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

RELEASED

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Maynard, Justice, concurring:

I agree with the majority that the circuit court's order must be reversed and the appellant must be allowed to withdraw his guilty plea. Upon remand, if the appellant's case goes to trial, I agree that the State should be precluded from introducing the transcript of Roy Benny Helmick's prior testimony unless the appellant is afforded his right of cross-examination. I also agree that in order for a spousal communication made in the presence of a third party not to be considered confidential, the third party must be a comprehending third party. I agree as well that only the accused can waive the marital privilege during criminal prosecution. However, unlike the majority, I believe the appellant waived his confidential marital communications privilege when he communicated the privileged information to third parties. Therefore, I write separately.

The majority summarily states that they are unaware of any case *in this State* which holds that after a spouse communicates privileged information to a third person, the confidentiality is destroyed and the privilege is waived. The majority then concludes that if the appellant's case goes to trial, the appellant's wife "should be precluded from testifying as to the confidential remarks made by the appellant[.]" If the majority had researched this issue

outside of West Virginia, they would have found that many other jurisdictions, when faced with this precise issue, have reached the opposite result.

For example, in *Weedon v. State*, 647 A.2d 1078 (Del.Supr. 1994), *reversed on other grounds*, *Weedon v. State*, 750 A.2d 521 (Del.Supr. 2000), the defendant, William Weedon, Jr., was convicted by a jury of numerous crimes including attempted first-degree murder. After he severely beat the victim, the defendant returned home, told his wife the details of the crime, and asked her not to tell anyone. However, the defendant immediately told several neighbors that he had assaulted the victim earlier that morning. At the defendant's trial, Mrs. Weedon testified by reciting the details of the crime which the defendant had confided in her. On appeal, the defendant argued, *inter alia*, that the trial court erred by admitting Mrs. Weedon's testimony regarding the conversation over Weedon's marital communication privilege objection. The Supreme Court of Delaware reasoned that "[d]isclosure by a speaker-spouse to a third party of subject matter that parallels that of an earlier, otherwise privileged marital communication constitutes waiver." *Id.* at 1081. The court held, "Weedon waived the privilege [] by his subsequent actions. In disclosing to third parties [] that he 'took care' of Ward, Weedon repeated in substance (absent details) that which he had earlier told his wife to keep secret." *Id.* at 1082.

In *State v. Boucher*, 652 A.2d 76 (Me. 1994), a jury convicted the defendant, Michael Boucher, Sr., of murder. The State connected Boucher to the murder with his own

statements which he made to various people over thirteen years. The trial court admitted the testimony of his two ex-wives finding that the defendant waived the marital privilege by revealing in non-privileged communications much of what he told them. On appeal, Boucher contended the trial court erred by admitting this testimony. The Supreme Judicial Court of Maine held that the trial court did not err by finding “that in disclosing to third parties the ‘key element’ of his communications to [his ex-wives] waived protection as to all communications relating to the incident.” *Id.* at 77. *See also People v. Fox*, 862 P.2d 1000, 1006 (Colo. 1993) (“The trial court admitted another letter because a postscript therein is addressed personally to his brother. We conclude that the postscript forms the basis for a waiver of the spousal privilege as to that letter.”); *State v. Wilkinson*, 136 N.H. 170, 612 A.2d 926 (1992) (The defendant waived his marital communication privilege with respect to a conversation regarding a hit-and-run accident when he revealed facts of his involvement with the incident to a friend, which was overheard by a witness.); *U.S. v. Lea*, 249 F.3d 632 (7th Cir. 2001) (Confidentiality, as a necessary element of marital communications privilege, is lost when a spouse divulges to a third party the communication which he or she seeks to exclude from evidence.); *State v. Countryman*, 572 N.W.2d 553 (Iowa 1997) (The defendant waived any marital privilege applicable to her notes to her husband by leaving the notes in the car she and her husband had stolen, thereby exposing confidence to third parties.); *Hall v. State*, 720 So.2d 1043 (Ala.Crim.App. 1998) (Even if a murder defendant’s act of having a large amount of money in his wife’s presence constituted a privileged confidential communication, the defendant waived protection of that privilege when he acknowledged in a statement to an

investigator and in trial testimony that a third party had given him \$5,500 in the days immediately following the murder and that he, in turn, gave some of the money to his wife and told her where he buried the rest.); and *Dansby v. State*, 338 Ark. 697, 1 S.W.3d 403 (1999) (The defendant's spousal privilege was waived in a capital murder trial when a third party testified that the defendant communicated the privileged matter to him by confessing to murders while they were both being held in jail, even though the third party's credibility was disputed and there was no indication the communications were overheard by others.).

I believe the great weight of authority supports the proposition that communication of any significant part of the privileged matter to someone other than the spouse waives the spousal privilege. The view in federal courts is that the defendant-spouse cannot prevent his or her spouse from testifying unless confidential communications are involved. *Trammel v. United States*, 445 U.S. 40, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980). In other words, if privileged information has been communicated to third persons, only the witness-spouse has a privilege to refuse to testify adversely. Consequently, upon withdrawal of his guilty plea, if the appellant's case goes to trial, I would allow the appellant's wife to testify regarding the remarks the appellant made to her in confidence because the appellant himself later communicated these remarks to third persons.

Accordingly, I concur in the majority's final result. But I must disagree when we depart from the clear and overwhelming trend of the law regarding waiver of the spousal

privilege by communication to third parties, and I strongly believe the majority is simply wrong on this issue.