STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State ex rel. Amber DeStefano,
Petitioner Below, Petitioner

vs) No. 11-1063 (Marion County 08-C-294)

Adrian Hoke, Warden,
Respondent Below, Respondent

FILED
May 29, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Amber DeStefano, by counsel Paul S. Detch, appeals the Circuit Court of Marion County's order dated June 1, 2011, denying her petition for a writ of habeas corpus. Petitioner argues that the circuit court erred in finding that her trial counsel was effective and in finding that there was no reversible error regarding a specific jury instruction. Warden Adrian Hoke, by counsel Jacob Morgenstern, has filed his response.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the appendix presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Petitioner was convicted following a jury trial of second degree murder in the stabbing death of her boyfriend. After an evening of drinking, petitioner and her boyfriend had an argument that resulted in several physical altercations, initiated by both parties at different times, as testified to by a third person who witnessed the events. Petitioner then stabbed the victim, penetrating his lung, severing an artery, and resulting in his death. Petitioner's direct criminal appeal was refused by this Court. Petitioner then filed a petition for writ of habeas corpus in the circuit court, alleging several errors.

At the omnibus hearing on the petition for writ of habeas corpus, both of petitioner's trial attorneys testified, as did petitioner. Her attorneys testified that they discussed the plea deal with her at length but that petitioner sought acquittal of all charges due to a pending abuse and neglect case against her. Thus, she chose an "all or nothing" defense of self-defense. Further, petitioner's prior counsel testified that they investigated the alleged prior acts of domestic violence by the victim against the petitioner, including a door-to-door canvass of the neighborhood, but there was no corroborating evidence found outside of petitioner's mother. Additionally, petitioner's counsel had petitioner evaluated for Battered Woman's Syndrome by Dr. William Fremouw, who found no evidence of Battered Woman's Syndrome. Petitioner's counsel discussed a second knife found at

the scene, but elected not to pursue the origins of this knife at trial, as there was no evidence that the victim had been the last to touch the knife, nor was there evidence that the victim was somehow weilding the knife during the altercation, as the eyewitness testimony indicated that he was not.

On appeal, petitioner first argues generally that the circuit court erred in failing to grant her petition for a writ of habeas corpus. Petitioner's argument revolves around her use of deadly force to defend herself. Petitioner argues that the State's case implied that she had not been "beaten up enough" to use deadly force against the victim, and, therefore, petitioner should have been acquitted. Petitioner further argues that her trial counsel was ineffective in failing to anticipate this Court's ruling in *State v. Harden*, 223 W.Va. 796, 679 S.E.2d 628 (2009), which states that one does not have a duty to retreat in one's own home before using deadly force, even when assaulted by a co-inhabitant, and that she was prejudiced in not having the *Harden* ruling, which should be deemed retroactive. Petitioner also argues that her counsel was ineffective in not offering information regarding the second knife into evidence, as it could have raised the possibility that the victim was armed with said knife when he was stabbed. Finally, petitioner argues that although she was convicted of second degree murder, she was prejudiced by the jury instruction on first degree murder because it contained the statement "it is only necessary that said intention [to kill] came into existence at the time of such killing or at any time previous thereof."

In response, the State argues that *Harden* was not controlling law, as it was decided three years after the trial of this matter, and petitioner chose to pursue a claim of self-defense. The State also argues that counsel was not ineffective under *Strickland* and there is nothing in the record that indicates that the trial outcome would have differed if a different defense had been pursued. Furthermore, the State argues that the jury instruction on murder was harmless error, as petitioner was convicted of second degree murder and the instruction was made with regard to first degree murder.

This Court has stated as follows:

> "In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review." Syllabus Point 1, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006).

Syl. Pt. 2, *State ex rel. Farmer v. McBride*, 224 W.Va. 469, 686 S.E.2d 609 (2009). Petitioner claims ineffective assistance of trial counsel. In West Virginia, claims of ineffective assistance of counsel are governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *See* Syl. Pt. 5, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995). Petitioner further argues that the circuit court erred

in allowing the first degree murder instruction. This Court has held that "[w]hether jury instructions were properly given is a question of law." *State v. Guthrie*, 194 W.Va. 657, 671 n. 12, 461 S.E.2d 163, 177 (1995) (quoting *U.S. v. Morrison*, 991 F.2d 116 (4th Cir. 1993)). Since there was no objection to this jury instruction, the instruction must be reviewed under the "plain error" standard; "[t]he court's instructions to the jury must be a correct statement of the law and supported by the evidence . . . A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy." *Guthrie*, 194 W.Va. at 671, 461 S.E.2d at 177.

The Court has fully reviewed the issues raised by petitioner. The Court concludes that the circuit court's decision to deny habeas corpus relief under the facts and circumstances of this case was proper and hereby adopts and incorporates by reference, and attaches hereto, the well-reasoned "Opinion/Final Order Denying 'Petition for Writ of Habeas Corpus, Ad Subjiciendum'" entered by the circuit court on June 1, 2011.

For the foregoing reasons, we affirm the circuit court's decision.

Affirmed.

ISSUED: May 29, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

11-1063

IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
DIVISION II

AMBER DESTEFANO,

PETITIONER,

v.

CASE NO. 08-C-294

ADRIAN HOKE, WARDEN,

RESPONDENT.

FINAL ORDER

OPINION/FINAL ORDER DENYING "PETITION FOR WRIT OF HABEAS CORPUS, AD SUBJICIENDUM"

This Court is in receipt of, and has reviewed, a "Petition for Writ of Habeas Corpus, Ad Subjiciendum" submitted by the petitioner, Amber Destefano, through her counsel, Paul S. Detch, Esquire, on August 14, 2008. The petition alleges that the petitioner's constitutional rights have been violated and that she is being illegally imprisoned because of (1) improper instructions to the jury; (2) voir dire procedure; and (3) ineffective assistance of counsel. The petitioner argues six grounds in which counsel was allegedly deficient in rendering assistance: (1) questioning on voir dire; (2) opening statements; (3) not introducing evidence of a second knife; (4) cross-examination of State's witness, Eric Cain; (5) closing argument; and (6) jury instructions.

After due consideration of the petition, the entire record and the legal issues presented, this Court is of the opinion that the petition should be denied and that the petitioner's "Petition for Writ of Habeas Corpus, Ad Subjiciendum" should be

dismissed. In support of this opinion, the Court makes the following findings of fact and conclusions of law:

Findings of Fact

1. The October 2005 Marion County Grand Jury returned an indictment against the petitioner, Amber Destefano, alleging that Ms. Destefano committed the offense of Murder of the First Degree by feloniously, wilfully, maliciously, intentionally, deliberately, premeditatedly, and unlawfully slaying, killing and murdering Jeremy Richard Cosner on or about October 15, 2005.

2. On October 17, 2005, the Marion County Circuit Court, Division II, entered an order appointing Scott Shough, Esquire, to represent Ms. Destefano.

3. On November 10, 2005, Mr. Shough requested that this Court appoint co-counsel to assist him in representing Ms. Destefano. The Court appointed Rebecca Tate, Esquire, as co-counsel on November 10, 2005.

4. Ms. Destefano, through counsel, filed a "Motion to Continue" on January 1, 2006. The Court heard the motion on January 9, 2006, at which hearing Ms. Destefano waived her right to a "speedy trial" and agreed that the trial may be continued from the October 2005 term of court to the February 2006 term of court. The Court entered a "Continuance Order" on January 13, 2006 that continued the trial to the February 2006 term of court. The parties subsequently agreed that the trial would again be continued to the June 2006 term and the trial was scheduled to begin on September 25, 2006.

5. On September 12, 2006, Ms. Tate filed a "Motion to Withdraw As Counsel," which stated, *inter alia*, that "[c]ounsel for the defendant has personal family matters that would prevent her to proceed to trial in this matter on September 25, 2006."

6. The Court conducted a hearing on Ms. Tate's motion on September 12, 2006. At this hearing, Ms. Tate stated that the she could not participate in the September 25, 2006 trial due to family matters (her father's death). Wishing to avoid another postponement of the trial, Ms. Destefano did not object to Ms. Tate's withdrawal, nor did she object to Dana Shay, Esquire, being appointed as co-counsel. The Court granted Ms. Tate's motion and appointed Dana Shay, Esquire, as Mr. Shough's co-counsel.

7. The trial began and voir dire took place on September 25, 2006. Following a series of preliminary questions by the Court, Patrick N. Wilson, Esquire, Prosecuting Attorney for Marion County, questioned prospective jurors on behalf of the State and Mr. Shay questioned the panel on behalf of Ms. Destefano. During voir dire, Mr. Wilson asked prospective jurors if "there is any member of this panel that believes that there just no way a female, a woman, can be the instigator of a fight or physical altercation with a man?" Mr. Wilson also disclosed the identities of prospective State witnesses and questioned the panel about any potential biases for or against the State's witnesses.

8. After the jury was selected and sworn, the parties proceeded to present their evidence and the testimony of their respective witnesses, which testimony and evidence concluded on September 28, 2006.

9. The Court read its charge to the jury on September 28, 2006. The charge included instructions on first degree murder and defined the element of premeditation. With respect to the element of premeditation, the charge stated that "it is not necessary that the intention to kill exist for any particular length of time . . . ; it is only necessary that said intention came into existence at the time of such killing or any time previous thereto." Defense counsel did not object to the Court's instruction on premeditation.

10. The jurors began deliberating on September 28, 2006 and returned a verdict that found Ms. Destefano guilty of second degree murder on September 29, 2006.

11. On December 21, 2006, Ms. Destefano, through her counsel, filed "Defendant's Final Response As to Post Trial Motions." The motion alleged that the Court erred in allowing evidence of the victim's insurance policy into evidence.

12. Mr. Shough filed a second post-trial motion on January 8, 2007 alleging that the jury foreman, in violation of the Court's instructions, read the local newspaper in which the trial was extensively covered.

13. On January 9, 2007, the Court conducted a hearing on Ms. Destefano's post trial motions and her sentencing. During the hearing, the Court heard the arguments of defense counsel, testimony from the parties' respective witnesses and arguments from the State. The Court denied Ms. Destefano's motions and entered an order reflecting this decision on January 16, 2007.

14. On January 16, 2007, the Court entered a "Sentencing Order" in which the Court ordered Ms. Destefano to be "confined in the West Virginia State Penitentiary

for the offense of murder in the second degree for a definite term of Thirty (30) years, ..."

15. On January 18, 2007, Mr. Shough filed a "Notice of Intent to Appeal" with the Marion County Circuit Clerk.

16. The Court released Mr. Shough from representing Ms. Destefano in her appeal by order entered on March 1, 2007, in which the Court appointed David DeMoss, Esquire, to represent Ms. Destefano.

17. Mr. DeMoss filed a "Petition for Appeal" to the West Virginia Supreme Court on July 8, 2007. The petition raised five issues in which this court allegedly erred: (1) allowing the decedent's insurance policy into evidence; (2) not allowing Ms. Destefano's statements into evidence as a present sense impression; (3) permitting the prosecutor to express personal statements and misstate the evidence; (4) denying the defendant's motion to set aside the verdict as being against the weight of the evidence and motion for new trial; and (5) allowing gruesome photographs of the crime scene into evidence.

18. On September 13, 2007, the West Virginia Supreme Court entered an order denying Ms. Destefano's petition for appeal.

19. On March 4, 2008, this Court entered an order permitting Mr. DeMoss to withdrawal from representing Ms. Destefano in any further post-conviction proceedings.

20. Ms. Destefano, through her counsel, Paul S. Detch, Esquire, filed a "Petition Under W.Va. Code 53-4A-1 For Writ of Habeas Corpus" (hereinafter

petition) on August 14, 2008, alleging, *inter alia*, that Ms. Destefano was denied effective assistance of counsel.

21. On March 25, 2009, the Court considered Ms. Destefano's petition and found that "probable cause exists to believe that that the petitioner may be entitled to some relief and that further proceedings are proper." The Court entered an "Order Granting Writ of Habeas Corpus and Commencing Omnibus Proceeding" on March 25, 2009. The March 25, 2009 order directed Ms. Destefano to complete the "Habeas Corpus Notification Form" provided with the order. It also advised Ms. Destefano that all grounds not initialled on the form would be waived and "may not be raised in future habeas corpus proceedings absent a retroactive change in the law that is favourable to the petitioner, newly discovered evidence, or ineffective assistance of counsel at the omnibus hearing."

22. Ms. Destefano filed her "Habes Corpus Notification Form" with the Marion County Circuit Clerk on September 8, 2009. Ms. Destefano initialled the following the grounds to be raised at her omnibus proceeding: (1) ineffective assistance of counsel; (2) instructions to the jury; (3) claims of prejudicial statements by the prosecutor; and (4) other grounds.

23. On April 4, 2011, this Court conducted an Omnibus Habeas Corpus proceeding. At this hearing, the Court heard testimony from Amber Destefano, Scott Shough, Esquire, Rebecca Tate, Esquire, and Dana Shay, Esquire. The Court also heard argument from Ms. Destefano's counsel, Paul S. Detch, Esquire, and from the Marion County Prosecuting Attorney, Patrick N. Wilson, Esquire.

24. At the April 4, 2011 hearing, Ms. Destefano testified that she did not discuss trial strategy with her attorneys. She further testified that she told Ms. Tate about prior acts of domestic violence committed against her by the victim, Jeremy Cosner. Ms. Destefano also testified that she provided to her attorneys names of potential witnesses who could support these allegations. She further testified that defense counsel chose not to bring these acts up at trial.

25. On cross examination, Ms. Destefano admitted that her attorneys discussed with her the elements of each potential criminal offense that could be charged against her. Ms. Destefano also admitted that because she had a pending abuse and neglect case, she wanted a full acquittal of all criminal charges in order to regain custody of her son. Consequently, she refused the state's offer to accept her plea of guilty to voluntary manslaughter, with a sentencing recommendation of three to twelve years.

26. Mr. Shough testified that he discussed all the elements of homicide with Ms. Destefano and that she decided to present the "all or nothing" defense of self-defense. Mr. Shough also testified that he investigated the alleged prior acts of domestic violence by Mr. Cosner and that he had Ms. Destefano psychologically evaluated by Dr. William Fremouw for Battered Woman's Syndrome. Mr. Shough testified that his investigation into the alleged prior acts of domestic violence did not yield any corroborating evidence and that Dr. Fremouw concluded that Ms. Destefano did not have Battered Woman's Syndrome.

27. Mr. Shough further testified that he elected not to attempt to introduce into evidence a second knife allegedly found at the crime scene because there were no

witnesses or other supporting evidence to place the knife in the hands of the victim, Jeremy Cosner.

28. Rebecca Tate, Esquire, testified that she went to "door-to-door" in Ms. Destefano's home town of Fairview in an attempt to find witnesses who observed any acts of domestic violence between Ms. Destefano and Jeremy Cosner, but that she could find no witnesses to support the allegations. Ms. Tate further testified that, following numerous conversations, Ms. Destefano decided on the "all or nothing defense" of self defense and that she understood all of the alternative defenses available to her. She also testified that she discussed with Ms. Destefano the varying elements for the different levels of homicide. Ms. Tate testified that she thoroughly prepared Ms. Destefano to testify on her own behalf at trial.

29. Dana Shay, Esquire, testified that although he was appointed as Mr. Shough's co-counsel just two weeks before trial, he was thoroughly informed about the case by Ms. Tate. Mr. Shay further testified that Ms. Destefano was emphatic in presenting the defense of self-defense at trial. Mr. Shay also testified that, based upon their conversations with Ms. Destefano, defense counsel decided to pursue one theory of defense instead of several defense theories so that the jury would not think that the defendant was "talking out of both sides of her mouth."

Conclusions of Law

1. The West Virginia Code provides that

> [a]ny person convicted of a crime and incarcerated under sentence of imprisonment therefore who contends that . . . the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under the common-law or any statutory provision of this State, may, without paying a filing fee, file a petition for a writ of habeas corpus ad subjiciendum, and prosecute the

> same, seeking release from such illegal imprisonment, correction of the sentence, the setting aside of the plea, conviction and sentence, or other relief, if and only if such contention or contentions and the grounds in fact or law relied upon in support thereof have not been previously and finally adjudicated or waived in the proceedings which resulted in the conviction and sentence, or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding or proceedings which the petitioner has instituted to secure relief from such conviction or sentence. . . .

W.Va. Code § 53-4A-1(a) (2010).

2. West Virginia Code § 53-4A-3 gives a court authority to refuse to grant a writ of habeas corpus:

> (a) If the petition, affidavits, exhibits, records and other documentary evidence attached thereto, or the record in the proceedings which resulted in the conviction and sentence, or the record or records in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or the record or records in any other proceeding or proceedings instituted by the petitioner to secure relief from his conviction or sentence (if any such record or records are part of the official court files of the court with whose clerk the petition is filed or are part of the official court files of any other court within the same judicial circuit as the court with whose clerk such petition is filed and are thus available for examination and review by such court) show to the satisfaction of the court that the petitioner is entitled to no relief, or that the contention or contentions and grounds (in fact or law) advanced have been previously and finally adjudicated or waived, the court shall by order entered of record refuse to grant a writ, and such refusal shall constitute a final judgment. If it appears to such court from said petition, affidavits, exhibits, records and other documentary evidence, or any such available record or records referred to above, that there is probable cause to believe that the petitioner may be entitled to some relief, and that the contention or contentions and grounds (in fact or law) advanced have not been previously and finally adjudicated or waived, the court shall forthwith grant a writ, directed to and returnable as provided in subsection (b) hereof. If any such record or records referred to above are not a part of the official court files of the court with whose clerk the petition is filed or are not part of the official court files of any other court within the same judicial circuit as the court with whose clerk such petition is filed and are thus not available for examination and review by such court, the determination as to whether to refuse or grant the writ shall be made

> on the basis of the petition, affidavits, exhibits, records and other documentary evidence attached thereto.

W.Va. Code § 53-4A-3 (a) (2010).

3. The West Virginia Code also provides that

> [f]or the purposes of this article, a contention or contentions and the grounds in fact or law relied upon in support thereof shall be deemed to have been previously and finally adjudicated only when at some point in the proceedings which resulted in the conviction and sentence, or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding or proceedings instituted by the petitioner to secure relief from his conviction or sentence, there was a decision on the merits thereof after a full and fair hearing thereon and the time for the taking of an appeal with respect to such decision has not expired or has expired, as the case may be, or the right of appeal with respect to such decision has been exhausted, unless said decision upon the merits is clearly wrong.

W.Va. Code § 53-4A-1(b) (2010); *see also Losh v. McKenzie,* 166 W.Va. 762, 764, 277 S.E.2d 606, 609 (W.Va. 1981) (Neely, J.) (holding that "every person convicted of a crime shall have . . . one omnibus post-conviction habeas corpus hearing at which he may raise any collateral issues which have not previously been fully and fairly litigated).

4. An omnibus habeas corpus hearing occurs when

> (1) an applicant for habeas corpus is represented by counsel or appears pro se having knowingly and intelligently waived his right to counsel; (2) the trial court inquires into all the standard grounds for habeas corpus relief; (3) a knowing and intelligent waiver of those grounds not asserted is made by the applicant upon advice of counsel unless he knowingly and intelligently waived his right to counsel; and, (4) the trial court drafts a comprehensive order including the findings on the merits of the issues addressed and a notation that the defendant was advised concerning his obligation to raise all grounds for post-conviction relief in one proceeding.

Syl. Pt. 1, *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (W.Va. 1981).

5. West Virginia Code 53-4A-7(c) gives the circuit court in reviewing a habeas corpus petition considerable discretion in fashioning appropriate relief. *See Carter v. Bordenkircher*, 159 W.Va. 717, 226 S.E.2d 711 (W.Va. 1976).

I. Improper Instructions to the Jury on First Degree Murder

6. "Murder by poison, lying in wait, imprisonment, starving, or by any willful, deliberate and premeditated killing . . . is murder of the first degree. All other murder is murder of the second degree." W.Va. Code § 61-2-1 (2010).

7. The West Virginia Legislature did not define "premeditation" in W.Va. Code § 61-2-1. The West Virginia Supreme Court did, however, define premeditation in *State v. Guthrie*. It found that premeditation is a distinctive element for first degree murder and that it cannot arise simultaneously with the intent to kill. *See State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (W.Va. 1995).

8. " '[I]t is not necessary to prove premeditation existed for any definite period of time. But it is necessary to prove that it did exist.' " *Guthrie*, 194 W.Va. at 675, 461 S.E.2d at 181 (*quoting Green v. State*, 1 Tenn.Crim.App. 719, 735, 450 S.W.2d 27, 34 (1970)).

9. "To allow the State to prove premeditation and deliberation by only showing that the intention 'came into existence for the first time at the time of such killing' completely eliminates the distinction between the two degrees of murder." *Guthrie*, 194 W.Va. at 675, 461 S.E.2d at 181.

10. Premeditation means that "there must be an opportunity for some reflection on the intention to kill after it is formed. The accused must kill purposely after contemplating the intent to kill." *Id.*

11. " 'Whether jury instructions were properly [legally] given is a question of law[.]' " *State v. Guthrie*, 194 W.Va. 657, 671, 461 S.E.2d 163, 177 (W.Va. 1995) (*quoting U.S. v. Morrison*, 991 F.2d. 116 (4th Cir. 1993)).

12. If the defendant did not object to the trial court's instructions to the jury regarding a legal standard, the Court must review the instructions under the "plain error" standard. *See Guthrie*, 194 W.Va. at 671, 461 S.E.2d at 177 (*citing State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (W.Va. 1995)).

13. "The court's instructions to the jury must be a correct statement of law and supported by the evidence. . . A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy." *Guthrie*, 194 W.Va. at 671, 461 S.E.2d at 177.

14. "[A]n omission of an element of an offense or an error in a jury instruction is not a structural error requiring automatic reversal, but rather an error which is amendable to harmless error review." *Hawkins v. Painter*, 136 F.Supp.2d 569, 573 (S.D. W.Va. 2001) (*citing Neder v. United States*, 527 U.S. 1 (1999)).

15. The United States Supreme Court has directed that when a court undertakes a collateral review of a "harmless error" the court should apply a less stringent "harmless error" standard. *See Hawkins*, 136 F.Supp.2d at 574; *see also Brecht v. Abrahamson*, 507 U.S. 619 (1993).

16. "[T]he standard the [court] must apply in determining whether the error . . . was harmless is whether the error had a substantial and injurious effect or influence in determining the jury verdict." *Hawkins*, 136 F.Supp.2d at 574 (*citing Brecht*, 507 U.S. at 683).

17. In order to effectuate the *Brecht* standard, the Court must analyze the exact nature of the error as it relates to the jury's verdict. *See Hawkins*, 136 F.Supp.2d at 574.

18. The Court is of the opinion that its instructions on the element of premeditation were an incorrect statement of the law, and its admission to the jury constituted plain error. Despite the incorrect statement of the law, the erroneous instruction did not have a substantial and injurious effect on the jury's decision because the jury found Ms. Destefano guilty of second degree murder and not first degree murder. Of course, premeditation is not an element of second degree murder. There is no evidence to demonstrate that the jury's decision was influenced in any way by the premeditation instruction. Therefore, the erroneous premeditation instruction is harmless error, and it is unlikely that the defendant was prejudiced by this instruction to the point of reversible error.

II. Voir Dire

19. The West Virginia Supreme Court has held that "the trial court is free to determine whether *voir dire* shall be conducted by the court or by counsel." *State v.*

Lassiter, 177 W.Va. 499, 504, 354 S.E.2d 595, 600 (W.Va. 1987) (italics original) (*citing State v. Pratt*, 161 W.Va. 530, 244 S.E.2d 227 (W.Va. 1978)).

20. "However, there are limits to the trial court's discretion. A trial court may not limit *voir dire* to the extent that the very purpose of *voir dire* has been substantially undermined or frustrated. Thus, a trial court may abuse its discretion if it so limits the *voir dire* that the litigants are unable to determine whether the jurors are statutorily qualified or free from bias." *Michael v. Sabado*, 192 W.Va. 585, 593, 453 S.E.2d 419, 427 (W.Va. 1994) (italics original) (*citing State v. Toney*, 171 W.Va. 725, 301 S.E.2d 815 (W.Va. 1983)).

21. "[T]he official purposes [sic] of *voir dire* is to elicit information which will establish a basis for challenges for cause and to acquire information that will afford the parties an intelligent exercise of peremptory challenges." *State ex rel. Nationwide Mut. Ins. Co. v. Karl*, 222 W.Va. 326, 332, 664 S.E.2d 667,673 (W.Va. 2008) (italics original) (*quoting* Syl. Pt. 2, in part, *Michael v. Sabado,* 192 W.Va. 585, 453 S.E.2d 419 (W.Va. 1994)).

22. "[T]o overturn a trial court's decision regarding the method of questioning prospective jurors, a complaining party must demonstrate to us that he or she has been specifically prejudiced." *Sabado*, 192 W.Va. at 593, 453 S.E.2d at 427.

23. This Court is of the opinion that Mr. Wilson's questioning of prospective jurors during voir dire did not frustrate the purpose of voir dire nor did it prejudice the defendant in any specific manner. Mr. Wilson's questioning was permissible because it allowed him to acquire information that he believed to be necessary to make his peremptory strikes. Additionally, the trial court has a broad discretion in choosing its

method of voir dire. There is no evidence in the record that demonstrates that Ms. Destefano was specifically prejudiced by the Court allowing the prosecution to identify potential witnesses. The defendant had opportunity, through her counsel to question the prospective jurors directly, to pose any follow up questions to the panel and to strike potential jurors. Therefore, Ms. Destefano did not suffer any prejudice as a result of the Court's method of voir dire.

III. Ineffective Assistance of Counsel

24. "In all criminal prosecutions, the accused shall enjoy the right to . . . the Assistance of Counsel for his defence." U.S. Const. amend. VI.

25. "[T]he purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial." *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

26. In *Strickland v. Washington,* the United States Supreme Court further explained the standard for determining ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687.

27. "Judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689.

28. Because of the inherent difficulties in making this evaluation, the United States Supreme Court has emphasized that circuit courts should give counsel "a strong presumption that [their] conduct falls within the wide range of reasonable professional assistance." *Id.* In other words, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* (citation omitted).

29. "A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.* at 690.

A. Questioning by Defense Counsel During Voir Dire

30. Mr. Shay's questioning of potential jurors during voir dire does not fall outside of the range of professionally competent assistance nor did his actions prejudice Ms. Destefano in a way that deprived her of a fair trial. There is no evidence in the record to suggest that Mr. Shay's method of questioning fell below professional norms. Mr. Shay questioned potential jurors about whether they possessed any biases for or against the defendant and the defendant's witnesses. Ms.

Destefano cannot demonstrate that Ms. Shay's method of questioning was not part of a "sound trial strategy," nor can she demonstrate that any prejudice occurred to her as a result of defense counsel's method of questioning.

B. Opening and Closing Statements

31. This Court is of the opinion that defense counsel's opening and closing statements does not fall outside the wide range of professionally competent assistance. Furthermore, defense counsel's opening and closing statements did not prejudice the defendant in a way that would deprive her of a fair trial. Ms. Destefano argues that defense counsel should have used alternative strategies to rebut the prosecution case against her. Specifically, she argues that defense counsel did not discuss and disprove each element of the potential offenses charged against her in their opening and closing statements but instead chose to focus only on the theory of self-defense. In light of all the circumstances, this Court believes that the defense counsel's actions were within the boundaries of professional competent assistance, and Ms. Destefano has not provided evidence sufficient to demonstrate the contrary. Ms. Destefano discussed her potential defenses with her attorneys, and she insisted upon defense counsel's trial strategy. Therefore, defense counsel's opening and closing statement did not result in any prejudice that deprived Ms. Destefano of a fair trial.

C. Prior Acts of Domestic Violence and Expert Testimony on Domestic Violence

32. Defense counsel's decision not to introduce alleged prior acts of domestic violence and expert testimony on domestic violence was the result of reasonable professional judgment, and it did not result in any prejudice that would deprive Ms. Destefano of a fair trial. Mr. Shough and Ms. Tate testified at the April 4, 2011 hearing that their investigation into prior acts of domestic violence against Ms. Destefano by Mr. Cosner did not yield any witnesses. Additionally, Mr. Shough had Ms. Destefano psychologically evaluated by Dr. Fremouw, who ultimately concluded that Ms. Destefano did not suffer from Battered Woman's Syndrome. Therefore, defense counsel's decision not to introduce this evidence at trial was not outside the range of professional competent assistance, and it did not prejudice Ms. Destefano in a way that deprived her of a fair trial.

D. Cross Examination of Eric Cain and Evidence of a Second Knife

33. After reviewing the record, this Court believes that the cross-examination of Eric Cain was neither deficient, nor did it prejudice the defendant. Additionally, Ms. Destefano has not produced evidence sufficient to overcome the presumption that the defense's decision not to introduce the second knife into evidence was not part of a "sound trial strategy." Mr. Shough testified that the defense lacked evidence to connect Jeremy Cosner to the second knife and that, because of this lack of evidence, he feared that the jury might think that Ms. Destefano was fabricating her side of the

story. Therefore, the defense counsel's decision not to enter the second knife into evidence was the result of reasonable professional judgment, and the decision did not manifest any prejudice that deprived Ms. Destefano of a fair trial.

E. Jury Instructions on the Duty to Retreat

34. "[A]n occupant who is, without provocation, attacked in his or her home, dwelling or place of temporary abode, by a co-occupant who also has a lawful right to be upon the premises, may invoke the law of self-defense and in such circumstances use deadly force, without retreating, whether the occupant reasonably believes, and does believe, that he or she is at imminent risk of death or serious bodily injury." *State v. Harden*, 233 W.Va. 796, 808, 679 S.E.2d 628 (W.Va. 2009), *overruling* Syl. Pt. 2, *State v. Crawford*, 66 W.Va. 114, 66 S.E. 110 (W.Va. 1909).

35. The defense counsel's alleged failure to instruct the jury that Ms. Destefano did not have a duty to retreat in her home does not render its assistance ineffective because the *Harden* case was not controlling law at the time of trial. The *Harden* case was decided in 2009 and Ms. Destefano's trial took place in 2006. During Ms. Destefano's trial, the controlling law on the duty to retreat was articulated in *State v. Crawford*, which imposed a duty to retreat on an occupant that was attacked by a co-occupant in the home. Defense counsel, with the consent of Ms. Destefano, made the decision not to argue the *Crawford* issue, and instead chose to focus on the theory of self-defense and to provide self-defense instructions in the Court's charge to the jury. The Court is of the opinion that, in light of all the

circumstances, defense counsel's decision to focus on self-defense instead of the issue of retreat was not outside the boundaries of professional competent assistance and their decision did not deprive Ms. Destefano of a fair trial.

Accordingly, for the reasons set forth in the foregoing opinion, the Court is of the opinion to, and does, hereby ORDER that the relief sought in the "Petition For a Writ of Habeas Corpus" filed by the petitioner, Amber Destefano, shall be, and the same is, hereby DENIED.

The Court directs the Circuit Clerk of Marion County to provide certified copies of this "Opinion/Final Order Denying Petition for Writ of Habeas Corpus, Ad Subjiciendum" to Patrick N. Wilson, Esquire, Prosecuting Attorney For Marion County, at his address: 213 Jackson Street, Fairmont, West Virginia 26554; and to Paul S. Detch, Esquire, at his address: 201 N. Court Street, Lewisburg, West Virginia 24901.

ENTER: 5/31/11

JUDGE DAVID R. JANES

A COPY TESTE

Barbara A. Core

CLERK OF THE CIRCUIT COURT
MARION COUNTY, WEST VIRGINIA