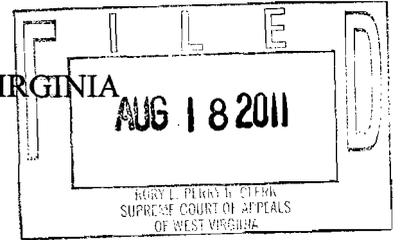


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Respondent,

v.

Supreme Court No. 101179

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

RHONDA K. STEWART,

Petitioner.

PETITIONER'S REPLY BRIEF

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REPLY ARGUMENT

I. The Trial Court's Refusal To Permit Lay Witnesses (Other Than Rhonda Stewart) And Her Expert Witness To Testify She Is A Battered Woman, Subjected To Many Years Of Physical, Sexual, And Verbal Abuse By Her Husband, Denied Rhonda Her Due Process Rights To The Best Means Of A Defense And Her Rights To Compulsory Process To Present Witnesses.

The State's Supplemental Response Brief (State's Supp. Brief), essentially repeats the argument in its initial brief that because Rhonda Stewart (Rhonda) could have testified about the domestic abuse by her husband and did not, she was not prejudiced by the trial court's exclusion of her expert and other witnesses. State's Supp. Brief 3-4. The State's Supp. Brief ignores and fails to address this Court's caselaw, see Petitioner's Supplemental Brief¹ (Pet. Supp. Brief) 6-7, indicating that a trial court's erroneous ruling may not "preclude[] or impair[] the presentation of a defendant's best means of a defense[.]" State v. Barnett, 226 W.Va. 422, 429, 701 S.E.2d 460, 467 (2010) (quoting State v. Blake, 197 W.Va. 700, 705, 478 S.E.2d 550, 555 (1996)). The trial court's ruling in this case did just that, even assuming Rhonda could have testified to her husband's domestic abuse. Rhonda's best means of a defense would have included not only her testimony but also that of Dr. Clayman and members of her family, Alice Blackwell (sister) and Micky Stewart (daughter), who testified but were precluded from testifying about the domestic abuse. The exercise of one's right to testify in no way precludes the right to present other relevant and probative evidence.

The State's argument that State v. McCoy, 219 W.Va. 130, 137, 632 S.E.2d 70, 77 (2006), and the line of cases guaranteeing the right to present corroborating evidence, see Pet. Supp. Brief 7-8, are inapplicable unless there is a witness to corroborate, State's Supp. Brief 5-6,

¹ This brief was originally filed as "Petitioner's Reply Brief" but counsel agreed to designate it "Petitioner's Supplemental Brief" when the State indicated it wanted to file a supplemental brief per this Court's scheduling order.

misses the point. A trial court's erroneous ruling limiting the presentation of witnesses essential to the best means of a defense clearly prejudices a defendant's constitutional rights to due process and compulsory process. See Pet. Supp. Brief 6-7. The trial court's ruling, substantially limiting the presentation of evidence of domestic abuse by Rhonda's husband, had significant adverse consequences for the defense. Because the trial court's erroneous ruling denied defense counsel the opportunity to present the best means of defense regarding her husband's domestic abuse, defense counsel obviously chose to forego presentation of that evidence. Defense counsel's decision was a direct result of the trial court's erroneous ruling.

It is erroneous to assume that Rhonda's testimony – what was and was not elicited on direct and cross – was unaffected by the trial court's rulings. Trial strategies are necessarily effected based on the defense's assessment of the case as a whole. There are any number of reasons why the defense may choose to present certain testimony from the defendant, or not. For example, defense counsel may opt not to present evidence that he or she believes will be disregarded if the court does not allow the presentation of corroborative evidence.

The State argues again that defense counsel failed to give the trial court any evidence of the abuse Rhonda claims was wrongfully excluded. State's Supp. Brief 7-8. The State fails to mention defense counsel advised the trial court that Dr. Clayman determined Rhonda "fits the model of a battered woman,"² and is a "stereotyp[ical] battered spouse" (Tr. 50, 46-47) who "has a long history as a victim of verbal, emotional, physical, and sexual spousal abuse." (Tr. 76). It requires no imagination to conclude his testimony would reflect that.

² See Sue Ostoff, *But, Gertrude, I Beg to Differ, a Hit is not a Hit is not a Hit: When Battered Women are Arrested for Assaulting their Partners*, *Violence Against Women Journal*, 8, pp. 1526-27 (2002) ("Battering involves a systematic pattern of using violence, the threat of violence, and other coercive behaviors and tactics, to exert power, to induce fear, and to control another person.").

Moreover, before the trial court ruled on the prosecutor's motion *in limine*, defense counsel on two occasions asked the trial court to let Dr. Clayman testify, but the court refused:

* * *

MR. MITCHELL [defense counsel]: Before the Court would render a decision, I would ask that Dr. Clayman could testify.

MRS. AKERS [prosecutor]: Judge, I would ask that you – I would submit it on the arguments, number one.

* * *

MR. MITCHELL: Your Honor, you're not going to allow me to present Dr. Clayman?

THE COURT: No. As a matter of law, I am ruling that his evidence is irrelevant at this time. And disconnected from the time and space that this Supreme Court case [Tonya Harden] gives us for that defense. That any defense that he would offer based on his reports or based on the proffer of the counsel, is too remote in time to be used in the facts that have been proffered and can be stipulated in this case at this time.

* * *

(Tr. 63-65). See also Tr. 87; State v. Lockhart, 200 W.Va. 479, 484-85, 490 S.E.2d 298, 303-04 (1997) (after trial court refused to permit the defendant to present an insanity defense based on Dissociative Identity Disorder and refused a proffer of testimony by the defense psychiatrist, this Court remanded case to the trial court to permit psychiatrist to testify even though this Court had medical reports and defense counsel's summary of the psychiatrist's proposed testimony as the trial court and this Court needed a more adequate record to rule on the issue).³

Ironically, the State argues the trial court properly denied defense counsel's request to have Dr. Clayman testify while at the same time asserting counsel failed to present sufficient evidence of his excluded testimony. State's Supp. Brief 10. The State cannot have it both ways. Also, Jenkins v. CSX Transport, Inc., 220 W.Va. 721, 728, 649 S.E.2d 294, 301 (2007), cited by

³ Also, no one contended in Lockhart the expert testimony was not necessary or relevant because the defendant testified and chose not to talk about his mental illness. Id. at 483, 490 S.E.2d at 302.

the State's Supp. Brief, at 10, is inapposite as the court's refusal to permit the expert's testimony in that case was due to a discovery violation which is not present here.

The State further contends that because the trial court's *in limine* ruling, prohibiting Dr. Clayman and Rhonda's family members from testifying about Rhonda's husband's domestic abuse, was tentative, defense counsel was required to renew his request to present these witnesses during trial. State's Supp. Brief 10-11. The State's characterization of the trial court's ruling as tentative is incorrect. The trial court's ruling was anything but tentative. See Tr. 64 (trial court responds to prosecutor's question as to whether court ruled that evidence of domestic abuse is not admissible by stating: "I have already done that. That's twice."). This ruling was clearly definitive.

The State's reliance on Justice McHugh's concurring opinion in Coleman v. Sopher, 201 W.Va. 588, 499 S.E.2d 592 (1997), State's Supp. Brief 11, is misplaced as Justice McHugh noted "the trial court did not make a definitive ruling on the motion during the pretrial hearing." Id. at 613, 499 S.E.2d at 617. Thus, Justice McHugh properly concluded that the syllabus point one, Wimer v. Hinkle, 180 W.Va. 660, 379 S.E.2d 383 (1989), rule, where there was a definitive ruling which negated the need for further objection, does not apply. A further objection was therefore necessary to preserve the issue for review in Coleman, 201 W.Va. at 613, 499 S.E.2d at 617.⁴

The State further argues defense counsel did not preserve his objection to the trial court's *in limine* ruling because the trial court said it reserved the right to revisit its ruling (Tr. 72), and defense counsel failed to request the court to do so. State's Supp. Brief 11-12. The State's

⁴ Unlike the case at bar, Green Constr. Co. v. Kansas Power & Light Co., 1 F.3d 1005 (10th Cir. 1993), cited in Justice McHugh's concurring opinion in Coleman, 201 W.Va. at 613, 499 S.E.2d at 617, was also a situation where the trial court did not make a definitive ruling pretrial.

argument is again incorrect. Just because the trial court indicates a willingness to revisit its ruling does not mean the ruling was not definitive. Moreover, as Wimer recognized, where the trial court makes a definitive ruling on the issue pretrial, counsel is not required to make additional objections at trial “unless there is a significant change in the basis for [excluding] the evidence.” Wimer, 180 W.Va. at 663, 379 S.E.2d at 386. Since there was no change in the basis for the trial court’s ruling excluding the domestic abuse evidence in this case, see Pet. Supp. Brief 3, requiring another objection at trial would be pointless. Implicit in the rule requiring a renewed objection is that there is some reason for the court to reconsider its ruling. None existed here as nothing had changed since the trial court’s initial pretrial ruling. Absent a change in circumstances, counsel should not be required to make repeated, fruitless objections to a definitive ruling to preserve the issue for appeal.

Because the trial court’s *in limine* ruling deprived Rhonda of her best means of a defense and defense counsel adequately preserved this issue for review, Rhonda was denied due process of law and her rights to compulsory process for the attendance of witnesses. Fourteenth and Sixth Amendments, U.S. Constitution; Article III, §§ 10, 14, W.Va. Constitution.

- II. The Prosecutor’s Improper, Prejudicial Closing Argument That First-Degree Murder Could Be Committed In Two Seconds Denied Rhonda Her Due Process Rights To A Fair Trial.**

- III. The Trial Court Was Required To Give The Jury Further Instructions On The Essential Element Of Premeditation When It Indicated A Lack Of Understanding Of That Element And Requested Further Instructions And Guidance On That Element During Deliberations.**

In its supplemental brief, the State argues the prosecutor properly told the jury that if Rhonda did not decide to kill her husband until a few seconds before she did so, that period of

time is sufficient to commit first degree murder. State's Supp. Brief 14. That is not an accurate statement of what the prosecutor said. He did not say a few seconds, he said "two seconds." (Tr. 747).

The State further contends the prosecutor's argument is not a misstatement of West Virginia law and the trial court properly refused to give the jury further instructions when it asked, obviously as a result of the prosecutor's argument, if a "few seconds" is sufficient for first degree murder. State's Supp. Brief 14. The State is incorrect. The State fails to cite or even acknowledge this Court's statements in State v. Guthrie, 194 W.Va. 657, 675, 461 S.E.2d 163, 181 (1995), that "instantaneous premeditation and momentary deliberation is not satisfactory for proof of first degree murder[;]" "the need to have some appreciable time elapse between the intent to kill and the killing[;]" and that "there must be some evidence the defendant considered and weighed his decision to kill in order for the State to establish premeditation and deliberation[.]" As Guthrie noted, "[t]his is what is meant by a ruthless, cold-blooded, calculating killing. Any other intentional killing, by its spontaneous and nonreflexive nature, is second degree murder." Id., at 675-76, 461 S.E.2d at 181-82 (footnote omitted).

Contrary to the prosecutor's misstatement of the law, it is evident premeditated first degree murder cannot be committed in two seconds. That is nothing less than instantaneous premeditation or momentary deliberation in which there is no appreciable time lapse between the formation of the intent to kill and the killing. It further fails to prove Rhonda "did in fact reflect, at least for a short period of time before [her] act of killing." Id. at 674, 461 S.E.2d at 180 (quoting LaFave & Scott, *Criminal Law* § 73, at 563 (1972 ed.)).

Just as Justice Cleckley in Guthrie relied upon LaFave & Scott's learned treatise in defining premeditation and deliberation, this Court should likewise consider LaFave's rejection of the notion that premeditation and deliberation require only a matter of seconds:

It is often said that premeditation and deliberation require only a "brief moment of thought" or a "matter of seconds," and convictions for first degree murder have frequently been affirmed where such short periods of time were involved. The better view, however, is that to "speak of premeditation and deliberation which are instantaneous, or which take no appreciable time, * * * destroys the statutory distinction between first and second degree murder[.]"

2 W. LaFave, *Substantive Criminal Law*, § 14.7(a), at 478 (2d ed. 2003) (footnotes and citations omitted). Accord Willey v. State, 613 A.2d 956 (Md. 1992); Midgett v. State, 729 S.W.2d 410, 414 (Ark. 1987); Tennessee v. Coleman, 2002 Tenn. Crim. App. LEXIS 84, 13-14 (2002); Bullock v. United States, 122 F.2d 213, 214 (D.C. Cir. 1941).

The view that some appreciable time must elapse between formation of the intent to kill and the fatal act was endorsed by the United States Supreme Court in Fisher v. United States, 328 U.S. 463, 66 S.Ct. 1318 (1946). In Fisher, the defendant unsuccessfully argued the government failed to prove premeditated murder. The Court quoted the trial court's instruction which stated, *inter alia*, that "the mental process of deliberating upon such a design [to kill] does require that an appreciable time elapse between formation of the design and the fatal act within which there is, in fact deliberation." Id. at 467, 66 S.Ct. at 1320.⁵ The United States Supreme

⁵ The trial court's complete instructions on premeditation and deliberation in Fisher stated: "Then, there is the element of premeditation. That is, giving thought, before acting, to the idea of taking a human life and reaching a definite decision to kill. In short, premeditation is the formation of a specific intent to kill.

"Deliberation, that term of which you have heard much in the arguments and one of the elements of murder in the first degree, is consideration and reflection upon the preconceived design to kill; turning it over in the mind; giving it second thought.

Court stated that “[p]remeditation and deliberation were defined carefully by the instructions[,]” and that “[t]he instructions, we think, were clear, definite, understandable and applicable to the facts developed by the testimony. We see no error in them.” *Id.* at 470, 66 S.Ct. at 1321-22. See also United States v. Frady, 456 U.S. 152, 172-73, 102 S.Ct. 1584, 1597 (1982) (Court quoted similar instruction on premeditation and deliberation requiring that “some appreciable period of time must have elapsed during which the defendant deliberated[.]”). Accord State v. Lodermeier, 539 N.W.2d 396, 397 (Minn. 1995). State v. Ros, 973 A.2d 1148, 1161 (R.I. 2009); Austin v. United States, 382 F.2d 129, 136 (D.C. Cir. 1967).

This view requiring “some appreciable time” between formation of the intent to kill and its execution was adopted by this Court in Guthrie, 194 W.Va. at 675, 461 S.E.2d at 181, and followed in State v. Hatcher, 211 W.Va. 738, 741, 568 S.E.2d 45, 48 (2002), and State v. Hutchinson, 215 W.Va. 313, 322, 599 S.E.2d 736, 745 (2004). As Justice Cleckley noted in Guthrie, “[t]o allow the State to prove premeditation and deliberation by only showing that the intention came ‘into existence for the first time at the time of such killing’ completely eliminates the distinction between the two degrees of murder. Guthrie, 194 W.Va. at 675, 461 S.E.2d at 181. Thus, the State’s argument that premeditation and deliberation can occur in “two seconds,” as Rhonda’s prosecutor argued, or even a few seconds at the time of the killing, must be rejected.

“Although formation of a design to kill may be instantaneous, as quick as thought itself, the mental process of deliberating upon such a design does require that an appreciable time elapse between formation of the design and the fatal act within which there is, in fact, deliberation.

“The law prescribes no particular period of time. It necessarily varies according to the peculiar circumstances of each case. Consideration of a matter may continue over a prolonged period -- hours, days, or even longer. Then again, it may cover but a brief span of minutes. If one forming an intent to kill does not act instantly, but pauses and actually gives second thought and consideration to the intended act, he has, in fact deliberated. It is the fact of deliberation that is important, rather than the length of time it may have continued.” *Id.*

The State cites State v. Hutchinson, 215 W.Va. 313, 599 S.E.2d 736 (2004), to support its argument that premeditation and deliberation can occur in a few seconds. State's Supp. Brief 14-15. The Court's opinion in Hutchinson, however, demonstrates that the events which culminated in the victim being shot occurred over a much longer period of time. These events, quoted in the Petition for Appeal, at 39, but omitted from the State's Supp. Brief, indicated an escalation of incidents throughout the day, including, as the Court noted, the defendant's heated discussion with the victim and others, the defendant's previous threats to shoot the victim and others, the passage of time before the defendant fired off a shot and had more conversation, the passage of more time before the defendant shot the victim, and the defendant's statement afterward that "I told you I'd shoot you-ins." Id. at 322, 599 S.E.2d at 745. It was impossible for these events to happen in a few seconds.

Although the trial court correctly instructed the jury in this case that the time for premeditation and deliberation cannot be arbitrarily fixed, that is precisely what the prosecutor did by arguing that first degree murder can be committed in "two seconds." (Tr. 747). This blatant misstatement of the law by the prosecutor prompted the jury to ask the trial court for "a clear-cut, definition of premeditation, including a time element," and whether it can "be a few seconds." See written question in circuit clerk's file.

While reasonable minds may disagree about whether the trial court should have directly answered their question regarding a few seconds, the trial court's refusal to give the jury further instructions on premeditation, an issue on which they requested further guidance, denied Rhonda a fair trial. See cases cited in Petition for Appeal, at 46-47. The trial court could have easily given the jury further instructions on premeditation per the above-quoted language from Guthrie. The trial court's refusal to do so is plain error as the jury, in deciding the issue of premeditation,

likely relied on the prosecutor's clear misstatement of the law that first degree murder could be committed in "two seconds." See Hatcher, 211 W.Va. at 742, 568 S.E.2d at 49. See Petition for Appeal, at 44-47.

Since the State rested on its initial brief regarding the prosecutor's closing argument addressing the suicide note, Rhonda will likewise rest on her previous briefs on this issue.

CONCLUSION

For these 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,

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CERTIFICATE OF SERVICE

I, Gregory L. Ayers, hereby certify that on this 18 day of August, 2011, a copy of the foregoing Petitioner's Reply Brief was sent via U.S. Mail to counsel for respondent, Thomas W. Rodd, Assistant Attorney General, 812 Quarrier Street, 6th Floor, Charleston, West Virginia 25301, and to local counsel for *amici curiae*, Kevin Baker, Baker & Brown, PLLC, Chase Tower, Suite 230, 707 Virginia Street East, Charleston, West Virginia 25301, and to Cindene Pezzell, counsel for *amici curiae*, National Clearinghouse for the Defense of Battered Women, 125 S. 9th Street, Suite 302, Philadelphia, PA 19107.



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