns an important point in the trial so that the failure to give it seriously impairs a defendant's ability to effectively present a defense." Syl. Pt. 11, State v. Derr, 192 W.Va. 165, 451 S.E.2d 731 (1994). Accord Syl. Pt. 2, State v. Bell, 211 W.Va. 308, 565 S.E.2d 430 (2002). "In general the question on review of the sufficiency of jury instructions is whether the instructions as a whole were sufficient to inform the jury correctly of the particular law and the theory of defense." State v. Miller, 197 W.Va. 588, 607, 476 S.E.2d 554 (1996).

Rhonda Stewart's Right To A Jury Instruction On Her Theory Of Defense

It is well-settled that '"as a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find

in his favor.'" State v. McCoy, 219 W.Va. 130, 133, 632 S.E.2d 70, 73 (2006) (quoting Mathews v. United States, 485 U.S. 58, 63, 108 S.Ct. 883, 887 (1988)). Accord State v. LaRock, 196 W.Va. 294, 308, 470 S.E.2d 613, 627 (1996); Syl. Pt. 3, State v. Miller, 184 W.Va. 492, 401 S.E.2d 237 (1990). See also Syl. Pt. 2, State v. Shingleton, 222 W.Va. 647, 671 S.E.2d 647 (2008) ("Where there is competent evidence tending to support a pertinent theory in the case, it is the duty of the trial court to give an instruction presenting such theory when requested to do so." (quoting Syl. Pt. 7, State v. Alie, 82 W.Va. 601, 96 S.E.1011 (1918)).

The McCoy Court further recognized that a defendant is entitled to an instruction on her theory of defense "when [s]he presents any evidence supporting that defense, regardless of the weakness or strength of that evidence." McCoy, 219 W.Va. at 135, 632 S.E.2d at 75 (quoting Cannon v. State, 615 So.2d 1285, 1286 (Ala. Crim. App. 1993)). See also State v. Headley, 210 W.Va. 524, 529, 558 S.E.2d 324, 329 (2001) ("Even where the evidence is scant, the trial court has a duty to allow a defendant to get [his/]her theory before the jury.").

The Trial Court Refused To Give Defense Counsel's Requested Jury Instruction On Accident, Rhonda Stewart's Theory Of Defense

As indicated above, defense counsel requested a jury instruction on accident based on Rhonda's testimony. Rhonda testified she learned from one of her husband's girlfriends he was in the hospital and she went to see him about six times prior to June 13, 2009, although he was "basically out of it" due to his condition. (Tr. 532-34, 536). On June 13, 2009, her husband was much better as he was off the ventilator and sitting up. (Tr. 537). When she and her daughter Micky entered the room that day her husband called Rhonda by her maiden name, Rhonda K. Boyd, which meant their marriage was over, which devastated and hurt Rhonda. (Tr. 538). Her husband also told Micky to leave (Tr. 539). Micky left and Rhonda told her husband not to

worry, she was leaving. (Tr. 539). Rhonda went to Micky's home to check on her, but Micky was not home. (Tr. 539).

Rhonda then went home and wrote a suicide note to Micky and her other daughter Samantha. In the note she told Micky and Samantha she loved them and she was sorry; she also told Micky she was sorry she (Rhonda) invited her (Micky) back into her dad's life and that he hurt her again. (Tr. 540-41). Rhonda testified she blamed herself for trying to keep their dad in their life and that without her, her daughters wouldn't have to be hurt and she (Rhonda) wouldn't keep feeling the pain. (Tr. 541). She therefore decided to commit suicide and put a gun her son-in-law had given her for protection in her purse. (Tr. 540-42). Rhonda testified she returned to the hospital to take her own life, not her husband's:

* * *

Q. [Defense counsel] Mrs. Stewart look at me please. Did you go back to that hospital to kill Sammy?

A. No. No. No. No. No. No, not him. No, not him. Not – no. No, not him.

* * *

(Tr. 543).

Rhonda then explained what happened when she went to her husband's room:

A. I walked in to the room. I took the gun out of my purse.

Q. What were you going to do then?

A. Oh, oh.

Q. What did you want to do?

A. I wanted – I wanted to stop the pain. I wanted to stop the pain. I wanted to stop the pain.

Q. And how were you going to stop the pain?

A. I was going to take my own life. I was – I was going to take my life. And I wanted Sam to know it. I wanted him to know.

Q. Why was it so important that Sam knew, Rhonda?

A. Oh, Oh, Oh. Because – because it was – it had lasted so long. It was – and it had lasted too long. It lasted too long.

* * *

Q. So what did you do?

A. I stepped in into the bed. And I reached across him. And I nudged him. And he opened his eyes, and I was going to do this. I was going to do this, and he pulled my elbow down. And my – it was so fast. It was so fast. It was so fast. It was so fast. It was – there was blood. There was blood. There was blood. And I was – I needed to get help. I needed to get – I turned, I walked. I was walking. I knew – I knew Christina was there. I knew – I knew she could help. I knew – I knew she could help. I knew she could. I knew she –

Q. Christina was a nurse?

A. Yes. Yes. Yes. Yes

Q. Do you remember giving the gun to the doctor?

A. I don't. I don't. I don't. I don't.

Q. Do you remember laying on the floor?

A. I don't. No. I was walking. I needed to get help. I was walking and I couldn't walk anymore. I couldn't move my legs. I needed to get help. My legs wouldn't go anymore.

Q. Rhonda, look at me. Rhonda, look at me. Please.

Was there ever a moment, even a split second of a moment, while you were in that room that you ever wanted to take the life of Sammy?

A. Oh, no. Oh, no. Oh, no. Oh, no.

* * *

(Tr. 543-45).

On cross-examination, Rhonda testified she shot her husband accidentally:

* * *

Q. [Prosecutor] And when you walked into his room, you were still planning on shooting yourself?

A. Yes. Yes. Yes.

Q. It may be an easier question to ask. What point did you change your mind from shooting yourself and shot you husband?

A. I never – I never changed my mind.

Never.

Q. You never changed your mind?

A. No, I never changed my mind.

Q. So as I understand it then, this was an accident?

A. Yes. Yes, it was. Yes. Yes

* * *

(Tr. 567-68).

Rhonda again testified the shooting was a complete accident on re-direct:

* * *

Q. [Defense counsel] Rhonda, did you ever intentionally pull on that trigger so that the gun would go off?

A. No. No.

Q. And kill Sammy?

A. No. No. No. No. No. No. No. Not him.

Q. The prosecutor asked you – look at me please. When the prosecutor asked you, "So this was just an accident, wasn't it?" Do you remember him asking you that?

A. Yes. Yes.

Q. It wasn't a complete accident, was it, Rhonda?

A. Oh, yes. Okay. Yes. Oh, not him.

* * *

(Tr. 583).

After the shooting, witnesses said Rhonda was screaming "I am so sorry, I am so sorry," over and over again, became hysterical, and was screaming and crying uncontrollably on the floor. (Tr. 372-73, 382-83, 423-24, 471). Witnesses described Rhonda as wild-eyed, dazed, and in a state of shock. (Tr. 442, 452, 454, 468, 471).

Based on Rhonda's testimony, defense counsel requested the trial court give the following jury instruction on accident:

> Accidental killing may provide a legal excuse for the crime charged in the indictment. If the evidence in this case raises a reasonable doubt in your minds as to whether the death was accidental or intentional, it is your duty to find the defendant not guilty.

(Defendant's Jury Instruction No. 14, Circuit Clerk's File) (Tr. 653). The prosecutor objected to this instruction, arguing Rhonda "was fully responsible for what happened." (Tr. 653). The trial court refused to give this instruction and indicated he was giving an instruction on involuntary manslaughter which included an absence of intention. (Tr. 653-54).

The Trial Court's Refusal To Give An Instruction On Accident Denied Rhonda Her Due Process Right To A Fair Trial

Since Rhonda's only theory of defense was accident, the trial court's refusal to give defense counsel's requested instruction on that defense was an abuse of discretion and denied her a fair trial. In State v. Derr, this Court held that a trial court's refusal to give a requested instruction is reversible error where "(1) the instruction is a correct statement of the law; (2) it is not substantially covered in charge actually given to the jury; and (3) it concerns an important point in the trial so that the failure to give it seriously impairs a defendant's ability to effectively

present a defense." Syl. Pt. 11, in part, Derr, 192 W.Va. 165, 451 S.E.2d 731. Defense counsel's requested instruction satisfied all three requirements.

First, the requested instruction on accident is a correct statement of the law. "Accidental death is a recognized defense to a murder charge in West Virginia." State v. Evans, 172 W.Va. 810, 814, 310 S.E.2d 877, 881 (1983) (citing State v. White, 171 W.Va. 658, 301 S.E.2d 615 (1983)). In Evans, the defendant, charged with murder, relied on the defense of accident but the trial court refused to give an instruction on that defense. Id., 310 S.E.2d at 880-81. In reversing Evans' conviction, this Court stated:

> "'Where one, upon an indictment for murder, relies upon accidental killing as a defense, and there is evidence tending in an appreciable degree, to establish such defense, it is error to refuse to instruct the jury that if they believe from the evidence that the killing was the result of an accident, they should find the defendant not guilty.' Syl. pt. 10, *State v. Legg, 59 W.Va. 315, 53 S.E. 545 (1906)*."

Id. at Syl. Pt. 4. Moreover, defense counsel's requested instruction in Rhonda's case is almost identical to this Court's statement in Legg, 59 W.Va. at 327, 53 S.E. at 550: ". . . if from a consideration of all the evidence, both that for the state and the prisoner, there is a reasonable doubt as to whether or not the killing was accidental, or intentional, the jury should acquit." Accord State v. Cross, 42 W.Va. 253, 258, 24 S.E. 996, 997 (1896). Thus, defense counsel's requested instruction on accident is a correct statement of the law.

Second, an instruction on accident entitling Rhonda to an acquittal was not included in the trial court's instructions. Apparently, the trial court erroneously believed the court's instruction on involuntary manslaughter, see Tr. 681-82, would be sufficient because it mentioned an unintentional killing. See Tr. 653-54. The Evans' Court rejected the same reasoning, finding the defendant's requested accident instruction "is a proper statement of the law, does not eclipse a verdict of guilty of involuntary manslaughter, and therefore should have

been given." Evans, 172 W.Va. at 814, 310 S.E.2d at 881. In concluding an accident instruction was necessary and would not preclude an involuntary manslaughter verdict, the Court stated:

> Our research effort is memorialized in syllabus point 2 of *Lawson*, which provides: "A person may be guilty of involuntary manslaughter when he performs a lawful act in an unlawful manner, resulting in the unintentional death of another." In explicating this rule, we concluded that "the State [is required] to show that the act, or the manner of the performance of the act, for which conviction [of involuntary manslaughter] is sought is unlawful and culpable and something more than the simple negligence, so common in everyday life, in which there is no claim that anyone has been guilty of wrong-doing." *State v. Lawson, 128 W.Va. [136] at 148, 36 S.E.2d [26] at 32 [1945].*

Therefore, the trial court's jury instructions did not include the defense of accident.

Finally, as shown above, the defense of accident presented by Rhonda's testimony was her only defense. The trial court's refusal of an accident instruction not only seriously impaired, but actually denied her the ability to effectively present a defense. See Syl. Pt. 11, Derr, 192 W.Va. 165, 451 S.E.2d 731. The jury was given no instructions permitting them to find Rhonda not guilty because the shooting was an accident.

In State v. Miller, 197 W.Va. 588, 607, 476 S.E.2d 535, 554 (1996), the Court noted that "the question on review of the sufficiency of jury instructions is whether the instructions as a whole were sufficient to inform the jury correctly of the particular law and the theory of defense." "A trial judge's instructions to a jury as to the law and how the evidence should be assessed are crucial to a fair trial." Id. at 610, 476 S.E.2d at 557. "Errors in such matters may go to the heart of the question of guilt." Id.

That is the situation here as the trial court refused to inform the jury of Rhonda's theory of defense and how her testimony in support of that defense should be assessed. This failure by the trial court denied Rhonda a fair trial as the jury was "unable to draw the appropriate legal conclusions based on the facts." Miller, 197 W.Va. at 611-12, 476 S.E.2d at 557-58 (quoting

State v. Guthrie, 194 W.Va. 657, 672, 461 S.E.2d 163, 178 (1995)). See also LaRock, 196 W.Va. at 308, 470 S.E.2d at 627 ("A failure to instruct a jury upon a legally and factually cognizable defense is not subject to harmless error analysis[.]").

III. The Prosecutor's Improper, Prejudicial Closing Argument In Which He Commented (1) That Defense Counsel Did Not Introduce The Suicide Note When The Trial Court Granted The State's Motion In Limine To Exclude It, And (2) That Rhonda Stewart Could Commit First-Degree Murder In "Two Seconds," Denied Rhonda Her Due Process Right To A Fair Trial.

"[A] prosecuting attorney is not just an officer of the court, like every attorney, but is also a high public officer charged with representing the people of the State" and "can therefore usually exercise great influence upon jurors." State v. Hamrick, 216 W.Va. 477, 481, 607 S.E.2d 806, 810 (2004) (quoting State v. Swafford, 206 W.Va. 390, 398, 524 S.E.2d 906, 914 (1999) (Starcher, J., concurring)). A prosecutor is required to maintain a position that is not partisan, eager to convict, but rather must deal fairly with the accused. Id. Prosecutorial remarks that have a significant '"tendency to mislead the jury and to prejudice the accused[,]'" require reversal. Id. (quoting State v. Sugg, 193 W.Va. 388, 393, 456 S.E.2d 469, 474 (1995)). The prosecutor's remarks in closing argument in this case did just that when he commented that defense counsel did not introduce the suicide note, inferring it may not exist, when the trial court, on the State's motion *in limine*, excluded it from the evidence at trial. The jury was further mislead on the law of first-degree murder by the prosecutor's prejudicial comment that Rhonda could have committed first-degree murder in two seconds. Both of these prejudicial arguments substantially mislead the jury and denied Rhonda her due process right to a fair trial guaranteed by Article III, § 10 of the West Virginia Constitution and the Fourteenth Amendment to the United States Constitution.

Standard of Review

In Syllabus Point. 5, State v. Sugg, 193 W.Va. 388, 456 S.E.2d 469 (1995), the Court stated that "[a] judgment of conviction will not be set aside because of improper remarks made

by a prosecuting attorney which do not clearly prejudice the accused or result in manifest injustice." The Court further stated that "[f]our factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters." Id. at Syl. Pt. 6.

In addition, since there was no objection to the prosecutor's second comment regarding first-degree murder, that issue also will have to be decided under the plain error standard which will be set forth in the argument.

The Prosecutor's Comment Defense Counsel Didn't Introduce The Suicide Note, When It Was Excluded From Evidence On The State's Motion, Intentionally Mislead The Jury To Doubt Its Existence And Rhonda's Credibility

In a pretrial motion *in limine*, the prosecution requested the trial court to exclude the suicide note Rhonda wrote before going to the hospital as hearsay and unauthenticated evidence. (State's Exhibit 3) (Tr. 33-35). The trial court granted the State's motion and ruled it inadmissible. (Tr. 40-41). During Rhonda's testimony, she said before going to the hospital the second time on June 13, 2009, she wrote a suicide note to her daughters Micky and Samantha. (Tr. 540-42). Per the trial court's ruling, however, the suicide note was never admitted into evidence. The prosecutor, nevertheless, commented in closing argument that defense counsel never introduced the suicide note:

> He eluded to something here I am a little confused about. And admittedly, this defense counsel is very good defense attorney. One of these days I hope to be as a good lawyer as he is. But we are here today to make a decision based on the

> evidence. He mentioned that she testified to a suicide note. It is the defendant's theory here today that she went in intending to commit a suicide. Why didn't he introduce the suicide note?

(Tr. 738-39).

Application of the Sugg factors indicates the prosecutor's argument was very prejudicial and denied Rhonda a fair trial. First, the prosecutor's remarks mislead the jury by asking them to consider the absence of evidence, i.e., the suicide note, which the State knew existed and specifically demanded be excluded. This Court has stated that "counsel must keep within the evidence, [and] not make statements calculated to influence, prejudice, or mislead the jury[.]" Syl. Pt. 2, State v. Kennedy, 162 W.Va. 244, 249 S.E.2d 188 (1978). Accord Syl. Pt. 7, State v. England, 180 W.Va. 342, 376 S.E.2d 548 (1988). In State v. Guthrie, 194 W.Va. 657, 679, 461 S.E.2d 163, 185 (1995), the Court noted, "[i]t is unprofessional conduct for the prosecutor to intentionally to refer to or argue on the basis of facts outside the record." (quoting Standard 3-5.9, American Bar Association Standards for Criminal Justice (2nd ed. 1980)). Accord State v. Moose, 110 W.Va. 476, 477, 158 S.E. 715, 716 (1931).

The jury here was mislead to believe there was significance to defense counsel's decision to not introduce the suicide note which would mislead the jury to believe it did not exist. The prosecutor's remarks, leading the jury to draw this inference, was particularly egregious because the prosecutor sought and obtained the trial court's ruling excluding the suicide note from the evidence at trial. Thus, the prosecutor did not confine his comments to the evidence at trial but asked the jury to consider the absence of the suicide note which he knew existed.

While the trial court sustained the defense's objection to the prosecutor's suicide note comment, the court's instruction to the jury further prejudiced the defense:

* * *

> [MR. PLANTS, Prosecutor] . . .Why didn't he introduce the suicide note?
>
> MR. MITCHELL [defense counsel]: Objection, You Honor.
>
> THE COURT: That's sustained.
>
> MR. MITCHELL: And I want warnings right now to this jury, Judge.
>
> MR. PLANTS: He brought it up.
>
> THE COURT: That is sustained. The objection is sustained. The suicide note is not in evidence and cannot be referred to by prior court order. So the jury should disregard any motive ascribed to the suicide note. (Emphasis added).

* * *

(Tr. 739). A reasonable juror would understand the court's instructions to mean the suicide note is not only not in evidence but that the juror is "to disregard any motive ascribed to the suicide note[,]" id., or in other words, to disregard Rhonda's testimony regarding her motive or reason for writing the note. While the court may not have intended the instruction to have that effect, this understanding is the clear import of the court's statement, effectively negating Rhonda's testimony that her motive for writing the note was because she intended to commit suicide.

Secondly, while the prosecutor's improper argument was not repeated, it struck at the heart of Rhonda's defense, her credibility, and implied her testimony should not be believed because the suicide note was not introduced by the defense.

The third Sugg factor, relating to the strength of the prosecution's proof to establish guilt of first-degree murder, demonstrates how prejudicial the prosecutor's comment actually was. The State presented evidence Rhonda went to the hospital with a gun and shot her husband. The State, however, presented little or no evidence to show why she did so or her mental state at the time of the shooting. On the other hand, Rhonda testified she went to the hospital with the intent

of committing suicide and had written a suicide note to her daughters which she left at her home before going to the hospital. (Tr. 540-43). The State never presented any significant evidence to disprove her intent to commit suicide other than evidence she shot her husband rather than herself. Thus, it was critical to the jury's decision as to the elements of first-degree murder to determine Rhonda's mental state and whether she entered her husband's room to commit suicide or homicide. Therefore, Rhonda's credibility with the jury and whether she actually wrote the suicide note were very important to the jury's decision on the first-degree murder elements of intent, malice, and premeditation.

As shown above, the prosecutor's comment on defense counsel's failure to introduce the suicide note was calculated to raise doubts about Rhonda's credibility regarding the suicide note and her testimony she intended to commit suicide, not homicide. Since the evidence of first-degree murder was open to serious question, the prosecutor's comment about why defense counsel did not introduce the suicide note was extremely prejudicial to Rhonda as it put her whole defense of suicide/accident in doubt and thereby bolstered the State's case.

As to the fourth Sugg factor, it is evident the prosecutor's comment was deliberately made and designed to torpedo Rhonda's suicide claim by diverting attention to the defense's failure to introduce the suicide note, which clearly raised questions in the jury's mind of its existence. Why else would the prosecutor ask the jury, "Why didn't he [defense counsel] introduce the suicide note?" (Tr. 739).

Several courts have reversed convictions where prosecutors commented on the absence of evidence they knew existed. For example, in United States v. Toney, 599 F.2d 787 (6th Cir. 1979), the prosecutor commented that a particular witness the defendant claimed was with him following a robbery did not testify and corroborate the defendant's story when the prosecutor

knew the witness had given such a statement which the trial court refused to admit. Id. at 790. The court reversed the defendant's conviction, finding the prosecutor's improper reference to the absence of this evidence to be "foul play" as the prosecutor knew this evidence existed to corroborate the defendant's story. Id. See also State v. Weiss, 752 N.W.2d 372, 377-78 (Wis. 2008) (court reversed conviction where prosecutor improperly argued in closing that the defendant never denied committing the offense until he took the witness stand when prosecutor had two police reports to the contrary); State v. Hammonds, 651 S.W.2d 537, 539 (Mo. App. 1983) ("it is also well-settled that in Missouri it is improper for a prosecutor to comment on or refer to evidence or testimony that the court has excluded"[;] court reversed conviction where prosecutor commented on absence of alibi witness where prosecutor obtained exclusion of alibi witness from trial); People v. Anderson, 682 N.Y.S 2d 231, 232 (N.Y.App. 1998) ("Because the prosecutor misled the jury by pointing to the absence of evidence that he knew existed, reversal is warranted (citations omitted)."); State v. Kassahun, 900 P.2d 1109, 1116 (Wash. App. 1995) (court found prosecutorial misconduct where prosecutor implied in argument to jury defendant was untruthful because he failed to present evidence to support his belief his business was being overrun by gangs when prosecutor had obtained motion *in limine* to preclude defendant from discovering such evidence).

In Syllabus Points 3 and 4, State v. Boyd, 160 W.Va. 234, 233 S.E.2d 710 (1977), this Court emphasized that prosecutors must deal fairly with the accused and that this duty is more elevated in cases that are particularly serious or repugnant in nature:

> 3. The prosecuting attorney occupies a quasi-judicial position in the trial of a criminal case. In keeping with this position, he is required to avoid the role of a partisan, eager to convict, and must deal fairly with the accused as well as the other participants in the trial. It is the prosecutor's duty to set a tone of fairness and impartially, and while he may and should vigorously pursue the State's case,

> in so doing he must not abandon the quasi-judicial role with which he is cloaked under the law.
>
> 4. The standard of fair and impartial presentation required of the prosecutor may become more elevated when the offense charged is of a serious or revolting nature, as it is recognized that a jury in this type of case may be more easily inflamed against the defendant by the very nature of the crime charged.

In State v. Swafford, 206 W.Va. at 397, 524 S.E.2d at 913, Justice Starcher, in a concurring opinion, further explained the prosecutor's duty to be fair and not raise issues with the jury it has no right to consider:

> * * *
>
> The privilege of addressing the jury should never be taken as a license to state, or to comment upon, or to suggest that the jury draw an inference from, facts not in evidence, or for that matter to raise issues which a jury has no right to consider issues such as race, religion, economic status, the accused's exercise of a constitutional right, or some other issue designed to encourage jurors to act with an improper motive.
>
> Every citizen must be able to trust their criminal justice system. The public must be assured that the guilty will be punished and that the innocent will be exonerated. But when there is a reasonable question of guilt or innocence, the public should be assured that both sides will get a fair shot to prove their case. However, even the most conscientious prosecutors may be tempted to sneak their thumb onto the scale of justice to make it more certain that the jury reaches a guilty verdict. (Emphasis added).
>
> * * *

In this case, the prosecutor deliberately commented on a fact not in evidence, the suicide note, which he knew existed in an obvious effort to get the jury to reject Rhonda's defense and make it more certain the jury found her guilty.

The Prosecutor's Misstatement of the Law In Closing Argument That Rhonda Could Commit First-Degree Murder In "Two Seconds" Was Highly Prejudicial

As indicated above, Rhonda testified she went to the hospital with a gun to commit suicide and the shooting of her husband was an accident. (Tr. 542-43, 567-68, 583). To rebut Rhonda's testimony and her defense, the prosecutor improperly asserted in closing argument that

even if she intended to commit suicide, if she changed her mind two seconds before she shot her husband, she was guilty of first-degree murder.

* * *

> MR. PLANTS [prosecutor]: Let's just assume, again, give her the benefit of the doubt. I got the burden here. I carry it gladly. Base your decision on the evidence. Assuming what she said is true, let's assume that she was intending to com[m]it suicide that day. She drove back to the hospital intending to shoot herself and she changed her mind. Two seconds before she put the gun to Sammy Stewart's temple. Ladies and gentlemen, that's first degree murder.

* * *

(Tr. 747).

This clear misstatement of West Virginia law regarding first-degree murder "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Sugg, 193 W.Va. at 405, 456 S.E.2d at 486 (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871 (1974)).

The Sugg factors indicate the prosecutor's improper argument was so damaging as to require reversal of the conviction. First, the prosecutor's argument that Rhonda could commit first-degree murder in two seconds clearly misstated the law and mislead the jury to find her guilty of that offense even if they believed her testimony she intended to commit suicide until two seconds before her husband was shot. While an intent to kill may be formed in two seconds, first-degree murder cannot be committed after instantaneous premeditation and momentary deliberation, which is all that can occur in two seconds.

In State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995), the Court stated in Syllabus Points 5 and 6:

> 5. Although premeditation and deliberation are not measured by any particular period of time, there must be some period between the formation of the intent to kill and the actual killing, which indicates the killing is by prior calculation and design. This means there must be an opportunity for some reflection on the intention to kill after it is formed.

> 6. In criminal cases where the State seeks a conviction of first degree murder based on premeditation and deliberation, a trial court should instruct the jury that murder in the first degree consists of an intentional, deliberate, and premeditated killing which means that the killing is done after a period of time for prior consideration. The duration of that period cannot be arbitrarily fixed. The time in which to form a deliberate and premeditated design varies as the minds and temperaments of people differ and according to the circumstances in which they may be placed. Any interval of time between the forming of the intent to kill and the execution of that intent, which is of sufficient duration for the accused to be fully conscious of what he intended, is sufficient to support a conviction for first degree murder. To the extend that *State v. Schrader, 172 W.Va. 1, 302 S.E.2d 70, (1982),* is inconsistent with our holding today, it is expressly overruled.

The Guthrie Court further explained that premeditation cannot be instantaneous nor deliberation momentary to prove first-degree murder:

> This means there must be an opportunity for some reflection on the intention to kill after it is formed. The accused must kill purposely after contemplating the intent to kill. Although an elaborate plan or scheme to take life is not required, our *Schrader's* notion of instantaneous premeditation and momentary deliberation is not satisfactory for proof of first degree murder. . . .To speak of premeditation and deliberation which are instantaneous, or which take no appreciable time, is a contradiction in terms. It deprives the statutory requirement of all meaning and destroys the statutory distinction between first and second degree murder.

Id. at 675, 461 S.E.2d at 181 (underline added). Thus, "murder in the first-degree is a calculated killing as opposed to a spontaneous event." Id. at 674, 461 S.E.2d at 180.

In State v. Hatcher, 211 W.Va. 738, 741, 568 S.E.2d 45, 48 (2002), the prosecutor argued in closing argument that "premeditation can be formed in an instant[.]" Citing the above syllabus points and quotation from Guthrie, this Court held the prosecutor's erroneous misstatement of the law prejudicial to the defendant and reversed the conviction. Id. at 742, 568 S.E.2d at 49. The Court said since the element of premeditation was not indisputably shown by the State's evidence, the jury could have relied on the prosecutor's erroneous statement of the law. Id.

The same reasoning is applicable here. Given Rhonda's testimony, the State's proof of premeditation was disputed and questionable. In view of that, it is very likely the jury relied on the prosecutor's misrepresentation of the law to find the element of premeditation. This reliance is even more likely because the jury requested further instruction on that element and asked if two seconds would be sufficient, but the trial court did not give the jury further instructions. See Fourth Assignment of Error *infra*.

This Court's decision in State v. Hutchinson, 215 W.Va. 313, 599 S.E.2d 736 (2004), further demonstrates the prosecutor's statement that first-degree murder can be committed in two seconds" is a gross misstatement of the law. Although the Hutchinson Court found sufficient evidence of premeditation by the defendant, the defendant's actions culminating in the murder took considerably more time than a couple seconds, as described by the Court:

> The evidence in this case indicated that a heated discussion occurred between the appellant, Mr. Toler and Mr. West regarding the whereabouts of Ms. Cline. As Mr. West declared that Ms. Cline was in the truck with him and Randy, the appellant responded, "She better not be . . . I'll shoot every one of yous." At this point the appellant did not shoot anyone in an uncontrollable fit of rage. Instead, Mr. Toler stepped out of the vehicle and attempted to calm the appellant. After some time had passed, the appellant fired a shot in the air from his pistol. Even at this point, the appellant did not shoot Mr. West. Instead, more time passed and Mr. Toler asked the appellant why he was "shooting that damn gun around like that for." The appellant responded by telling Mr. West that he was going to shoot him. When Mr. West responded "you won't shoot me," the appellant aimed the gun at Mr. West's chest and pulled the trigger. As Mr. Toler ran to the neighbor's house to call an ambulance and the police the appellant stood on his porch and yelled, "I told you I'd shoot you-ins."

Id. at 322, 599 S.E.2d at 745.

Although the prosecutor's misstatement of the law was not repeated (the second Sugg factor) in this case, its impact was clearly devastating to the defense in light of the State's case and lack of evidence of premeditation (the third Sugg factor). As noted previously, the State presented little evidence to prove the elements of premeditation, malice, and intent, other than

showing Rhonda shot her husband. On the other hand, Rhonda's credibility regarding her intent to commit suicide was critical to the jury's determination as to whether the elements of intent, malice, and premeditation existed. What is so damaging and prejudicial about the prosecutor's misstatement of the law is that it mislead the jury to believe that even if they believed Rhonda's testimony she intended to commit suicide, the jury could still find her guilty of premeditated first-degree murder if she changed her mind two seconds before shooting her husband. In other words, Rhonda's testimony really did not matter on the elements of premeditation, intent, and malice as long as the jury found she changed her mind two seconds before the act. This conclusion effectively gutted Rhonda's testimony and defense by eliminating any effect it could have had on the jury's finding of the elements of first-degree murder if the jury believed the shooting was intentional. The trial court's refusal to answer the jury's questions regarding premeditation further exacerbated the situation.

As to the final Sugg factor, it is evident the prosecutor's misstatement of the law was deliberately calculated to cause the jury to find Rhonda guilty despite her evidence of a different state of mind up to two seconds before the shooting.

The Prosecutor's Improper Misstatement of The Law Is Plain Error

Although defense counsel failed to object to the prosecutor's improper closing argument, this error should be noticed as plain error for two reasons.

First, this Court has consistently held the trial court has an independent duty to intervene when a prosecutor makes an improper closing argument.

> The trial court also committed reversible error when it failed to intervene for the purpose of limiting and correcting improper remarks made by the prosecuting attorney during closing.
>
> * * *

> [T]he trial court has a duty to independently protect the accused's right to a fair trial free from improper remarks by the prosecuting attorney. . . . It is the responsibility of the court to ensure the final argument to the jury is kept within proper, accepted bounds.
>
> * * *
>
> We find . . .that the trial court erred by not intervening in order to limit and correct the prosecutor's fundamentally improper remarks.

State v. Moss, 180 W.Va. 363, 367-68, 376 S.E.2d 569, 573-74 (1988) (Emphasis added; citations and internal quotes omitted). Accord State v. Grubbs, 178 W.Va. 811, 818, 364 S.E.2d 824, 831 (1987); State v. Kanney, 169 W.Va. 764, 766, 289 S.E.2d 485, 487. The trial court should have intervened in this case.

Secondly, the prosecutor's improper, prejudicial argument rises to the level of plain error. Plain error is defined as "(1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." State v. Miller, 194 W.Va. 3, 18, 459 S.E.2d 114, 130 (1995).

The facts of this case meet the plain error test. As discussed above, the prosecutor's misstatement of the law regarding first-degree murder is an error that is plain and obvious. This Court conflates parts three and four of the plain error test, noting errors that affect substantial rights are prejudicial errors and must have affected the outcome of the trial. Id. That occurred here because, as shown above, the prosecutor's prejudicial argument likely affected the outcome of the trial and denied Rhonda a fair trial. The jury's questions regarding premeditation, which went unanswered by the trial court, are convincing evidence of this.

While the trial court permitted the prosecutor "to sneak his thumb onto the scale of justice to make it more certain that the jury reach[ed] a guilty verdict[,]" Swafford, 206 W.Va. at 398, 524 S.E.2d at 914 (Starcher, J., concurring), this Court should not uphold it. As Justice

Cleckley reminded the Court in Guthrie, 194 W.Va. at 685, 461 S.E.2d at 191, "this Court is obligated to see that the guarantee of a fair trial under our Constitution is honored."

IV. The Trial Court's Failure To Answer The Jury's Question Requesting A Clear Definition Of The Essential Element Of Premeditation And Whether It Can Be Committed In A Few Seconds, Forced The Jury To Reach A Verdict Without Any Explanation Or Clarification Of That Element They Indicated They Did Not Understand.

When the prosecutor made his erroneous argument that first-degree murder could be committed in two seconds (discussed in previous assignment of error), the jury obviously was listening as it sent a written question to the trial court requesting a further definition of premeditation, including a time element, and whether it can be a few seconds. Unfortunately, the trial court refused to answer the jury's question. This failure denied Rhonda Stewart her due process right to a fair trial and her right to trial by jury as the jury was forced to decide her guilt or innocence of first-degree murder without a proper understanding of the element of premeditation.

Standard of Review

Because defense counsel did not object to the trial court's failure to answer the jury's question, the Court's standard of review is plain error. "To trigger application of the "plain error" doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. Pt. 7, State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995).

The Trial Court Failed To Fulfill Its Duty To Answer The Jury's Question And Explain Or Clarify The Element Of Premeditation

"Where it clearly and objectively appears in a criminal case from statements of the jurors that the jury has failed to comprehend an instruction on a critical element of the crime . . . the trial court must, on request of defense counsel, reinstruct the jury." Syl. Pt. 2, State v. McClure, 163 W.Va. 33, 253 S.E.2d 555 (1979). See also Bollenbach v. United States, 326 U.S. 607, 612-

13, 66 S.Ct. 402, 405 (1946) ("When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy."). Justice Cleckley outlined the correct procedure for a trial judge to follow when a deliberating jury sends a written question of law: "the proper method of responding to a written jury inquiry during the deliberations period . . . is for the judge to reconvene the jury and to give further instructions, if necessary, in the presence of the defendant and counsel in the courtroom." Syl. Pt. 3, State v. Allen, 193 W.Va. 172, 455 S.E.2d 541 (1994); Edgell v. Painter, 206 W.Va. 168, 175, 522 S.E.2d 636, 643 (1999).

The trial judge in this case took none of these actions.

While the jury was deliberating it sent the trial court a note asking an important question about the first-degree murder element of premeditation:

> "We would like a clear-cut definition of premeditation, including a time element. Can it be a few seconds?"
>
> /s/ Sandra J. Burdette [Foreperson]

Without reconvening the jury in the courtroom with counsel and responding to the jury's question on the record, the trial court responded to the above question in writing, stating:[3]

> "Limited to instructions already given."
>
> /s/ T.J. Kaufman, Judge

The trial court's refusal to answer this important question and clear up the jury's failure to understand the element of premeditation is reversible error under the circumstances of this case.

The Trial Court's Failure To Answer The Jury's Questions Was Plain Error

[3] Counsel understands the trial court consulted with counsel for both parties concerning the question and the court's response but the only thing in the lower court record is the written question and response in the circuit clerk's file.

Application of the plain error standard demonstrates that (1) there was an error; (2) that is plain; (3) that affects substantial rights or substantially impairs the truth-finding function of the trial; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings. Syl. Pt. 7, Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995); State v. England, 180 W.Va. 342, 347, 376 S.E.2d 548, 553 (1988); Syl. Pt. 2, State v. Myers, 204 W.Va. 449, 513 S.E.2d 676, (1998).

The trial court's failure to further explain the essential element of premeditation and tell the jury that a few seconds is insufficient for premeditation was clearly error which was plain and evident. The jury's question explicitly advised the trial court the jurors did not understand (1) the element of premeditation and (2) that it requires more than a few seconds. As pointed out in the previous assignment of error, this Court stated in State v. Guthrie, 194 W.Va. 657, 675, 461 S.E.2d 163, 181 (1995), that instantaneous premeditation and momentary deliberation is insufficient to prove first-degree murder. "To speak of premeditation and deliberation which are instantaneous, or which take no appreciable time, is a contradiction in terms." Id. Since a few seconds is obviously no appreciable time, the trial court had a duty to further instruct the jury that a few seconds was insufficient for premeditation. See also State v. Hatcher, 211 W.Va. 738, 741-42, 568 S.E.2d 45, 48-49 (2002), and State v. Hutchinson, 215 W.Va. 313, 322, 599 S.E.2d 736, 745 (2004), discussed in previous assignment of error.

This is the type of situation in which this Court has held the judge must answer the jurors' questions. In State v. Lutz, 183 W.Va. 234, 395 S.E.2d 478 (1988), for example, this Court found reversible error when the trial court refused to answer a jury's questions about the implications of a verdict of not guilty by reason of insanity. See also State v. Daggett, 169 W.Va. 411, 416-17, 280 S.E.2d 87, 90 (1980). Similarly, in State v. McClure, 163 W.Va. at 37,

253 S.E.2d at 557-58, this Court reversed a conviction when the trial court refused to answer a jury's question about the defendant's right not to take the witness stand.

In addition, in State v. Davis, 220 W.Va. 590, 648 S.E.2d 354 (2007), this Court found plain error in a very similar situation where the jury indicated by their question they did not understand that second-degree murder required an intent to kill. Id. at 594, 597, 648 S.E.2d at 358, 361. Instead of correcting the jury's misunderstanding, the trial court just reread its initial instructions. This Court found plain error, in part, because the court's response "was not responsive to the jury's question and, as a consequence, the court committed error by failing to clarify the jury's misunderstanding of the law on the issues presented by the question." Id. at 596, 648 S.E.2d at 360. The same analysis is applicable here. The jury's question explicitly indicated they did not understand the meaning of premeditation and that it required more than a few seconds. As in Davis, the trial court's failure to clear up this misunderstanding was plain error.

The error here further affected a substantial right and substantially impaired the truth-finding function of the jury. Essential to the right to a fair trial is to have the jury fully and properly instructed on the applicable law. "Without [adequate] instructions as to the law the jury becomes mired in a factual morass, unable to draw the appropriate legal conclusion based on facts." Guthrie, 194 W.Va. at 672, 461 S.E.2d at 178 (quoting Miller, 194 W.Va. at 16 n.20, 459 S.E.2d at 127 n.20). Thus, "the jury must be clearly and properly advised of the law in order for it to render a true and lawful verdict." McClure, 163 W.Va. at 37, 253 S.E.2d at 558. Accord Lutz, 183 W.Va. at 236, 395 S.E.2d at 480. Because the trial court did not clarify the jury's failure to understand the element of premeditation, the jury's truth-finding function on that element was substantially impaired. See Price v. Glosson Motor Lines, 509 F.2d 1033, 1037-38

(4th Cir. 1975) ("Thus, we hold that it was the duty of the trial court to respond when the jury indicated difficulty with instructions on the central issue of the case; the failure to do so was reversible error."). Accord State v. Baby, 946 A.2d 463, 488-89 (Md. 2002).

Finally, the error here seriously affected the fairness, integrity, or public reputation of the judicial proceedings. The trial court's error in this case seriously affected the fairness of Rhonda's trial because the jury very likely convicted Rhonda upon the erroneous belief the element of premeditation, and consequently a conviction for first-degree murder, could be based on Rhonda's conduct lasting only a few seconds. This is very likely to have occurred because the prosecutor erroneously argued in closing argument that first-degree murder could be committed in two seconds. (Tr. 747). This undoubtedly prompted the jury's question which was not answered. Since neither defense counsel nor the Court corrected the prosecutor's misstatement of the law, the jury was left with the erroneous impression that a few seconds was sufficient for the element of premeditation. Thus, the prosecutor's argument, combined with the trial court's failure to answer the jury's question, had "the clear capacity to mislead the jury on an essential element of the offense, and to lead it to a result it otherwise might not have reached." Davis, 220 W.Va. at 597, 648 S.E.2d at 361 (quoting State v. Harmon, 516 A.2d 1047, 1062 (N.J. 1980)).

The trial court's failure to answer the jury's question denied Rhonda her due process rights to a fair trial and to trial by jury. Fifth, Sixth, Fourteenth Amendments, U.S. Constitution; Article III, §§ 10, 14, W.Va. Constitution.

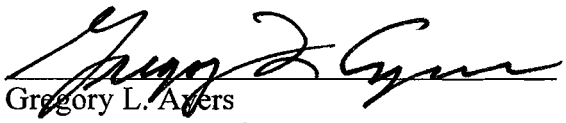
RELIEF REQUESTED

For the above reasons, Rhonda Stewart respectfully requests that her conviction and sentence be reversed and her case remanded to the circuit court for a new trial.

Respectfully submitted,

RHONDA K. STEWART

By Counsel



Gregory L. Ayers
Deputy Public Defender
W.Va. Bar No. 7824
Kanawha County Public Defender Office
P.O. Box 2827
Charleston, WV 25330
(304) 348-2323

Counsel for Petitioner