

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Respondent,

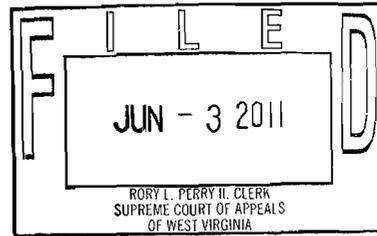
v.

Supreme Court No. 101179

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

RHONDA K. STEWART,

Petitioner.



Supplemental Brief

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 Present A Complete Defense And Her Rights To Compulsory Process To Present Witnesses.

The State alleges Rhonda Stewart's (Rhonda) claim she was prevented from calling lay and expert witnesses to testify she is a battered woman is false because the trial court permitted her to testify regarding the abuse. State's Response To Petition For Appeal (State's Brief) 4. Rhonda disagrees. Her assignment of error did not allege she was prohibited from testifying to the many years of physical, sexual, and verbal abuse by her husband, but that she was denied her right to call lay and expert witnesses to testify to that abuse. Had the trial court ruled she was prohibited from testifying to the abuse, her assignment of error and argument would have been much different and would have clearly stated the defendant was denied her right to testify in addition to calling witnesses in support. There is a distinct factual as well as constitutional difference between denying a defendant the right to testify and denying a defendant the right to call witnesses to testify concerning a certain subject. Rhonda claims the latter, not the former.

The State further contends that because Rhonda was permitted to testify regarding the abuse and did not, that somehow eliminates the trial court's error in prohibiting her from calling other lay and expert witnesses. State's Brief 22-23. As argued in the Petition for Appeal, at 10-11, and as will be shown below, Rhonda has a right to a complete defense, not one-third (1/3) of a defense, if you consider her testimony, her witnesses' testimony, and her expert's testimony as comprising one-third (1/3) each. The trial court's granting the State's motion *in limine* to prohibit two-thirds (2/3) of her defense clearly adversely affected the ability of the defense to convince the jury she was a battered woman, a key component of her defense. The defense

would have to rely solely on her testimony without any corroboration, which a jury would reasonably expect.

The State further contends (1) defense counsel failed to preserve this issue because he did not ask the trial court to revisit and reconsider its pretrial ruling prohibiting lay witnesses (other than Rhonda) and her expert witness from testifying about her husband's domestic abuse and did not make an adequate record of the excluded evidence; and (2) any limitation placed on the defense by the trial court's exclusion of defense witnesses was not reversible error. State's Brief 16-30. Rhonda disagrees and will address each argument below.

A. Defense Counsel's Objection To The Pretrial Ruling Excluding Most Of The Defense Evidence Of Domestic Abuse Sufficiently Preserved This Issue Because There Was No Change In The Court's Basis For Excluding The Evidence During The Trial And The Court Did Actually Revisit The Issue During The Trial.

First, the State's argument defense counsel's objection to the *in limine* ruling was insufficient to preserve the error, State's Brief 16, is legally incorrect as there was no change in the basis for excluding the evidence that would have required another objection. The State fails to cite the leading case of Wimer v. Hinkle, 180 W.Va. 660, 379 S.E.2d 383 (1989), which is dispositive of this issue. In Wimer, the trial court ruled *in limine* pretrial, over objection of the defense, that a certain plaintiff's witness could testify, but the defense did not object when the witness testified at trial. Id. at 661-62, 379 S.E.2d at 384-85. On appeal, the plaintiff argued the defense's failure to object at trial did not preserve the issue for appeal. Id. This Court disagreed, holding in Syllabus Point 1:

An objection to an adverse ruling on a motion in limine to bar evidence at trial will preserve the point, even though no objection was made at the time the evidence was offered, unless there has been a significant change in the basis for admitting the evidence.

Wimer, 180 W.Va. 600, 379 S.E.2d 383.

The Court further stated:

A different result may be warranted where there is a significant change in the basis for admitting the evidence. When this occurs, a further objection may be required. Here, there was no change in the basis for admitting the evidence from the time the in limine ruling was made until the evidence was introduced at trial. Therefore, the plaintiff's objection to the in limine ruling preserved the point.

Id. at 663, 379 S.E.2d at 386. Although Wimer involved a ruling admitting evidence, rather than the exclusion of evidence, as in this case, the same reasoning is applicable. There was no change during the trial in the trial court's basis for excluding the evidence.

Both the State and the defense, for 43 pages of the trial transcript (Tr. 46-89), thoroughly argued the State's motion *in limine* to exclude evidence of domestic abuse by Rhonda's husband. The State advised the trial court of the facts regarding Rhonda shooting her husband in the hospital, that it was not in self-defense, and the trial court clearly ruled that evidence of domestic abuse from witnesses other than Rhonda would only be admissible two ways:

THE COURT: The only two ways that the abuse would get in is if there was a diagnosable abused spouse syndrome. There isn't one. Prior by an expert. There isn't one, either one of the experts. Or secondly, that it is self-defense. There isn't any evidence of self-defense. No evidence of self-defense in this case.

(Tr. 83). Because that underlying basis for the trial court's ruling excluding defense evidence never changed during the trial, there was no reason for defense counsel to continue to object to the court's pretrial ruling. As the Wimer Court noted, "the trial court was given a fair opportunity to consider the matter, and there was a sufficient objection to preserve the point." Wimer, 180 W.Va. at 663, 379 S.E.2d at 386. Cf. Tennant v. Marion Health Care Foundation, Inc., 194 W.Va. 97, 114, 459 S.E.2d 374, 391 (1975), cited by the State, where "the plaintiffs received a *favorable* ruling [pretrial], but failed to raise an objection even once it was clear the defendants were violating the *in limine* order."

The State's reliance upon Coleman v. Sopher, 201 W.Va. 588, 499 S.E.2d 592 (1997), is misplaced as the plaintiff in that case failed to preserve the errors alleged on appeal because "the record fails to establish that the specific challenges now raised were presented to or addressed by the court below." Id. at 601, 499 S.E.2d at 605. That is not the situation here as defense counsel made known his reasons for objecting to the court's ruling.

Moreover, contrary to the State's assertion, State's Brief 16, the parties and the trial court did revisit the trial court's ruling during the trial. For example, after the State rested and before the defense called Brian Jones, its first witness, the prosecution told defense counsel and the court: "I just want to make sure that [defense counsel] knows that you [trial court] have ruled that no discussion about domestic battery can come in. If it does, there will be a mistrial. That's why we didn't use him." (Tr. 507). Defense counsel responded: "I understand that judge." . . . "I am very conscientious of your ruling you made." (Tr. 508). When discussing the use of Rhonda's taped statement for impeachment purposes, the prosecutor again told the court that he did not want the defense or the State to "open the door in any way and allowing the domestic battery issues to come in." (Tr. 519). After defense counsel responded to the prosecutor's comment, the trial court said, "Go on. We've been through that. Just tell her story, that's her day in court." (Tr. 520) (Emphasis added). Again, before Alice Blackwell, Rhonda's sister, testified, the issue was again revisited when the prosecutor told the trial court: "The State wants to make sure it does not contravene the Court's Order with regard to the exclusion of domestic battery evidence." (Tr. 590). Addressing defense counsel, the trial court responded: "They want to make sure there is no violation of the previous order." (Tr. 590).

During the defense case, the parties and the trial court had a discussion about Dr. Clayman testifying and the court said he was precluded from testifying, but defense counsel

reminded the court it only precluded Dr. Clayman from testifying about battered spouse evidence (Tr. 561-62), and the court responded: “. . . you will have to tell me on the record what he is going to testify about or else I’ll preclude him from testifying. I am not going to run the risk of mistrying it. Clayman is not going to come in.” (Tr. 563). Finally, the parties and the trial court subsequently had a substantial discussion about Dr. Clayman testifying and the court said the only relevance of his testimony would be if he could testify regarding the battered spouse syndrome, a legitimate defense. (Tr. 606-07). Defense counsel said, “[This] [i]s the second time that the court’s ruling that would appear to exclude my expert . . .” (Tr. 608). The trial court then ruled Dr. Clayman could testify about Rhonda being suicidal, but stated: “He can do that as long as he doesn’t get into battered spouse.” (Tr. 609). As shown above, the State’s assertion the trial court never revisited its *in limine* ruling is a complete misrepresentation of the facts.

The State further contends the issue was not preserved because defense counsel failed to put in the record sufficient evidence to indicate the substance of the evidence excluded by the court’s *in limine* ruling. State’s Brief 20. First, it is noteworthy the State moved to exclude this evidence of domestic violence and abuse by Rhonda’s husband. If this evidence did not exist, why would the State file a motion *in limine* to exclude it?

Obviously, the State had investigated case, knew this evidence existed, and that it would adversely affect their prosecution of Rhonda for first degree murder. Hence, they filed a motion to exclude it. The trial court confirmed its existence when it commented at sentencing that Rhonda was abused by her husband throughout their marriage and their daughters Micky and Samantha were likewise abused by him. (3/2/10 Tr. 11-12). It requires little imagination to understand what the substance of the excluded evidence would have been. More specifically, the trial court was advised Dr. Clayman determined Rhonda “fits the model of a battered woman”

and is a “stereotyp[ical] battered spouse[,]” (Tr. 50-51, 46-47); and that “[i]f the information gathered is credible, she has a long history as a victim of verbal, emotional, physical, and sexual spousal abuse. These 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).

Thus, the trial court had a pretty good idea what the substance of the excluded lay and expert testimony would have been. In addition, defense counsel twice asked the trial court to let Dr. Clayman testify before ruling on the motion *in limine*. (Tr. 63, 87). The trial court refused to hear Dr. Clayman’s testimony regarding Rhonda being a battered woman so it is pretty evident the trial court had its mind made up about the exclusion of domestic violence evidence that could have affected its decision. Part of the reason for proffering evidence is so that the court can reevaluate its ruling. The trial court had no interest in doing that here.

B. The Trial Court’s Ruling Prohibiting Lay And Expert Testimony From Anyone Other Than Rhonda Regarding The Domestic Abuse By Her Husband Prevented Her From Presenting Not Only Her Best Means Of Defense But Also A Complete Defense.

The State argues that because Rhonda could testify to the domestic violence and abuse she suffered at the hands of her husband, any prejudicial error in the trial court’s ruling prohibiting other witnesses from testifying on that subject was “*de minimis*” or insignificant. State’s Brief 23. The State’s argument is refuted by this Court’s relevant caselaw which the State fails to address. As stated in the Petition for Appeal, at 10-11, the constitutional rights to due process and compulsory process for obtaining witnesses 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) (emphasis added)). Thus, a trial court’s evidentiary rulings may not deprive a

defendant of the right to offer testimony in support of his or her defense. 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, Jenkins, 195 W.Va. 620, 466 S.E.2d 471). Further, “[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.” (citations omitted). State v. Barnett, ___ W.Va. ___, 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 prohibiting witnesses other than Rhonda to testify to the domestic violence and abuse she suffered not only denied her “a meaningful opportunity to present a complete defense[,]” Jenkins, 195 W.Va. at 628, 466 S.E.2d at 479 (quoting Crane, 476 U.S. at 690, 106 S.Ct. at 2146-47), but also “preclude[ed] or impair[ed] the presentation of [Rhonda’s] best means of a defense[.]” Barnett, 71 S.E.2d at 467 (quoting Blake, 197 W.Va. at 705, 478 S.E.2d at 555). The State cannot seriously contend that allowing one witness on a contested issue when others, including an expert, have relevant testimony to give, is sufficient to satisfy the state and federal constitutional due process rights to present a complete defense and rights to compulsory process for the attendance of witnesses.

The State further fails to cite or address this Court’s relevant caselaw. See discussion of State v. McCoy, 219 W.Va. 130, 137, 632 S.E.2d 70, 77 (2006), in the Petition for Appeal, at 20, where this Court found the trial court abused its discretion in excluding lay witnesses who would have corroborated relevant facts relied upon by the defendant’s insanity expert. In addition, McCoy cited State v. Weiland, 732 So.2d 1044 (Fla. 1999), a case where a battered woman defendant, as well as her two expert witnesses, were permitted to testify about the domestic abuse she suffered, but the trial court improperly excluded three defense witnesses who would

have corroborated the defendant's testimony regarding prior acts of abuse by her husband. Id. at 1048, 1057-58. The Florida Supreme Court rejected the argument that the trial court's exclusion of three eyewitnesses was harmless in light of the defendant's testimony and two experts who testified about battered spouse syndrome and the history of abuse.

However, expert testimony on battered spouse syndrome, even when it contains details of alleged incidents of abuse that have been related by the defendant to the expert, does not replace the importance of eyewitness testimony to corroborate the defense.

Id. at 1057.

As this Court noted in McCoy, “[t]he importance of corroboration ‘testimony, which is consistent with that of the original witness, [is that it] has the direct effect of bolstering the original witness’s credibility on all facts to which he testified.’” McCoy, 219 W.Va. at 136, 632 S.E.2d at 76 (quoting 1 Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers* § 6-7(H)(1) (4th ed. 2000)). See also State v. Glover, 183 W.Va. 431, 435, 396 S.E.2d 198, 202 (1990) (Court found trial court abused discretion in excluding testimony of defendant’s alibi witnesses corroborating alibi and “its exclusion could very easily have affected the outcome of the trial.”); Brand v. State, 766 N.E.2d 772, 782 (Ind. Ct. App. 2002) (“The wrongful exclusion of any evidence that would tend to corroborate [a defendant’s] testimony or lend credence to his defense would not be without prejudice to his substantial rights.”) (both cases cited in McCoy). Thus, the State’s assertion that any prejudice from the prohibition of defense witnesses other than Rhonda from testifying about the domestic abuse she suffered was *de minimis* or insignificant finds no support in existing caselaw.

Moreover, the State does not take issue with this Court’s decisions in State v. Harden, 223 W.Va. 796, 803, 679 S.E.2d 628, 635 (2009), State v. Lambert, 173 W.Va. 60, 63-64, 312 S.E.2d 31, 35 (1984), and State v. Wyatt, 198 W.Va. 530, 542, 482 S.E.2d 147, 159 (1996),

indicating that evidence of domestic violence is admissible “in order that the jury may fully evaluate and consider the defendant’s mental state at the time of the commission of the offense.” State v. Whittaker, 221 W.Va. 117, 134, 650 S.E.2d 216, 233 (2007) (quoting State v. Dozier, 163 W.Va. 192, 197, 255 S.E.2d 552, 555 (1979)). What the State essentially argues is that it was permissible for the trial court to allow only the defendant to testify about the domestic abuse and because she did not, it does not matter that other witnesses were excluded. This assertion conflicts with the above caselaw guaranteeing a complete defense and the best means of defense. It further ignores that defense counsel’s strategy is directly affected by a trial court’s pretrial rulings and defense counsel in this case apparently decided the trial court’s ruling prohibiting his presentation of the best means of defense would substantially weaken that defense before the jury. Whether counsel’s assessment was correct, however, is beside the point as the trial court only permitted the defense to present a limited defense regarding Rhonda’s mental state. As shown above, that is inconsistent with constitutional standards.¹

The State also argues the trial court excluded Dr. Clayman because, even though he said Rhonda “fits the model of a battered woman” and is a “stereotyp[ical] battered spouse” (Tr. 50, 46-47), he did not diagnose Rhonda with battered woman syndrome. State’s Brief 24. As noted in the Brief of *Amici Curiae*, the West Virginia Coalition Against Domestic Violence and the National Clearinghouse for the Defense of Battered Women (*Amici Brief*), that “formal diagnosis is not germane, as the characterization of this evidence as proof of pathology or a

¹ The State’s argument the trial court followed State v. Harden, 223 W.Va. 796, 803, 679 S.E.2d 625, 635 (2009), by permitting Rhonda to testify to the domestic abuse misses the point. State’s Brief 25. Harden never said the trial court could limit such evidence to only the defendant’s testimony. Neither did State v. Riley, 201 W.Va. 708, 500 S.E.2d 524 (1997), cited by the State. State’s Brief 26. Riley permitted a defense psychologist to testify regarding the factual underpinnings of his conclusion the defendant was a battered woman, but upheld the trial court’s ruling that any hearsay encompassed therein was only being introduced for that limited purpose. Id. at 714, 500 S.E.2d at 530.

disease is inaccurate.” Mary Ann Dutton, VAWNET, The Nat’l Online Res. Ctr. On Violence Against Women, Update of the “Battered Women Syndrome” Critique 1, 4 (2009), http://new.vawnet.org/category/Main_Doc.php?docid=2061. As *Amici* point out, “experts [now] largely describe battering and its effects not as a syndrome, pathology, or something that requires a diagnosis, but as a category of social framework evidence that encapsulates ‘the nature and dynamics of battering, the effects of violence, battered women’s responses to violence, and the social and psychological context in which domestic violence occurs.’” *Amici* Brief 5 (quoting Sue Osthoff & Holly Maguigan, *Explaining Without Pathologizing: Testimony on Battering and its Effects, in Current Controversies in Domestic Violence, Second Edition* 231 (Donileen R. Loseke, Richard J. Gelles & Mary M. Cavanaugh eds., 2005)).

It is further significant the State agrees that “jurors are entitled to hear about the impacts and effects of battering on defendants who are victims of domestic violence, including . . . cases that do not involve a self-defense claim.” Response of State of West Virginia To Brief of *Amici Curiae* 1 (quoting *Amici* Brief iv). Thus, the jury should have been permitted to hear Dr. Clayman’s testimony about the impacts and effects of battering on Rhonda who he indicated “has a long history as a victim of verbal, emotional, physical, and sexual spousal abuse.” (Tr. 76). Dr. Clayman’s testimony as to her history of abuse, the effects of battering, and how it affected Rhonda’s mental state would have been extremely relevant to the jury’s determination of her mental state at the time of the offense and whether the State had proved the elements of premeditation, malice and intent to kill. The trial court’s ruling precluded the jury from hearing this evidence.

II. After Further Consideration, Rhonda Stewart Withdraws Her Assignment Of Error Regarding The Trial Court’s Refusal To Give An Accident Instruction.

III. The Prosecutor's Improper, Prejudicial Closing Arguments That (1) Defense Counsel Failed To Introduce The Suicide Note After The Court Granted The State's Motion To Exclude It, and (2) That First-Degree Murder Could Be Committed In Two Seconds, Denied Rhonda Her Due Process Rights To A Fair Trial.

The State argues the prosecutor's comment during closing argument, asking the jury why defense counsel didn't introduce the suicide note (Tr. 738-39), was only a proper response to defense counsel's argument. State's Brief 34. Defense counsel told the jury in closing argument that nothing in the note indicated Rhonda was going to kill her husband or else the jury would have seen it. (Tr. 726-27). The prosecutor's comment was not a proper response as it misled the jury to believe the suicide note did not exist when the prosecutor knew otherwise, especially since the trial court granted the prosecutor's motion *in limine* to exclude it. (Tr. 40-41).

The State asserts defense counsel's remarks were false, without any basis in the evidence, implied the note existed, and that the prosecutor had deliberately not presented the note because it would show Rhonda was suicidal. State's Brief 34-35. Defense counsel's comments were not false as Rhonda testified she wrote a note to her two daughters, Micky and Samantha, before returning to the hospital. (Tr. 540-42). It is also a fair inference from her testimony that if the note contradicted her testimony, the State would have introduced it. Defense counsel's comments were definitely not false and were based on Rhonda's testimony. Counsel did not misstate the evidence.

On the other hand, the prosecutor's remark asking the jury why defense counsel did not introduce the suicide note implied, and misled the jury to believe, the note did not exist which the prosecutor knew was not true. That defense counsel could have possibly introduced the suicide note, as the State contends, State's Brief 34, does not lessen the prejudicial impact of the prosecutor's improper comment.

The State also contends any error was cured by the trial court's instruction to the jury to disregard the prosecutor's comments. The court's instruction did not cure the error as the court told the jury it "should disregard any motive ascribed to the suicide note." (Tr. 739). The court's instruction only compounded the error because the instruction effectively told the jury to disregard Rhonda's testimony regarding her motive or reason for writing the note, i.e., suicide. Rhonda's credibility with the jury and whether she wrote the note was very important to the jury's decision on the first degree murder elements of premeditation, intent, and malice. The prosecutor's improper comment, implying she had not written the note, when he knew she had, prejudiced the jury's consideration of her testimony and the court's instruction did not cure it.

The State further argues that the prosecutor's closing argument that if Rhonda entered the hospital intending to commit suicide and "changed her mind [t]wo seconds before" she shot her husband. . . "that's first degree murder[.]" (Tr. 747), was also a proper response to defense counsel's argument regarding premeditation. State's Brief 36. The State is incorrect. The State fails to quote all of defense counsel's statement, see page 36 of its brief, which clearly indicates defense counsel was telling the jury that was what the State, not the defense, was arguing regarding the element of premeditation:

[Defense Counsel]: Because remember, if you're going to believe the State of West Virginia's position of first degree murder, and you heard how they justified the premeditation, the deliberation, and intentions, then you must believe beyond a reasonable doubt that at that moment, right then, Rhonda Stewart had decided to kill Sammy Stewart. If you incorporate the closing argument of the prosecuting attorney, that is when she made her decision. [They] even wanted you to believe that she then got angry and left angry, and set out to com[m]it this offense.

(Tr. 725). That is exactly what the State argued in closing. See Tr. 688-89, 693 (Prosecutor argued in closing Rhonda formed plan to kill her husband when she left the hospital, went home,

got a gun, returned to the hospital, and executed her plan). Thus, the State was not responding to defense counsel's arguments regarding premeditation.

Moreover, the State's argument that first degree murder could be committed in two seconds is entirely inconsistent with its previous statements in closing argument, cited above, that Rhonda carried out a well thought out plan to kill her husband. Instead of responding to defense counsel's argument regarding premeditation, the State was trying to completely gut and negate Rhonda's testimony she was suicidal and returned to the hospital to commit suicide. This improper, prejudicial argument clearly mislead the jury to believe they could believe Rhonda's testimony she intended to commit suicide and still find her guilty of first degree murder.

The prosecutor's statement that first degree murder can be committed in two seconds is a gross misstatement of the law and clearly lead the jury to ask the court for a clear cut definition of premeditation, including a time element, and if it can be a few seconds. See note in circuit clerk's file. See also Reply Argument IV.

The State argues the prosecutor's argument is consistent with the trial court's instruction that if a person reflects even for a moment before he acts, it is sufficient deliberation. (Tr. 683-84). It is, however, inconsistent with this Court's statement in Guthrie that "momentary deliberation is not sufficient for proof of first degree murder." State v. Guthrie, 194 W.Va. 657, 675, 461 S.E.2d 163, 181 (1995). To argue as the prosecutor effectively did, that Rhonda could form an intent to kill, a plan of destruction, and reflect upon it in a couple seconds is stretching the law and the element of premeditation beyond all reasonable bounds. Such an assertion further contradicts Guthrie's statement that "premeditation and deliberation which are instantaneous, or which take no appreciable time, is a contradiction in terms." Id. The "two seconds" argument the prosecutor made here is, for all practical purposes, indistinguishable from

the prosecutor's closing argument this Court condemned in State v. Hatcher, 211 W.Va. 738, 741, 568 S.E.2d 45, 48 (2000), that "premeditation can be formed in an instant[.]" As in Hatcher, the jury in this case could well have relied on the prosecutor's erroneous statement of the law in deciding the issue of premeditation. Id. at 742, 568 S.E.2d 49. This is particularly true here since the jury's request for further instructions on premeditation was refused by the trial court.

Because the prosecutor's improper, prejudicial argument likely affected the outcome of the trial and denied Rhonda a fair trial, the prosecutor's argument is plain error. See Petition for Appeal 40.

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

During the jury's deliberations, the jury indicated a lack of understanding of the element of premeditation and requested a clear cut definition of premeditation, including a time element, and asked if it could be a few seconds. See note in circuit clerk's file. The State argues that the trial court's failure to answer the jury's questions was not plain error because the time frame for premeditated murder cannot be arbitrarily fixed. State's Brief 37-38. While that is generally true, under the circumstances of this case, where the prosecutor improperly argued to the contrary — that it could be committed in two seconds, the trial court had an obligation to clear up the jury's lack of understanding of the element of premeditation by giving it further instructions and answering their questions.

The State does not dispute the case law cited in the Petition for Appeal, at 43-47, indicating the trial court has a responsibility to address a jury's failure to understand an element

of an important issue in a case. See, e.g., State v. Davis, 220 W.Va. 590, 648 S.E.2d 354 (2007), where this Court found plain error in the trial court's failure to clear up via further instructions a jury's misunderstanding that second degree murder required an intent to kill.

Here, the jury expressed a failure to understand the element of premeditation. The trial court's failure to give the jury further instructions to clear up any lack of understanding of the element of premeditation prevented the jury from properly deciding this element; and thereby substantially impaired the jury's truth-finding function on that issue.

The State argues that further instructions addressing the time element of a few seconds is inconsistent with State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995), and State v. Hatcher, 211 W.Va. 738, 568 S.E.2d 45 (2002). State's Brief 37-38. The State is incorrect. Syl. Pt. 5, Guthrie, states:

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.

194 W.Va. 657, 461 S.E.2d 163. Guthrie also clearly states that "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 (quoting Bullock v. United States, 122 F.2d 213, 214 (D.C. Cir. 1941)). Accord Hatcher, 211 W.Va. at 741, 568 S.E.2d at 48.

Guthrie further noted:

Thus, there must be some evidence that the defendant considered and weighed his decision to kill in order for the State to establish premeditation and deliberation

under our first degree murder statute. This is what is meant by the ruthless, cold-blooded, calculating killing. Any other intentional killing, by its spontaneous and nonreflective nature, is second degree murder. (footnotes omitted).

Guthrie, 194 W.Va. at 675-76, 461 S.E.2d at 181-82.

As a result, the Guthrie Court concluded that “[t]o allow the State to prove premeditation and deliberation by only showing that the intention [to kill] came ‘into existence for the first time at the time of such killing’ completely eliminates the distinction between the two degrees of murder.” Id. at 675, 461 S.E.2d at 181. It is further significant that the federal circuit court in Bullock, 122 F.2d at 214, upon which this Court in Guthrie relied in discussing the elements of premeditation and deliberation, stated that “[t]here is nothing deliberate and premeditated about a killing which is done within a second or two after the accused first thinks of doing it[.]”

The only reasonable conclusion is that two seconds or a few seconds is no appreciable time and a homicide that occurs in that period of time is at most a spontaneous event. Therefore, the trial court’s giving the jury further instructions and answering its questions to clear up its lack of understanding of the element of premeditation is not inconsistent with Guthrie and Hatcher. Given the circumstances of this case in which the prosecutor made a clear misstatement of the law when he argued first degree murder could be committed in two seconds, the trial court had a duty to address the jury’s questions on the same issue of premeditation, correct the prosecutor’s misstatement of the law, and clear up any misconceptions or lack of understanding by the jury. Even assuming, arguendo, it would have been improper to tell the jury that a few seconds is insufficient for premeditation, the trial court nevertheless had an obligation to further instruct the jury on that element consistent with Guthrie. Otherwise, the jury would likely rely on the prosecutor’s misstatement of the law on that element.

The difference in penalties between first degree murder and second degree murder, i.e., life versus 10-40 years, requires that the jury be given clear guidelines for distinguishing between the two offenses. The trial court's failure to do so here, leaving the jury without a clear understanding of the element of premeditation, and likely forcing it to rely upon the prosecutor's clear misstatement of the law, substantially impaired the jury's ability to render a fair verdict in this case. See State v. McClure, 163 W.Va. 33, 37, 253 S.E.2d 555, 558 (1979) ("the jury must be clearly and properly advised of the law in order for it to render a true and lawful verdict."). Rhonda was thereby denied her due process rights to a fair trial.

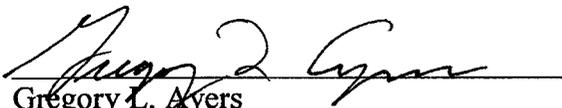
CONCLUSION

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 3rd day of June, 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*, National Clearinghouse for the Defense of Battered Women, 125 S. 9th Street, Suite 302, Philadelphia, PA 19107.



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