No. 33037 – *State of West Virginia v. Valerie Whittaker*

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OF WEST VIRGINIA

Albright, Justice, dissenting:

The majority demonstrates an inability to fully comprehend the underpinnings of the battered spouse syndrome by upholding, with minimal analysis, the trial court's evidentiary rulings.[1] Although a battered women's syndrome instruction was given to the jury, the jury was wrongly prevented from hearing evidence that might have tipped the scales in favor of Appellant's affirmative defense that she was acting in self defense when she shot Mr. Mills – the man who had inflicted both mental and physical abuse upon her for ten long years.

Instead of examining whether Appellant's history of being a battered spouse warranted closer inquiry into the admissibility of the evidence at issue, the majority simply concluded that the evidence was inadmissible on hearsay grounds. In similarly shortsighted fashion, the majority described the evidence sought to be introduced by Ms. Hudgins and Ms. Fowler as too remote in time to be relevant. Incredibly, the evidence that Appellant

[1]These rulings pertain to limiting the testimony of three defense witnesses: Ermajean Hudgins, Sandra Brinkley, and Debra Fowler. Each of these three women was prohibited from relating to the jury any statements that Appellant made to them pertaining to instances of abusive conduct inflicted upon her by Mr. Mills on hearsay grounds. After learning of the limited nature of the testimony Ms. Brinkley could offer at trial on her behalf, Appellant chose not to call Ms. Brinkley to the stand.

sought to introduce through Ms. Fowler were statements made on the very day that Mr. Mills was shot. While such statements were not contemporaneous to the shooting incident, they clearly were not too remote to be relevant to Appellant's state of mind.

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, such as that between Appellant and Mr. Mills, 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").

Sadly, the paradigm presented by a battered spouse is an individual who is prevented by emotional or financial obstacles, or both, from permanently escaping the environs of the abusing spouse. *See* Roberta Thyfault, *Self-Defense: Battered Woman Syndrome on Trial*, 20 Cal. W. L. Rev. 485, 488-89 (1984) (identifying economic obstacles

and psychological factors, such as fear, which prevent abused women from successfully leaving abusive relationship); Loraine Eber, *The Battered Wife's Dilemma: To Kill or To Be Killed,* 32 Hastings L.J. 895, 901-02 (1981) (recognizing emotional and economic dependency, low self-esteem, fear, and shame as explanations for why battered women remain in abusive relationships). Through the testimony of an expert witness, a jury is often educated about the prototypical patterns of abusive behavior that exist in battered spouse cases such as: "1) the escalation of the abuse in frequency and severity over time; 2) the existence of a three phase cycle of violence;[2] and 3) the jealousy of the batterer." Thyfault, *supra,* 20 Cal. W. L. R. at 486-87 (footnote added). Ideally, after hearing expert testimony on the subject, the jury will be in a better position to comprehend the battered individual's perceptions of imminent danger and, thus, to evaluate the reasonableness of her actions.

In addition to being educated about the patterns intrinsic to a battered spouse relationship, courts have recognized the need to apprise the jury of "all of the circumstances surrounding the incident." *State v. Wanrow,* 559 P.2d 548, 556 (Wash. 1977) (quoting State v. Lewis, 491 P.2d 1062, 1064 (1971)); *accord Bechtel v. State*, 840 P.2d 1, 12 (Okla. Crim. App. 1992) (stating that "the meaning of *imminent* must necessarily envelope [sic] the battered woman's perceptions based on all the facts and circumstances of his or her

[2]The three phase cycle includes the initial building of tension phase, which is followed by the acute battering phase, and culminates with the abuser demonstrating contrition by apologizing, showing remorse, acting lovingly, and often promising never to harm the abused woman again. *See* Thyfault, *supra,* 20 Cal. W. L. Rev. at 487-88.

relationship with the victim"). Only when the jury has been permitted to hear and consider all of the factual information surrounding the incident, which includes a full history of prior threats and past beatings, can it properly evaluate whether the defendant had reasonable grounds to believe that she was in immediate danger. *See* Eber, *supra,* 32 Hastings L.R. at 920-23; *see also State v. Steele,* 178 W.Va. 330, 336, 359 S.E.2d 558, 564 (1987) (stating that "[t]he reason evidence of prior acts of violence . . . is relevant is because it relates to the reasonableness of the defendant's belief that the deceased intended to inflict serious bodily injury or death and, as a consequence, the defendant was justified in the killing"). Without the introduction of pertinent evidence that fully explores the history of violence and threatened violence, the jury cannot attempt to discern the battered individual's perception of danger and imminent harm. As a result, the battered spouse is necessarily hampered in her ability to prove that she acted in self defense. Eber, *supra,* 32 Hastings L.R. at 920.

The majority essentially dismisses Appellant's contention that her theory of self-defense was hindered by the trial court's exclusion of testimony from three of her named defense witnesses. Because Appellant was permitted to testify about prior instances of abuse, the majority downplays the significance of statements that she made to others contemporaneous to those previous incidents. What the majority overlooks, however, is that by preventing the jury from hearing these statements, the jury was denied information that was relevant to Appellant's mental state – evidence which was offered to explain her actions

and tended to support her theory that she acted in self-defense. *See State v. Pettrey*, 209 W.Va. 449, 456, 549 S.E.2d 323, 330 (2001) (recognizing that out-of-court statements offered to prove state of mind are not excluded under the hearsay rule); *see also State v. Haines*, 860 N.E.2d 91, 101 (Ohio 2006) (recognizing that testimony on battered woman syndrome is offered as background for understanding behavior of abused individual)*; People v. Coffman*, 96 P.3d 30, 92 (Cal. 2004) (upholding admissibility of expert testimony offered to establish defendant's state of mind that did not directly relate to pending criminal offenses but concerned abused defendant's relationship with victim).

The Oklahoma Supreme Court wisely recognized in *Bechtel* that

> [a] defendant, in a self-defense case involving the [battered women's] syndrome, in order to establish her "fear" at the time of the commission of the offense and to establish the deceased as the aggressor, must be entitled to produce past violent encounters with the deceased and to introduce evidence of the turbulent and dangerous character or reputation of the deceased. This is an established method of proof in self-defense cases, because the law recognizes the fact that future conduct may be reasonably inferred from past conduct. *Justice would not be served to hold that a defendant is limited to relating the physical act of past conduct without its accompanying words.*

840 P.2d at 13-14 (citation omitted and emphasis supplied).

Having recognized the need to introduce statements voiced by the defendant in connection with prior instances of abuse in *Bechtel*, the court addressed whether such

statements fall within the prohibited area of hearsay and concluded that they did not. The court reasoned:

> Inherent in self-defense cases involving the Battered Woman Syndrome, are issues involving both the state of mind of the deceased and the defendant. An out-of-court statement, regardless of its truth, may imply intention, knowledge, physical or emotional feeling, or other state of mind . . . . If offered to prove such state of mind, the statement is not hearsay. An out-of-court statement, regardless of the truth, which elicits a state of mind *in another person* in consequence of the utterance is not hearsay. Such statements are circumstantial evidence and are recognized by the courts as such. We do not imply that said statements are to be admitted automatically. The trial judge may exercise his discretion to determine whether the inference sought to be drawn from the particular statement is reasonable and relevant. If not, the statement may be excluded for the lack of relevance, not on the ground of hearsay.

Id. at 14 (footnote omitted).

Rather than engaging in an earnest analysis of this evidentiary issue, the majority quickly dismissed the state of mind ground proffered by Appellant for admission of the banned evidence. According to the majority, "the only purpose which Ms. Hudgins' excluded statements could have served would have been to prove the truth of the matter asserted: that Ms. Whittaker had been abused and that Mr. Mills was the abuser." By preventing the jury from hearing what Appellant told Ms. Hudgins, Ms. Fowler, and Ms. Brinkley about prior instances of abuse, Appellant was denied the right to lay the proper foundation for establishing her state of mind on the day she shot Mr. Mills. Rather than

being offered to prove the truth of the matter asserted, as the majority concludes, those statements were clearly offered for state of mind purposes – to demonstrate the reasonableness of Appellant's state of fear at the time of the shooting. By denying testimonial evidence from Appellant's defense witnesses regarding Mr. Mills' prior threats and abusive acts, the jury was given an incomplete narrative. Consequently, the jury was forced to decide whether Appellant acted in self-defense without the benefit of all relevant circumstances bearing on her state of mind.

Many lay people have difficulty comprehending why an act of violence was committed by a battered woman at a time when she may have seemingly had the opportunity to extricate herself from the situation. This societal misapprehension stems from an inability to fully grasp that "from the perspective of the battered wife, the danger is constantly 'immediate.'" Eber, *supra*, 26 Hastings L.J. at 929. In an emotional state that is the result of a longstanding pattern of threats followed by violence, the abused individual is acutely aware that her abuser is fully capable of carrying out the violence that he is currently threatening to commit. Because of the cumulative pattern of abuse, the abused person processes the threat of violence as an eventuality, rather than a possibility. In Appellant's case, just prior to the shooting incident, Mr. Mills had threatened to kill both Appellant and her daughter – and this threat came immediately after he had rolled Appellant's daughter like

a bowling ball across the floor. Like many long-term victims of abuse, Appellant chose to commit an act of violence as a means of protecting herself and her loved one.

To a victim of abuse such as Appellant, the majority's offer of sympathy and its recitation of a "continuing commitment to ensuring the safety, security, and dignity of victims of domestic abuse" can only be perceived as an empty gesture. As to the unserved domestic violence petitions, Appellant's previously unsuccessful experiences with the legal system may have convinced her she had no choice but to defend herself. Despite the widespread recognition of domestic abuse and the legal system's efforts to protect the abused, the discomforting reality is that victims of abuse continue to find themselves in that proverbial setting of being between a rock and a hard spot. Until both the courts and society fully appreciate the realities of domestic abuse and all its consequences, it seems unlikely that in the context of criminal prosecutions our laws will adequately and fairly address the ramifications of such abuse.

Accordingly, I must respectfully dissent.