No. 25168 -- State of West Virginia v. Penny Gail Miller

Starcher, J., concurring:

I join the Court's *per curiam* opinion. I write separately for several reasons, but primarily to explain why I support this Court's decision not to consider whether the unpreserved errors asserted by Ms. Miller constitute reversible error under the discretionary "plain error" doctrine.[1]

I also want to briefly discuss several important issues that I think are involved in this case, and how those issues relate to further proceedings reviewing Ms. Miller's conviction and sentence.

I support the decision not to invoke the plain error doctrine because the asserted unpreserved errors are in large measure intertwined with the conduct of the trial by Ms. Miller's trial counsel, and this fact militates against reviewing them under the plain error doctrine in a direct appeal.

[1]The issue of the sufficiency of the evidence, to me, is a very close one, especially as to the "shared intent" and "abandonment" issues. But because the "sufficiency of the evidence" test is about as far in the province of the jury as one can get, I join in the Court's decision not to reverse on that ground.

For example, the asserted unpreserved errors include several variations on the theme that Ms. Miller did not receive a fair trial because the jury was not meaningfully apprised of the significance of her Post-Traumatic Stress Disorder as it impacted the issue of Ms. Miller's state of mind. In other words, the jury was not instructed -- nor did Ms. Miller's defense counsel argue to the jury -- that Ms. Miller's Post-Traumatic Stress Disorder and resultant state of mind could reduce or negate Ms. Miller's criminal culpability.[2]

After reading the full record in this case, it is more than reasonable to conclude that Ms. Miller's ability to have a trial on the charges against her, in which her available defenses and mitigating circumstances were fully and effectively presented -- that is, a fair trial -- was substantially impaired by the failure of the jury to receive such instructions or argument about the possible legal significance of her mental disorder.

But what this Court cannot do, in the context of a direct appeal, is determine whether such an impairment occurred as the result of a deliberate and competent trial strategy assented to by Ms. Miller -- or resulted from constitutionally insufficient, or "ineffective," assistance of counsel.[3]

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[2]In fact, Ms. Miller's counsel also did not discuss lesser included offenses with the jury, or suggest to the jury that Ms. Miller should receive a recommendation of mercy, in the event that the jury found her guilty of first degree murder. These issues are not raised on appeal, but could be raised in a habeas review.

[3]Several obvious and facially meritorious arguments and defenses on behalf of Ms. Miller were not presented to the jury. Can a "capital" conviction obtained in such a situation ever be acceptable? Perhaps, when a reasonably sophisticated defendant

consciously agrees to a deliberate trial strategy that involves foregoing such arguments and defenses. Was this the case for Ms. Miller? That remains to be seen.

It should be remembered that "ineffective assistance of counsel" does *not* mean that a lawyer is incompetent. Even the best lawyer's assistance can be "ineffective" in a given case. In a "capital" case like the instant one, the bar is set pretty high as to what constitutes a constitutionally fair trial.

There is an inherent difficulty in a direct appeal in assessing the merits of claims of error that raise questions about the constitutional sufficiency of a criminal defendant's legal representation. Therefore, such claims should ordinarily "be raised in a collateral proceeding rather than on direct appeal to promote development of a factual record sufficient for effective review." *State v. Miller*, 197 W.Va. 588, 611, 476 S.E.2d 535, 558 (1996).

For this reason, I join the Court's decision not to apply a "plain error" analysis to the unpreserved errors asserted by the appellant on direct appeal. These asserted errors should be addressed (along with any other issues that are raised) in a habeas corpus proceeding.

I also want to briefly discuss why the circumstances of the instant case require that there be an especially thorough and strict review of Penny Miller's conviction and sentence.

This is a case about domestic violence. There is no doubt that Penny Miller's conduct in connection with David Stinson's shooting flowed from David Stinson's domestic violence committed upon Penny Miller and their children for nearly 20 years. [4] "The legal system's response to domestic violence is one of the most

[4]Our society's understanding of what constitutes justice and responsibility has irretrievably abandoned the notion that David Stinson's criminal conduct was in any fashion Penny's "fault" -- simply because she returned to the relationship after she was beaten.

We recognize that the promises, intimidation, threats, stalking, terrorism, degradation, and warping of normal human love and commitment that the abuser

significant issues facing the judiciary in West Virginia." *State v. Wyatt*, 200 W.Va. 410, 416, 489 S.E.2d 792, 798 (1997) (Workman, J., dissenting).

Penny Miller was charged with first-degree murder for her involvement in the shooting of a man who by all of the undisputed evidence had criminally and savagely abused, beaten, oppressed, and terrorized Penny Miller for her entire adult life.[5]

What Penny Miller did in connection with David Stinson's shooting was wrong. But in reviewing how our law enforcement/criminal justice system responded to Penny Miller's conduct, we should also note how that system responded to David Stinson's horrible conduct.

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employs -- and the continued lack of effective social controls and sanctions for people like David Stinson who commit domestic violence -- belie and prohibit any ascribing of fault or blame for the domestic violence to its victims like Penny Miller.

Moreover, our legal system recognizes (although it was not effectively brought up at Penny Miller's trial) that an individual's criminal culpability may be diminished or negated as a result of the individual's prolonged brutalization by domestic violence. *See, e.g., State v. Lambert*, 173 W.Va. 60, 312 S.E.2d 31 (1984).

[5]Ms. Miller has a below-average IQ and sixth grade reading skills. In a clinical assessment of Ms. Miller's psychological state by Dr. Stone, the forensic psychologist who testified at trial, in addition to the violence discussed in this Court's *per curiam* opinion, the following conduct by David Stinson was reported: Holding a gun to her head, forced anal intercourse and fellatio, restraining Penny from taking medicine, numerous black eyes, a broken nose, dragging and shoving. Dr. Stone said that he believed that Ms. Miller, because of her PTSD, was acting in a self-protective mode in going to look for David Stinson with a gun.

Our criminal justice/law enforcement system, the record indicates, was fully aware of David Stinson's conduct (it was reported to the authorities on many occasions), but for a number of reasons that are not excuses, the system was ineffective in preventing David Stinson from engaging in an evil, violent criminal career of nearly 20 years' duration.[6]

Simply put, our law enforcement/criminal justice system utterly failed Penny Miller and her son Christopher (and Cheyenne, too). Yet, that system now pursues and punishes Ms. Miller and her son Christopher because they struck back at their tormentor.

While one can easily take the "moral high ground" and say that violence is never justified and must be punished, that moral position was not implemented during the years that David Stinson was perpetrating his reign of terror against Penny Miller and her

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[6]To illustrate what this case is about, I want to pose a question and to suggest one answer to the question. The question is:

After nearly 20 years of repeatedly and knowingly committing violent crimes against innocent people -- what really happened to David Stinson?

One answer to this question is as follows:

David Stinson's threats, curses, and rages -- his backhands to Penny Miller's face, his fist punching her belly, his foot kicking her as she lay on the floor -- Penny's puffy lips and swollen eyes, her cuts and bruises and bandages, her loose teeth and bleeding gums -- the nights of terror for Christopher and Cheyenne, the curses and the blows landing on their mother -- the lies, the insults, the broken promises -- the fear, shame, isolation, failure, resignation and numbness -- all of this, the fruits of David Stinson's abuse -- *came home to roost* when David Stinson was shot to death by his own son.

One may wonder, as David Stinson lay bleeding to death on a trailer porch, did he have time to feel that he had finally been brought to account for his crimes -- and by a person uniquely qualified to appreciate their gravity?

children. Do we have a "double standard" going on? And if so, what message does this double standard send to husbands and wives? I wonder, how far are we in the instant case from the O.J. Simpson case?

Most people want to build a society where justice is not a game and double standards are a thing of the past -- where we can raise our children without being ashamed or cynical about our criminal justice system. Our court system must above all work toward these goals. To serve these goals in the instant case, the fundamental fairness of every aspect of Penny Miller's trial, conviction, and sentence -- whether properly preserved for direct appellate review or not -- must be given the most strict and searching review and assessment.

Because of the nature of this Court's ruling in the instant appeal, a full review and assessment of Ms. Miller's conviction and sentence have yet to occur.

Conducting such a review and assessment will be a challenge. Our legal system is fully capable of meeting such a challenge with courage, compassion, and common sense. In Penny Miller's case, this capability must become a reality.

In conclusion, I want to make three brief points.

First, the issues in the instant appeal were presented in a somewhat unusual fashion. The brief of the *amici* took an independent and thoughtful approach in criticizing Ms. Miller's conviction. However, as *amici*, they were limited in their ability to frame the issues. The *amici's* input would be invaluable in further proceedings in this case. Therefore, the circuit judge handling any habeas corpus petition by Ms. Miller

should consult counsel for the *amici* before selecting appointed counsel to handle the petition.

Second, I think the State in good conscience should take a second look at the result that occurred in the instant case, in the light of conscience and fundamental fairness. If a habeas petition is filed, the State could agree to void Ms. Miller's conviction and to accept a plea to a lesser offense like voluntary manslaughter. Admittedly, our information in the record about Ms. Miller is incomplete, but I suspect that this result might be fair.[7]

Third, I simply state for the record that although the issue is not before this Court, I am also troubled by Christopher Stinson's second-degree murder conviction, especially if he was sentenced to an adult term of imprisonment for this offense, which would be 15 to 40 years.[8]

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[7]Taxpayer dollars are also an issue. There is no evidence that Ms. Miller poses any danger to the public at large. Isn't it somewhat wasteful and unecessary for the State to feed, clothe, house, and treat her medically for the next 50 years, at an annual cost somewhere around that of a Harvard education?

[8] Another matter that was not presented to the jury in Ms. Miller's trial, in evidence, instructions, or argument, was the effect of David Stinson's battering on Christopher Stinson and his state of mind. In Ms. Miller's case, this evidence should go to the issue of Ms. Miller's alleged "shared criminal intent" with her son.

The *amici* point out that the "battered child syndrome" has come to describe both the physiological and psychological effects of a prolonged pattern of physical, emotional and sexual abuse. *See generally* Steven R. Hicks, *Admissibility of Expert Testimony on the Psychology of the Battered Child*, 11 L. & Psychol.Rev. 103, 108-11 (1987). Such abuse typically lasts over a significant period of time and tends to operate in recurring patterns. *Id.* Victims of chronic abuse often suffer from Post-Traumatic Stress Disorder. As in the battered woman syndrome, hypervigilance, or what may seem to an

outsider to be a paranoid or irrational perception of danger, is a characteristic of the battered child syndrome. Paul A. Mones, *When a Child Kills: Abused Children Who Kill Their Parents* 63 (1991). Shelly Post, in *Adolescent Parricide in Abusive Families*, 51 Child Welfare No. 7, 445 (1982), observed that an abused child who kills a parent has generally witnessed that parent use violence and threats against other family members. *Id.* at 449. The helplessness of these children is exacerbated by the apparent lack of successful intervention by others, including the police and the courts, and this makes children place the burden on themselves to deal with the parental violence. *Id.* at 453. *See also* Diana J. Ensign, Note, *Links Between the Battered Woman Syndrome and the Battered Child Syndrome*: *An Argument for Consistent Standards in the Admissibility of Expert Testimony in Family Abuse Cases*, 36 Wayne L.Rev. 1619 (1990).

The *amici* argue that Ms. Miller, suffering from PTSD herself, did not deliberately manipulate or encourage Christopher to kill his father -- and that ultimately Christopher shot David Stinson as a result of Christopher's own disordered psychological state -- to protect Ms. Miller, his mother. "He will never hurt you again."

For the foregoing reasons, I respectfully concur.