No. 101179 - State of West Virginia v. Rhonda K. Stewart

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OF WEST VIRGINIA

Davis, J., dissenting:

I need to make clear at the outset that I support the prior decisions of this Court holding that an expert may provide evidence on the battered woman's syndrome when a defendant asserts self-defense in a homicide prosecution. I believe such evidence is critical in domestic abuse situations where a spouse is forced to protect herself from imminent death or serious bodily injury. The facts of this case did not present an assertion of self-defense, or imminent death or serious bodily harm to the defendant.[1]

[1]I wish to make clear that the trial judge did not rule definitively that Mrs. Stewart's expert could not testify at trial on the battered woman's syndrome until the expert was prepared to actually testify. Prior to the expert actually testifying, the trial court ruled on several occasions that he was amenable to allowing expert testimony of the battered woman's syndrom if the proper foundation for its admission was presented during the trial. Consistent with this ongoing tentative ruling, the trial judge made it clear that he would allow Mrs. Stewart to testify regarding any matter, including direct testimony by her of any previous domestic violence. Mrs. Stewart, however, chose to not present any testimony regarding domestic violence. To the extent that the majority opinion or any separate opinion implies that the trial court did not leave the door open on the issue of expert testimony on the battered woman's syndrome until after Mrs. Stewart testified, such implications are simply wrong. Counsel for Mrs. Stewart raised this issue after Mrs. Stewart testified and the trial judge ruled that no foundation had been laid by defense counsel that would permit introduction of the testimony by the expert, *i.e*, there had been no evidence of self-defense and Mrs. Stewart elected to not testify about any domestic abuse that may have occurred at any point during the marriage.

In June of 2009, the decedent in this case, Sammy Stewart, was lying in a hospital bed attempting to recover from pancreatitis. Mr. Stewart had been hospitalized for five or six days, during which time he was placed into an artificial coma and put on life support with a breathing tube. While in the hospital and in a coma, he was visited on several occasions by his wife of thirty-eight years, the defendant, Rhonda Stewart. On June 13, 2009, Mr. Stewart was awakened from his induced coma as part of his treatment. On that day, Mrs. Stewart visited Mr. Stewart. As will be discussed more fully below, during the visit Mr. Stewart informed Mrs. Stewart, in essence, that he was going to divorce her. Mrs. Stewart became extremely upset over this and left the hospital. She later returned to the hospital on the same day with a pistol. According to the testimony of an eyewitness, nurse Tara Webb, Mrs. Stewart entered Mr. Stewart's room, pointed the gun at his head and blew out his brains! At the trial, Mrs. Stewart testified that the gun went off by accident. In the face of these facts, the majority opinion found it reversible error to not allow Mrs. Stewart's expert, and at least two other witnesses, to present evidence of domestic abuse by the decedent, which abused occurred fifteen years prior to Mr. Stewart's murder. In view of the foregoing, I dissent.

A. The Defendant Shot Her Husband Because He Was Going to Divorce Her

Before I address the legal merits of my dissent, I feel it is important to review some background evidence that was presented at the trial. First, it is undisputed that, during

the trial, Mrs. Stewart presented one and only one defense: the shooting was an accident.[2]

The following is the testimony by Mrs. Stewart regarding the shooting:

> Q. Mrs. Stewart look at me please. Did you go back to that hospital to kill Sammy?
>
> A. No. No. No. No. No. No, not him. No, not him. Not – no. No, not him.
>
> . . . .
>
> Q. I know it's getting very hard, but please tell the ladies and gentlemen of the jury, what happened when you got back to room nine?
>
> A. I walked into the room. I took the gun out of my purse.
>
> Q. What were you going to do then?
>
> A. Oh, oh.
>
> Q. What did you want to do?
>
> A. I wanted – I wanted to stop the pain. I wanted to stop the pain. I wanted to stop the pain.
>
> Q. And how were you going to stop the pain?
>
> A. I was going to take my own life. I was – I was going to take my life. And I wanted Sam to know

[2]Contrary to assertions expressed in the majority opinion, Mrs. Stewart did not have an alternative theory of defense. The trial record is quite clear in showing that Mrs. Stewart did not assert the defense of self-defense. She did not assert the defense of diminished capacity or insanity. In fact, her expert could not render a opinion that Mrs. Stewart suffered from diminished capacity or insanity. The only opinion that the expert could render was that Mrs. Stewart was possibly suicidal.

it. I wanted him to know.

Q. Why was it so important that Sam knew, Rhonda?

A. Oh, oh, oh. Because – because it was – it had lasted so long. It was – and it had lasted too long. It lasted too long.

. . . .

Q. Where were you standing?

A. I went – I went to his bed side. And I went to his bed side. I went –

Q. Was he awake or asleep at that moment?

A. He was sleeping.

Q. So what did you do?

A. I stepped into the bed. And I reached across him. And I nudged him. And he opened his eyes, and I was going to do this. I was going to do this, and he pulled my elbow down and pulled it down. And my–it was so fast. It was so fast. It was so fast. It was so fast. It was–there was blood. There was blood. There was blood. And I was–I needed to get help. I needed to get–I turned [and] walked. I was walking. I knew–I knew Christina was there. I knew–I knew she could help. I knew–I knew she could help. I knew she could. I knew she–

Q. Christina was a nurse?

A. Yes. Yes. Yes. Yes.

This testimony established Mrs. Stewart's defense, *i.e.*, the gun went off accidentally when

Mr. Stewart nudged her arm.

The eyewitness to the shooting, nurse Tara Webb, disputed Mrs. Stewart's version of what happened on direct and cross-examination. Nurse Webb's testimony was succinctly given on cross-examination as follows:

> Q. If I am Sammy Stewart–and I know I should be laying on a bed, we're doing the best we can with the props.
>
> Would you please step down and show the jury what you observed in terms of my client being point blank over top of him.

(The witness then stepped down.)

> A. When I looked up when the monitor was ringing, I saw Rhonda standing right here with the gun to Sammy's head.
>
> Q. When you say point blank over top of him, how was her position? Her body position?
>
> A. She was standing right like this, with the gun to Sam's head just like this.
>
> . . . .
>
> Q. And then I assume you testified that you saw the act; correct?
>
> A. Yes.
>
> Q. Now, what did she immediately do then?
>
> A. After the shooting, she turned around and saw

me.

Q. What–

A. Saw me that I seen her shoot him.

Q. What did she say?

A. "Sorry, Sammy." Crying, "Sorry Sammy."

In the face of Mrs. Stewart's defense of accidental shooting, the State presented eyewitness testimony that the shooting was intentional. Before this Court, and during the trial, Mrs. Stewart contended that the "accidental" shooting was due to domestic violence during the early years of her thirty-eight year marriage to Mr. Stewart. This assertion was contradicted not only because she asserted the shooting was accidental; but, more importantly, because Mrs. Stewart actually testified that she killed her husband because he was going to divorce her.

During Mrs. Stewart's testimony at trial, she informed the jury that Mr. Stewart had been living alone for about three years in a camper on their property while she lived in the family home. Mrs. Stewart summarized the relationship during this period as follows:

Q. Did you or did you not continue to see Sammy during the next three years?

A. I did.

Q. How often?

A. Regularly.

Q. Would he come to your home?

A. He would. And I would cook food and take it to the camper to him.

. . . .

Q. Over the last three years, how many times per week would you say that you saw Sammy?

A. Twice maybe, maybe more. . . .

Q. Did he continue to come to visit you at the home?

A. He did.

Q. This–as odd as this scenario might sound, did you still feel that you were husband and wife?

A. I felt like I was his wife, yes.

Q. Did either of you ever file for divorce?

A. No.

This testimony established that, for about three years, Mr. Stewart refused to live in the same household with Mrs. Stewart. It also established that, during that period, Mrs. Stewart still thought of herself as a wife to Mr. Stewart. She, in fact, continued to take care of him even though he would not live with her.

Further testimony was given by Mrs. Stewart that Mr. Stewart had a girlfriend during the period that he lived in the camper. Even though Mrs. Stewart was aware of this

fact, she still considered herself his wife. The following testimony by Mrs. Stewart, describing events that occurred on the day that she murdered Mr. Stewart, explains why she killed him. In this testimony, Mrs. Stewart commented on how she visited Mr. Stewart before murdering him and massaged his body:

> Q. Were your visits during the regular visiting hours?
>
> A. Yes.
>
> Q. Rhonda, how were you feeling sitting or standing beside Sammy and rubbing his hand and feet; how were you feeling about your relationship during that time?
>
> A. Not good. I knew–I knew there was other girls. I knew there was. Coming there.
>
> Q. Had been other girls in his life before, hadn't there?
>
> A. Yes.
>
> Q. How did you always handle that?
>
> A. He would tell me he would quit, and I would believe him.
>
> Q. Now you made mention of it, you knew he had a girlfriend.
> How long had you known he had that girlfriend?
>
> A. Probably two years.
>
> Q. Lasted for awhile, hadn't it?
>
> A. Yes. Yes.

Q. In fact, who called you tell you that Sammy was in the hospital?

A. Her name is Leann Barker. Leann.

. . . .

Q. Okay. Okay, Rhonda, let's go to June 13th. Are you ready?

A. Yes.

. . . .

Q. And what was his condition on that Saturday around, I think you said one o'clock?

A. I think it was one.

Q. You think it was one. What was his condition?

A. He was off of the ventilator. And he was sitting up. And a nurse Christina was – she had come in and was taking care of something on him.

Q. Was he able to communicate with you?

A. He opened his eyes and he saw that it was me and Micky. And the nurse had her arm up over his head and was doing something to his head. And she asked him, she said, "Sam, do you know who is here?" And he said, "Yes." And he said, "It's Micky. And Rhonda Kay Boyd."

Q. What was your maiden name before you got married?

A. It was Boyd.

Q. How did you feel when he said that?

> A. Oh, I knew – I knew what he meant. He had often told me that it would never be over until he said it was over.
>
> Q. I am sorry. I didn't hear you. It wouldn't be over until what?
>
> A. Until he said it was over. That's by him calling me my maiden name, I knew what he meant. He said it one time before.
>
> Q. And how did you feel?
>
> A. Devastated. I was very hurt.
>
> Q. And then what were the words, the last words you said to Sammy before you left?
> A. I told him that it was okay and that – and that Leann would be there.

The above testimony by Mrs. Stewart clearly informed the jury that she murdered her husband, not because of domestic violence, but because she was "devastated" to know that he planned to divorce her.[3] In the face of this evidence, the majority opinion contends that Mrs. Stewart should have been permitted to inform the jury that during the first few years of her marriage domestic violence may have occurred. Assuming this to be true, what relevancy did it have in this case?

[3]It is quite clear to me that the jury convicted Mrs. Stewart of second degree murder, instead of first degree murder, because of the reason she gave for killing her husband–she did not want to divorce him.

B. A Defendant May Introduce Expert Testimony Regarding the Battered Woman's Syndrome When She Asserts Self-Defense

One of the reasons given by the circuit court for excluding Mrs. Stewart's expert from presenting evidence of the battered woman's syndrome was that such evidence had relevancy only if she asserted the defense of self-defense. The trial judge found that, because Mrs. Stewart's defense alleged an accidental shooting, evidence of the battered woman's syndrome had no relevancy. The trial court's conclusion is supported by every court in the country that recognizes the battered woman's syndrome. All courts that have judicially recognized the battered woman's syndrome allow a defendant to present expert testimony on the issue *when self-defense has been asserted*. *See Ex parte Haney*, 603 So. 2d 412 (Ala. 1992); *People v. Humphrey*, 56 Cal. Rptr. 2d 142 (1996); *People v. Darbe*, 62 P.3d 1006 (Colo. App. 2002); *State v. Hickson*, 630 So. 2d 172 (Fla. 1993); *Smith v. State*, 486 S.E.2d 819 (Ga. 1997); *People v. Evans*, 631 N.E.2d 281 (Ill. App. Ct. 1994); *Marley v. State*, 747 N.E.2d 1123 (Ind. 2001); *State v. Price*, 2008 WL 5234351 (Iowa App. 2008); *State v. Hundley*, 693 P.2d 475 (Kan. 1985); *Springer v. Commonwealth*, 998 S.W.2d 439 (Ky. 1999); *State v. Anaya*, 438 A.2d 892 (Me. 1981); *State v. Smullen*, 844 A.2d 429 (Md. 2004); *People v. Wilson*, 487 N.W.2d 822 (Mich. Ct. App. 1992); *State v. Hennum*, 441 N.W.2d 793 (Minn. 1989); *State v. Edwards*, 60 S.W.3d 602 (Mo. Ct. App. 2001); *Boykins v. State*, 995 P.2d 474 (Nev. 2000); *State v. Kelly*, 478 A.2d 364 (N.J. 1984); *People v. Seeley*, 720 N.Y.S.2d 315 (N.Y. Sup. Ct. 2000); *State v. Leidholm*, 334 N.W.2d 811 (N.D. 1983); *Bechtel v. State*, 840 P.2d 1 (Okla. Crim. App. 1992); *Commonwealth. v. Miller*, 634

A.2d 614 (Pa. Super Ct. 1993); *State v. Urena*, 899 A.2d 1281 (R.I. 2006); *State v. Grubbs*, 577 S.E.2d 493 (S.C. Ct. App. 2003); *Fielder v. State*, 756 S.W.2d 309 (Tex. Crim. App. 1988); *State v. Hendrickson*, 914 P.2d 1194 (Wash. Ct. App. 1996); *State v. Richardson*, 525 N.W.2d 378 (Wis. Ct. App. 1994); *Witt v. State*, 892 P.2d 132 (Wyo. 1995).[4] Indeed, it has been correctly noted that "battered women's syndrome is not itself a defense but, rather, is relevant in the context of self-defense." *People v. Wilcox*, 788 N.Y.S.2d 503, 505 (2005). For example, when the Ohio Supreme Court first recognized the battered woman's syndrome in *State v. Koss*, 551 N.E.2d 970 (Ohio 1990), it held in Syllabus point 3 of the opinion:

> Admission of expert testimony regarding the battered woman syndrome does not establish a new defense or justification. It is to assist the trier of fact to determine whether the defendant acted out of an honest belief that she is in imminent danger of death or great bodily harm and that the use of such force was her only means of escape.

Moreover, even when a defendant asserts self-defense, a trial court may deny expert

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[4]At least one court has allowed a defendant to present expert testimony on the battered woman's syndrome when the defense is duress. *See State v. B.H.*, 870 A.2d 273 (N.J. 2005) (allowing defendant to introduce battered woman's syndrome evidence when defense is duress). Further, at least three courts have determined that expert testimony on the battered woman's syndrome is admissible to explain a defendant's conduct in causing injury to, or neglecting the welfare of, her children. *See Mott v. Stewart*, 2002 WL 31017646 (D. Ariz. 2002); *Pickle v. State*, 635 S.E.2d 197 (Ga. Ct. App. 2006); *Barrett v. State*, 675 N.E.2d 1112 (Ind. Ct. App.1996) (superceded by statute). In *People v. Minnis*, 455 N.E.2d 209 (Ill. Ct. App. 1983), the court held that expert testimony was admissible to help explain why the defendant dismembered her husband's body.

testimony on the battered woman's syndrome when the evidence is insufficient to establish self-defense. *See People v. Hartman*, 926 N.Y.S.2d 746, 747-48 (2011) ("Defendant asserts that County Court improvidently exercised its discretion when it ruled, after she had testified, that it would not permit her to produce an expert regarding battered person syndrome. We are unpersuaded. . . . Here, the evidence at trial, including defendant's own testimony, undermined her claim of self-defense."); *State v. Fagan*, 2009 WL 2351753, at *4 (Ohio Ct. App. 2009) ("Because Mindy failed to establish this element of self-defense, there was no need to consider testimony regarding the 'battered woman syndrome' and whether, based on that syndrome, Mindy had an honest belief that she was in danger of imminent bodily harm.").

Absent a statute to the contrary, no court in the country has allowed a defendant to introduce evidence of the battered woman's syndrome when she alleges only that the crime was an accident.[5] The courts that have squarely addressed this issue have unanimously

[5]My research has revealed that only one state, Massachusetts, has by statute permitted evidence of battered woman's syndrome when a defendant alleges a killing was in self-defense or accidental. The statute requires that the defendant show "the reasonableness of the defendant's apprehension that death or serious bodily injury was imminent, the reasonableness of the defendant's belief that he had availed himself of all available means to avoid physical combat or the reasonableness of a defendant's perception of the amount of force necessary to deal with the perceived threat." Mass. Gen. L. Ann., ch. 233 § 23F (1996). *See Commonwealth v. Pike*, 726 N.E.2d 940, 948 n.9 (Mass. 2000) ("The Legislature has concluded that battered woman syndrome may be the subject of expert testimony at the trial of criminal cases 'charging the use of force against another where the issue of defense of self or another, defense of duress or coercion, or accidental harm is

agreed that expert testimony on the battered woman's syndrome is not admissible when the defendant asserts only that the crime she was charged with was committed by accident.

In *State v. Hanson*, 793 P.2d 1001 (Wash. Ct. App. 1990), the defendant was convicted of second degree murder. On appeal, the defendant argued that the trial court committed error by excluding testimony regarding the battered woman's syndrome on the ground that she did not assert self-defense. The appellate court rejected the argument:

> The scientific basis and relevancy of such testimony in proper cases is now well established. On the facts before us, if Hanson had claimed self-defense, the testimony would have been appropriate and admissible as supportive of her apprehensions and mental state in firing the gun. However, such testimony is not supportive of the claim of accident presented here.

Hanson, 793 P.2d at 1003.

In *State v. Sallie*, 693 N.E.2d 267 (Ohio 1998), the defendant was convicted of voluntary manslaughter. In her appeal, the defendant argued that she received ineffective assistance of counsel because her attorney failed to present expert testimony on the battered woman's syndrome. The appellate court rejected the argument:

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asserted.'"). Thus, even under the Massachusetts statute Mrs. Stewart would not have been able to introduce expert testimony on the battered woman's syndrome, because she was not in imminent danger of death or serious bodily injury by Mr. Stewart at the time she murdered him.

> Expert testimony explaining battered woman syndrome, and opining that the defendant suffered from the syndrome, may be admitted to establish the requisite mental state in proving self-defense. . . .
>
> In Sallie's case, trial counsel could have reasonably concluded expert testimony about battered woman syndrome was unnecessary and irrelevant. Sallie consistently maintained the shooting was accidental-that she did not intentionally pull the trigger. Testimony by the state's witnesses supported this position. Because Sallie did not claim she shot Brown in self-defense, evidence that she may have suffered from battered woman syndrome was immaterial.

Sallie, 693 N.E.2d at 270.

In *State v. Fazio*, 1994 WL 631654 (Ohio Ct. App. 1994), the defendant was convicted of murder. On appeal, one of the issues raised was that the trial court committed error in failing to appoint an expert to testify on the battered woman's syndrome. The appellate court disagreed:

> Appellant maintains that expert testimony on battered woman syndrome can be crucial when the mental state of the battered woman is at issue in a trial.
>
> [The State] argues that expert testimony about battered women syndrome was inconsistent with the defense of accident or suicide. In the present case appellant's testimony was that the shooting was accidental or that the decedent was trying to shoot himself. . . . Thus, testimony of an

> expert in battered women syndrome would be inconsistent to the facts presented here. The court did not commit plain error in failing to appoint an expert. Appellant's fifth assignment of error is without merit.

Fazio, 1994 WL 631654, at *4.

In *People v. Wilcox*, 788 N.Y.S.2d 503 (2005), the defendant had a group of men beat and robb her boyfriend. The defendant was convicted of gang assault and grand larceny. On appeal, the defendant contended that the trial court committed error in not allowing her to call an expert to testify concerning the battered woman's syndrome. The appellate court rejected the argument:

> We likewise find unpersuasive defendant's contention that County Court erred in excluding expert testimony regarding battered women's syndrome. As has been observed, battered women's syndrome is not itself a defense but, rather, is relevant in the context of self-defense. As noted by County Court, the defense of self-defense was unavailable here because defendant was the initial aggressor. Accordingly, County Court properly determined that there was no basis for introduction of evidence concerning battered women's syndrome.

Wilcox, 788 N.Y.S.2d at 505. *See also People v. Varner*, 2002 WL 741531 (Mich. Ct. App. 2002) (finding no error in denying expert evidence of battered woman's syndrome where defendant hired someone to attempt to kill her boyfriend).

Finally, in *Francis v. State*, 183 S.W.3d 288 (Mo. Ct. App. 2005), the appellate court rejected the defendant's contention that her trial counsel was ineffective for not calling an expert to testify about the battered woman's syndrome. This argument was rejected because the defendant's theory of defense was that the victim's killing was an accident. The Court observed that "[a] claim of self-defense, supported by battered spouse syndrome, however, requires an intentional act. A claim of accident requires an unintentional act." *Francis*, 183 S.W.3d at 299.

C. The Majority Opinion Has Made West Virginia the Only State in the Nation That Recognizes the Battered Woman's Syndrome as a Stand Alone Affirmative Defense

As I have previously mentioned, all courts in the country that have judicially recognized the battered woman's syndrome permit the defendant to present expert testimony on the issue when a defense of self-defense has been asserted. This observation by me in this dissent is not new to this Court. Justice Albright commented on this issue in his dissenting opinion in *State v. Whittaker*, 221 W. Va. 117, 650 S.E.2d 216 (2007):

> For more than twenty-five years this Court has recognized the significance of permitting a battered individual to introduce evidence about the abuse suffered "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. Dozier*, 163 W. Va. 192, 197, 255 S.E.2d 552, 555 (1979). Evidence adduced to demonstrate a long term abusive relationship . . . is characterized as battered women's syndrome and is *typically relied upon to prove that an*

> *abused defendant acted in self defense*. *See State v. Wyatt*, 198 W. Va. 530, 541, 482 S.E.2d 147, 158 (1996) (recognizing that "the principal use of battered women's syndrome testimony has been in the context of self-defense);" *State v. Lambert*, 173 W. Va. 60, 63-64, 312 S.E.2d 31, 35 (1984) (noting that evidence of battered spouse syndrome "go[es] to negate criminal intent").

Whittaker, 221 W. Va. at 134, 650 S.E.2d at 233 (Albright, J., dissenting) (emphasis added).

What is the significance of making the battered woman's syndrome a stand-alone affirmative defense? The significance is unnerving under the facts in which this defense was created by the majority. The facts of this case show that Mr. Stewart had been living alone in a camper for three years before he was murdered by his wife. The facts show that, to the extent domestic violence occurred during the marriage, it last occurred fifteen years before Mr. Stewart was murdered.[6] The facts show that, even though Mr. Stewart lived

[6]During the trial in this case, the State pointed out that the alleged domestic violence occurred fifteen years prior to Mr. Stewart being murdered. This information was taken from the report issued by Mrs. Stewart's expert on the battered woman's syndrome. As the majority opinion noted, Mrs. Stewart strategically declined to submit the expert's report as part of the record on appeal. (I find it ironic the that majority opinion has brought utter chaos into our criminal law without ever having reviewed the report that it finds so critical). Contrary to any implications from the majority opinion or any other separate opinion, the record in this case shows that the trial judge gave counsel for Mrs. Stewart an opportunity to submit evidence to show any recent domestic violence. There was none; because, based upon what the State asserted, no recent domestic violence was reported by Mrs. Stewart to her expert when he evaluated her and found that he could not conclude that she was in fact a battered woman. Moreover, the State informed the trial judge that no criminal or civil report of domestic violence had ever been filed against Mr. Stewart by Mrs. Stewart.

by himself, Mrs. Stewart would still have weekly contact with him. The facts show that, while Mr. Stewart was in a hospital in an induced coma for several days, Mrs. Stewart visited him regularly and massaged his body while he laid helpless in bed. With these facts in view, the majority opinion now allows Mrs. Stewart to introduce evidence that fifteen years ago Mr. Stewart argued and fought with her. The jury will be instructed that it can use this evidence to acquit Mrs. Stewart of murder or find her guilty of manslaughter or second degree murder. With this flawed reasoning, I simply cannot agree.[7]

D. The Trial Court Correctly Read and Determined That State v. Harden Did Not Permit the Introduction of Expert Testimony on the Battered Woman's Syndrome under the Facts of this Case

Notwithstanding any implications by the majority opinion, the trial court in this case did in fact read the decision in *State v. Harden*, 223 W.Va. 796, 679 S.E.2d 628 (2009), and properly concluded that *Harden* did not permit introduction of expert testimony on the battered woman's syndrome when a defendant has not asserted the defense of self-defense. As I will show, *Harden* was decided precisely on the issue of self-defense or imperfect self-defense.

[7]There are a host of other problems that the majority opinion has injected into our criminal law as it relates to the admissibility of evidence of the character of the victim of a crime.

The first point that was made in *Harden* was that "[a]t trial, the defendant asserted a claim of self-defense, arguing that her actions precipitously followed a 'night of domestic terror' that ended only when the defendant shot and killed the decedent." *Harden*, 223 W. Va. at 800-01, 679 S.E.2d at 796. Thus, it is clear that in *Harden* the defendant raised the defense of self-defense.

The decision in *Harden* did not involve a question of whether a defendant may present evidence of the battered woman's syndrome. That is, the defendant in *Harden* did not assign as error that she was precluded from presenting any evidence of prior abuse by the decedent. The question of prior abuse became an issue only to the extent that the state argued on appeal that the defendant failed to establish sufficient evidence of self-defense.

The facts of *Harden* showed that the defendant was savagely beaten, raped and threatened by her husband until he finally went to sleep.[8] The defendant shot and killed the decedent while he was sleeping. The state argued at trial and on appeal that the defendant failed to establish self-defense, because the victim was asleep when he was killed. To support this contention, the state relied on Syllabus point 6 of our decision in *State v. McMillion*, 104 W. Va. 1, 138 S.E. 732 (1927), where we held that:

[8]The evidence also showed that the victim threatened to kill the couples two children and a child that was visiting the home.

> Under his plea of self-defense, the burden of showing the imminency of the danger rests upon the defendant. No apprehension of danger previously entertained will justify the commission of the homicide; it must be an apprehension existing at the time the defendant fired the fatal shot.

The instruction given by the trial court, which was submitted by the state, tracked the language of *McMillion*. The trial court instructed the jury as follows:

> In order for the Defendant to have been justified in the use of deadly force in self-defense, she must not have provoked the assault on her or have been the aggressor. Mere words, without more, do not constitute provocation or aggression. Furthermore, *you must find that the apprehension existed at the time that the defendant attacked the victim. No apprehension of danger previously entertained will justify the commission of homicide*.

Harden, 223 W. Va. at 802, 679 S.E.2d at 634.

The state argued in *Harden*, and correctly so, that under *McMillion* the defendant could not establish self-defense if the apprehension of death or serious bodily injury was not existing at the time the defendant used deadly force. This Court saw two problems with *McMillion*. First, that decision did not properly outline the establishment of self-defense. Second, *McMillion* did not allow for mitigation of a homicide charge when a defendant's assertion of self-defense was imperfect, yet a jury could find the defendant acted reasonably because of prior abuse. To address both of these issues, *Harden* created the

following new syllabus points:

> 3. Where a defendant has asserted a plea of self-defense, evidence showing that the decedent had previously abused or threatened the life of the defendant is relevant evidence of the defendant's state of mind at the time deadly force was used. In determining whether the circumstances formed a reasonable basis for the defendant to believe that he or she was at imminent risk of serious bodily injury or death at the hands of the decedent, the inquiry is two-fold. First, the defendant's belief must be subjectively reasonable, which is to say that the defendant actually believed, based upon all the circumstances perceived by him or her at the time deadly force was used, that such force was necessary to prevent death or serious bodily injury. Second, the defendant's belief must be objectively reasonable when considering all of the circumstances surrounding the defendant's use of deadly force, which is to say that another person, similarly situated, could have reasonably formed the same belief. Our holding in Syllabus Point 6 of *State v. McMillion*, 104 W. Va. 1, 138 S.E. 732 (1927), is expressly overruled.
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> 4. Where it is determined that the defendant's actions were not reasonably made in self-defense, evidence that the decedent had abused or threatened the life of the defendant is nonetheless relevant and may negate or tend to negate a necessary element of the offense(s) charged, such as malice or intent.

Syllabus point four of *Harden* was not created to allow an expert to testify regarding the battered woman's syndrome in a case where the defendant has not asserted self-defense. That syllabus point was created to allow a jury to consider and give weight to

evidence of prior domestic violence that was introduced, even if the jury rejected the defendant's claim of self-defense. In the instant proceeding, the majority opinion has taken syllabus point four of *Harden*, expanded it beyond its intended application, and made the battered woman's syndrome a stand alone affirmative defense. The trial court in the instant proceeding was correct when it found that *Harden* did not require introduction of the battered woman's syndrome in a case where self-defense was not asserted. On the contrary, a holding allowing evidenced of battered woman's syndrome in the absence of a defense of self-defense was made for the first time in the history of Anglo-American jurisprudence by the majority opinion in this appeal.

Based upon the forgoing, I dissent.