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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, J., concurring:

In this criminal proceeding the majority opinion reversed the defendant's conviction for malicious wounding. I concur in this result. I have chosen to write separately to underscore the factual basis for my belief that the ex parte remarks made by the trial judge were not harmless beyond a reasonable doubt. Additionally, I believe the defendant presented a strong case of self-defense.

Self-Defense

The record supports the majority's conclusion that the error in this case was not harmless beyond a reasonable doubt. I will demonstrate the correctness of this conclusion by presenting the trial testimony of eyewitnesses in two contexts: an initial upstairs confrontation between the defendant and the alleged victim, and the downstairs confrontation, which led to the charges against the defendant.

1. Upstairs confrontation. No charges against the defendant arose from the initial upstairs confrontation. Nevertheless, details of this confrontation are critical to understanding the circumstances surrounding the subsequent downstairs confrontation, from which the malicious wounding charges arose.

There were two witnesses, excluding the defendant and the alleged victim, to the initial conduct that ultimately led to the stabbing of the alleged victim, Nick Patton. Those two witnesses were Danielle Digiorgi and Stephanie Mullins. The testimony of both of these women was consistent. They both indicated that the initial confrontation between the defendant and Nick occurred on the second floor of the home. Ms. Digiorgi and Ms. Mullins both testified that Nick began taking an illegal drug called crystal methamphetamine before they went upstairs, and continued taking the illicit drug while they were all upstairs. Each woman confirmed that no one else took drugs. The two witnesses also testified that the defendant and Ms. Digiorgi were “horse playing” on a bed. During the “horse play” between the defendant and Ms. Digiorgi, Ms. Digiorgi stated several times to the defendant to “get away from me, get away from me.” As a result of his drug-induced state of mind, Nick misunderstood what was occurring and immediately began to attack the defendant. Nick actually chased the defendant downstairs with a knife. The eyewitness trial testimony of Ms. Digiorgi was as follows:

QUESTION: And where was, was [the defendant] standing or sitting, or lying on top of you, or?

MS. DIGIORGI: No. He was, actually, gradually, you know we were just -- he was standing some way, and we were just horse playing around. You know how normal kids horse play around. They'll push each other back and forth, and just little things, nothing hurtful, nothing huge.

....

QUESTION: Then what happened?

MS. DIGIORGI: Nick had, -- I was playing around. I was, like, “No,

get away from me, get away from me.” But we had been playing like this all day long; we had been horse playing. And everybody had witnessed us horse playing. And [the victim], all of a sudden, was “Get off of her, leave her alone.” And I told Nick no, it was okay that we were just playing. “Don’t Nick,” we were, we were just playing around. And Nick didn’t like it.

So Nick proceeded to push [the defendant] away, push him off. And [the defendant] stepped back, you know. He looked, kind of, shocked, in a way, you know, he had pushed him, you know. There was no, really, reason, at all, to push him. And then Nick proceeded to push him again, and he did and continued to attack him. And that’s when [the defendant] stepped back and started to retaliate to what Nick was doing.

QUESTION: How did he retaliate at that time?

MS. DIGIORGI: He had, he got, well one thing --.

QUESTION: What was it? Was it an instrument or was it a fist or --.

MS. DIGIORGI: No, it was with his fist. It was with his hands.

....

QUESTION: And then what happened?

MS. DIGIORGI: Nick pulled out a knife, and [the defendant] ran downstairs.

QUESTION: Who pulled out a knife?

MS. DIGIORGI: Nick did.

....

QUESTION: What did Nick do?

MS. DIGIORGI: He ran after him.

....

QUESTION: So, [the defendant] ran out. And Nick, it wasn’t more than

a second later, that he ran behind him?

MS. DIGIORGI: Right.

QUESTION: With the knife in his hand?

MS. DIGIORGI: Yes.

Similarly, Ms. Mullins gave the following eyewitness account of what transpired upstairs between the defendant and Nick:

QUESTION: What was Danielle and [the defendant] doing?

MS. MULLINS: They were on the bed, playing around.

....

QUESTION: What were you doing?

MS. MULLINS: I was sitting in the chair that's across from the bed.

QUESTION: Tell us then what happened?

MS. MULLINS: I noticed Nick thought that Danielle didn't want [the defendant] messing with her, so he pushed him off of her.

....

QUESTION: What did [the defendant] do immediately?

MS. MULLINS: He stood up.

....

QUESTION: And what did Nick do then?

MS. MULLINS: He pushed him again.

.....

QUESTION: Then what happened?

MS. MULLINS: They began to fight. They both were fighting each other.

.....

QUESTION: Then what happened?

MS. MULLINS: Nick pulled out a knife, and [the defendant] went towards the door and went out the door. And when he done that, Nick followed him.

.....

QUESTION: Okay. What did he do?

MS. MULLINS: He pulled out the knife, and [the defendant] went out the door. As soon as he went out the door, Nick, I guess, pursued him down to, down the stairs.

QUESTION: Where was the knife when Nick pursued him down the stairs?

MS. MULLINS: In his hand.

QUESTION: In Nick's hand.

MS. MULLINS: Yes.

The testimony of the two eyewitnesses to the upstairs confrontation, Ms. Digiorgi and Ms. Mullins, plainly reveals that the defendant was attacked by Nick because, while under the influence of drugs, Nick misunderstood the horseplay between Ms. Digiorgi and the defendant. When Nick pulled out a knife, the defendant fled. With the defendant

retreating, Nick followed him downstairs with the knife in hand. Clearly, Nick initiated the confrontation.

(2) Downstairs confrontation. When the defendant ran downstairs, he went into the kitchen and retrieved two knives. There were four witnesses, excluding the defendant and the alleged victim, to the stabbing of Nick that occurred downstairs.¹ Those witnesses were Ezra Mullins, Matthew Mullins, Ms. Digiorgi, and Ms. Mullins. With the exception of Ezra Mullins,² all the witnesses testified that Nick was trying to stab the defendant when the defendant stabbed Nick. The testimony of Matthew on this issue was as follows:

QUESTION: Did you see Nick with anything in his hand?

MATTHEW: Yeah. He had a knife in his hand, too.

....

QUESTION: Did you see if Nick was trying to stab [the defendant]?

MATTHEW: Yeah. Because I seen him there trying to reach around my dad [Ezra Mullins], too.

QUESTION: So, when you saw your dad breaking them apart, you saw [the defendant] and Nick both trying to stab each other?

¹There was also a seventh person in the home, Shawn Mullins. However, Shawn's testimony indicated that he was sleeping and could only recall events that occurred after the stabbings had taken place.

²Ezra Mullins testified that the events happened too quickly and that he did not remember if Nick had a knife.

MATTHEW: Uh-huh.

Likewise, Ms. Digiorgi gave the following account of what occurred downstairs:

QUESTION: Did you see any part of the fight? Did you get down soon enough?

....

MS. DIGIORGI: Yeah. They were both stabbed. The only time I saw any stabbing was [the defendant] when he went to block his face from Nick, and Nick had got him on the arm.

QUESTION: Is that the first stabbing or the first slice of the knife that happened?

MS. DIGIORGI: I don't know. That is the only one I saw.

Additionally, Ms. Mullins gave the following account of the stabbing incident:

QUESTION: What did you see?

MS. MULLINS: When I came down, there was, Nick was, I guess, going towards [the defendant]. And he had his arm up, blocking, I guess, him stabbing him.

QUESTION: He had his arm up, who had his arm up?

MS. MULLINS: [The defendant] had his arm up, blocking.

....

QUESTION: Did you see any injuries on [the defendant]?

MS. MULLINS: Yes. On his arm.

Based on the above quoted testimony of what actually took place upstairs and what occurred downstairs, it is clear that the eyewitness testimony was *in favor* of the defendant, as to both the initial confrontation and the ultimate wounding of the alleged victim.³ In other words, this was not a “slamdunk” case for the State. The jury could very easily have found that the defendant was acting in self-defense when Nick was stabbed.

The defendant argues that the jury ruled against him because the trial judge cast him in an improper light during an *ex parte* communication with one of the jurors. Because the evidence was so overwhelmingly supportive of the defendant’s claim that his actions were done in self-defense, it is obvious that the jury’s decision was guided by something other than the evidence. Accordingly, it cannot be conclusively stated that the trial judge’s comment did not “detrimentally affect[] the substantial rights of the [defendant] and was [not] likely to have [a] serious[] affect[on] the fairness, integrity, and public reputation of the judicial proceedings.” *Honaker v. Mahon*, 210 W. Va. 53, 60, 552 S.E.2d 788, 795 (2001). “To hold otherwise would make a mockery of the [right to a fair trial] and trample upon the very essence of due process.” *State v. Myers*, 204 W. Va. 449, 464, 513 S.E.2d 676,

³In fact, the only eyewitness testimony that was not favorable to the defendant involved his post-stabbing conduct. That is, after the altercation ended, the defendant panicked and acted irrationally. For example, the defendant pulled the telephone off of the wall and grabbed a person to help him escape from the scene. Importantly, though, the defendant was not on trial for his post-stabbing conduct. In fact, this evidence probably should have been excluded because it had no bearing on the actual malicious wounding charge brought against the defendant.

691 (1998). Consequently, I believe the majority was correct in reversing the judgment and remanding this case for a new trial.⁴

In view of the foregoing, I respectfully concur.

⁴Had the defendant alleged in his appeal that the State failed to prove he did not act in self-defense, I would have agreed and taken the position that the case should be reversed, and the State prohibited from re-prosecuting the defendant.