No. 101179 - *State of West Virginia v. Rhonda Kay Stewart*

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OF WEST VIRGINIA

Benjamin, Justice, dissenting:

"If I wrong someone when not myself,
then Hamlet does it not.
Hamlet denies it. Who does it then?
His madness."

– Hamlet

The motivations for murder are seldom more apparent than in this case. On June 13, 2009, after thirty-eight years of marriage, the last three living apart, Rhonda Stewart finally understood that her marriage was over – that her hospitalized husband intended to divorce her. She was asked to leave her husband's hospital room. She did so. She drove home. She got a gun. She returned to the hospital. She parked. She walked to the Intensive Care Unit where her recently-comatose husband now lay incapacitated. She stood at his bedside and pulled the .40 caliber handgun from her purse. She woke him. He opened his eyes and focused. She put the gun to his head. She said something to him which caused his monitored vital signs to elevate dramatically, setting off alarms. And she killed him. Point blank. "Sorry, Sammy."[1]

[1] According to Tara Webb, who witnessed the shooting, Rhonda Stewart's words after the shooting were, "Sorry, Sammy."

On appeal, Rhonda Stewart becomes Hamlet, opining that she is not responsible for the death of her husband, despite an eyewitness to the execution and a confessed motive for the murder: her husband wanted to end their marriage. At trial, Rhonda Stewart said that the killing of Sammy Stewart was an accident. Not self-defense. Not fear of imminent threat. Not diminished capacity. Not insanity.[2] At trial, the killing wasn't her fault, it was an accident. The jury didn't buy it. On appeal the defense changed: it was not Rhonda Stewart that killed Sammy Stewart – it was something else. What was it? It was Sammy and the way he purportedly treated her decades – yes, *decades* – earlier in their marriage.

The majority opinion is based in large part on Syllabus Point 4 of *State v. Harden*, 223 W. Va. 796, 679 S.E.2d 628 (2009). In my dissent in *Harden*, I noted that *Harden's* Syllabus Point 4 was created by the majority from whole cloth with absolutely no support in the precedent of this Court (or elsewhere from what I could determine). I further explained:

> Moreover, beside having no support in our law, new Syllabus Point 4 may well have the unintended consequence of promoting vigilantism, an attempt to affect justice by one's own hand according to one's own understanding of right and wrong. . . . By placing absolutely no limit on the use of evidence of

[2] At trial, David Clayman, Ph.D., could not render an opinion that Mrs. Stewart suffered from diminished capacity or insanity. Rather, he could only say that she was possibly suicidal.

> prior abusive conduct to negate an element of the crime charged, the majority unwittingly permits a defendant to claim that the most senseless murder is justified by an allegation that the decedent had wronged the defendant or posed a threat to the defendant. Until the creation of new Syllabus Point 4, such a notion was totally foreign to our jurisprudence.
>
> Sadly, the majority opinion disregards the progress that this State has made in recent years in the prevention, treatment, and remediation of domestic violence. Thanks to the diligence (sic) efforts of our legislature and courts, our society now works to prevent violence among family members. Spouses who find themselves in abusive or threatening situations now have resources that previous generations of abused spouses did not.

State v. Harden, 223 W. Va. at 817-18, 679 S.E.2d at 649-50 (Benjamin, J., dissenting).

Syllabus Point 4 of *Harden* is bad policy and bad law. Then, as now, it is a misguided leap by the majority into a jurisprudential fringe. Worse, as I predicted in my dissent, Syllabus Point 4 of *Harden* posed the potential to lead to unanticipated results.[3] This statement was prescient. In *Harden*, the defendant shot her sleeping husband in the head, killing him instantly. A majority of this Court absolved the defendant of that crime – actually ordering Harden's acquittal. In the instant case, the petitioner shot her incapacitated, though conscious, husband in the head while he was in a hospital bed, killing him. The *Harden* decision was rendered by this Court on June 4, 2009, and was widely publicized. Just ten

[3] *See*, Devin C. Daines, Note, State v. Harden*: Muddying the Waters of Self-Defense Law in West Virginia*, 113 W. Va. L. Rev. 971 (2011).

days later, Rhonda Stewart stood by her estranged husband's bed, gun in hand.

Here, Rhonda Stewart was fairly tried by a jury of her peers who heard all of the relevant evidence. She was properly convicted of first-degree murder. The evidence was overwhelming. There was an eyewitness. There was an admission by Rhonda Stewart that she was upset because she understood that her husband intended to divorce her. There was no claim of self-defense. There was no imminent threat of death or of serious bodily harm to Rhonda Stewart. Other than alleged domestic incidents over fifteen years in the past, there was no evidence of domestic abuse. There was none in the record. There was none properly proffered.

The majority opinion also omits certain key facts that support the jury's decision to convict Rhonda Stewart of the first-degree murder of her husband. One of these witnesses was Tara Webb, a health unit coordinator for the intensive care unit who was working at the time of the shooting. Ms. Webb was the only person other than the victim and the petitioner in a position to witness the shooting. At the time of the shooting, she was seated at a desk immediately in front of Sammy Stewart's room. It was not by mere chance than she looked up to witness the shooting; she was prompted to look toward Mr. Stewart's room by the monitors assessing his condition. When Ms. Webb looked up at Mr. Stewart's room, she saw the petitioner standing over her husband with a gun pointed to his head. The

gun itself was aimed downward. We cannot know what Rhonda Stewart was saying to Sammy Stewart, but we know that it caused his breathing and heart rates to escalate to the point that alarms sounded in the ICU. The gun then was fired, striking Mr. Stewart in the head. The wound which was caused, including its arterial element, was graphic. Sammy Stewart lay lifeless. The effect on those in the hospital that day was profound and permanent, as evidenced by their testimony.[4]

The majority discusses alternate defenses to the crime of first-degree murder; however, the petitioner did not pursue any defense other than accident. This "accident" theory of defense requires no expert corroboration regarding whether the petitioner was the victim of spousal abuse.[5] The majority opinion states that "*this abuse could have affected*

[4] This testimony was in sharp contrast to the testimony of the petitioner, who, for the first time at trial, testified that the reason she brought the gun to the hospital was to kill herself in her husband's hospital room so that he would know "that [she] wouldn't bother him anymore." She testified that when she returned to her husband's hospital room after going to her home to retrieve her firearm, her husband was asleep. She awakened him, ostensibly so that he could see her kill herself. According to the testimony of the petitioner, Mr. Stewart pulled down her elbow, and the gun went off. A supposed suicide note by Rhonda Stewart appeared much later. The jury had the conflicting testimony of Rhonda Stewart and Ms. Webb, and chose to believe Ms. Webb when it made its decision to convict the petitioner of first-degree murder.

[5] The majority mentions in its opinion that Dr. David Clayman, a clinical and forensic psychologist with experience evaluating cases of Battered Woman's Syndrome, was retained by the defense to testify as to the petitioner's mental condition at the time she shot her husband. Dr. Clayman prepared a report which presented his findings regarding Stewart's mental state leading up to the shooting of her husband. This report was never made part of the record, and Dr. Clayman was not permitted to testify during trial as to Battered Woman's Syndrome.

the defendant's reasoning and demonstrated that she did not act with premeditation or malice." Because there is no evidence in the record that Stewart was abused, the majority elevates speculation to hard and fast fact, and I believe this to be error.

As I stated in my dissent in *Harden*, the defense of Battered Woman's Syndrome in cases of self-defense or where there is an imminent threat of death or serious bodily harm is an important and necessary part of our jurisprudence. West Virginia has made much progress in recent years in the prevention, treatment, and remediation of domestic

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While the parties did speak of Battered Woman's Syndrome during the pretrial hearing, there was no actual testimony during trial regarding Battered Woman's Syndrome. Upon the trial court's refusal to admit Dr. Clayman's report as evidence in the case, the defense made no attempt to make a proffer of what this report would contain. This Court has held that

> "[t]he purpose of vouching the record is to place upon the record excluded evidence, or to show upon the record what the excluded evidence would have proved in order that the appellate court may properly evaluate the correctness of the trial court's ruling excluding it." Syllabus point 4, *State v. Rissler*, 165 W.Va. 640, 270 S.E.2d 778 (1980).

Syl. pt. 5, *State v. Calloway*, 207 W. Va. 43, 528 S.E.2d 490 (1999). This Court has further held that, "'[t]he appellate review of a ruling of the circuit court is limited to the very record there made and will not take into consideration any matter which is not part of that record.' Syllabus point 2, *State v. Bosley*, 159 W.Va. 67, 218 S.E.2d 894 (1975)." Syl. pt. 6, *State v. Calloway*, 207 W. Va. 43, 528 S.E.2d 490 (1999). By failing to proffer the contents of either Dr. Clayman's report or Dr. Clayman's proposed testimony, "the record before this Court is wholly inadequate in terms of reviewing whether the circuit court acted correctly." *State v. Lockhart*, 200 W. Va. 479, 481, 490 S.E.2d 298, 301 (1997).

violence. This decision, however, takes that positive progress in a negative direction. More disturbing, it opens our courts to all forms of defenses *du jour*.[6]

Here, the majority opinion sanctions the ultimate act of domestic violence. They are misguided. They substitute excuse for responsibility. Disregarding the jury, they lend legitimacy to the latest designer defense of the day – at tremendous cost to the criminal justice system. In the end, they excuse the most extreme form of violence against another human being by relieving Rhonda Stewart from the responsibility of conducting herself in a lawful manner. No matter how well-intentioned, in the final measure, they are wrong. We will never know what was said to Sammy Stewart as he knew he was about to die – what he thought as his breathing and heart rates soared, setting off the alarms on his monitors. But there is something which we should know: The answer to domestic violence is not more domestic violence.

The conviction should be affirmed. I dissent.

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[6] This opinion encourages such notable defenses as the "twinkie" defense (used in the defense of Dan White in the killings of San Francisco Mayor George Moscone and Supervisor Harvey Milk) and "Black Rage" syndrome (proposed in the defense of Colin Ferguson in the killing of six "white" passengers on a Long Island train). A common thread in such defenses is the tendency to search for excuses rather than responsibility for people's bad behavior. As observed above, insanity was not a claimed defense in this action. There was never a contention that Rhonda Stewart did not know right from wrong.