No. 34268 - *State of West Virginia v. Tanya D. Harden*

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

Benjamin, Chief Justice, dissenting:

I dissent because I believe the majority opinion's conclusion that the State failed to prove beyond a reasonable doubt that the defendant's actions were not in self-defense is erroneous. Here, the defendant resorted to a type of self-help that previously has not been permitted by our law, but that the majority has now vindicated. While there is no doubt that the defendant was brutalized by the decedent, as the jury heard, and that the decedent should have been criminally prosecuted for his actions, I question the wisdom of a self-defense standard in our jurisprudence which sanctions the use of deadly force to defend one's self from a person who is unconscious or incapacitated, and who poses no threat of imminent harm.

I also question how such a lessened self-defense standard, which may be seen by some as condoning or even tacitly encouraging the use of self-help violence or vigilantism in a domestic setting, can be seen as a positive advancement in our efforts to reduce domestic violence. Our focus should be on the reduction of violence, where appropriate, in the domestic setting. Retaining an "imminent harm" requirement for self-defense in the domestic setting achieves this goal while permitting victims the opportunity to meet domestic violence with more domestic violence only when needed to actually defend one's self. In the

emotionally charged environment which surrounds domestic violence, I further worry that the rational, objective definition which we may accord to this new standard of "self-defense" in the vacuum of an academic or legal setting will yield to an irrational, self-serving, and narcissistic justification to a troubled mind to, in the spur of the moment, "right" some perceived domestic wrong and thereby defend one's honor as much as one's self. In other words, in the real world, the line between a legitimate and a non-legitimate defense of one's self in a highly charged emotional environment may get blurred – a situation which I fear may work against victims of domestic violence as much as for them.

The evidence presented at trial does not support the defendant's claim of self-defense. The defendant's alleged belief that at the time she used deadly force, that force was necessary to prevent serious bodily injury or death to the defendant is not objectively reasonable under new Syllabus Point 3. In other words, another person, similarly situated, could not have formed the belief that it was necessary to shoot the decedent in the head to prevent serious bodily injury or death to himself or herself. The State presented evidence at trial through the testimony of Dr. Hamada Mahmoud, Chief Deputy Medical Examiner for the State and a forensic pathologist, that the decedent was shot above his right ear with a left and downward trajectory. Dr. Mahmoud also testified that the stippling found around the entrance wound as well as the 25 shotgun pellets and the shell's wadding found in the decedent's brain cavity indicate that the shotgun blast came from close range, specifically one to five feet away. Sergeant David Castle, a Huntington Police Officer, testified that both

high and low velocity blood spatter and blood pooling present on the carpet indicated that the decedent was lying flat on his back when he was shot from behind. He further testified from the blood stain evidence that the decedent's left hand was lying just above his head and resting on a pillow, and the decedent's right hand was clutching a blanket. Sergeant Castle concluded from this that the decedent could not have been holding a weapon at the time the defendant shot him.[1] From this evidence, a reasonable trier of fact could conclude that the defendant, while standing behind the decedent, fired a shotgun blast from close range into the right temple of the decedent as he lay flat on the sofa. A rational trier of fact could also infer that because the decedent made no effort to prevent the defendant from walking up to him and firing a shotgun blast into his right temple, the decedent must have been unconscious. Finally, a rational trier of fact could additionally infer that because the decedent was unconscious, he could not pose an imminent risk of serious bodily injury or death to the defendant. These reasonable conclusions drawn from the evidence negate the defendant's theory of self-defense.

While I do not disagree with new Syllabus Point 5, it has no application to the

[1]The jury had reason to doubt the veracity of the defendant's testimony at trial. In a recorded statement the defendant gave to Sergeant James M. McCallister of the Cabell County Sheriff's Department on the day of the shooting, which was played for the jury, the defendant did not indicate that the decedent had threatened their son with the shotgun or that the defendant was sexually assaulted by the decedent prior to the shooting. However, in her testimony at trial the defendant claimed that the decedent had put the shotgun to their son's head and threatened to shoot him, and that the decedent had forced the defendant to have sex with him.

facts of this case. Simply because a co-occupant of a residence has no legal obligation to retreat from the residence in the face of the imminent threat of serious bodily injury or death, it does not follow that the co-occupant has the right to shoot an incapacitated person in the head at close range. Because the facts of this case do not support a self-defense claim, Syllabus Point 5 is wholly irrelevant to the decision of this case.

Further, new Syllabus Point 4 was created by the majority from whole cloth and has absolutely no support in the precedent of this Court. Under this Court's precedent, evidence that the decedent had abused or threatened the life of the defendant is admissible to support a self-defense claim but is not admissible to negate a necessary element of the offense charged in the absence of self-defense or other specific defenses enumerated by this Court. In addition, the cases cited by the majority opinion in support of Syllabus Point 4 simply do not stand for the proposition for which they are cited. Specifically, *State v. Dozier*, 163 W. Va. 192, 255 S.E.2d 552 (1979), permitted evidence of physical beatings the defendant had received at the hands of the decedent *where the defendant's primary theory of defense was self-defense.* The same is true of *State v. Hardin,* 91 W. Va. 149, 112 S.E. 401 (1922) in which this Court stated that "where self defense is relied upon to excuse a homicide, and there is evidence tending to establish that defense, it is competent to show the character of the deceased party for violence[.]" 91 W. Va. at 153, 112 S.E. at 402-403. The case of *State v. Lambert,* 173 W. Va. 60, 312 S.E.2d 31 (1984) concerns the effect of the defenses of compulsion, coercion, and duress upon criminal intent and provides that "[t]he

compulsion or coercion that will excuse an otherwise criminal act must be present, imminent, and impending, and such as would induce a well-grounded apprehension of death or serious bodily harm if the criminal act is not done[.]" 173 W. Va. at 62, 312 S.E.2d at 33, *citing* Syllabus Point 1, *State v. Tanner,* 171 W. Va. 529, 301 S.E.2d 160 (W. Va. 1982). In the instant case, the defendant did not raise the defenses of coercion, compulsion, or duress. The majority also cites *State v. Wyatt,* 198 W. Va. 530, 482 S.E.2d 147 (1996). However, *Wyatt* concerned the Battered Spouse Syndrome which was not raised by the defendant at trial and was not supported by the evidence. Finally, *State v. Plumley,* 184 W. Va. 536, 401 S.E.2d 469 (1990), and *State v. Summers,* 118 W. Va. 118, 188 S.E. 873 (1936) were both in regard to self-defense or defense of another. In sum, none of the cases cited in the majority opinion stands for the proposition that in the absence of evidence supporting a claim of self-defense, evidence that the decedent had abused or threatened the life of the defendant is nonetheless relevant and may negate a necessary element of the offense charged.

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. The law properly recognizes as a defense to murder that the defendant acted to defend himself or herself from the threat of imminent serious bodily injury or death. Significantly, the threat of serious bodily injury or death must be imminent. An imminent threat of serious bodily injury or death separates a killing in self-defense from a retaliatory killing or a preemptive killing. In

other words, the requirement that the threat is imminent distinguishes a killing in self-defense from a killing to redress a previous wrong or to prevent a non-imminent threat. Thus, the law is based on the proper understanding that the recognition of defense of self absent the element of an imminent threat would be to countenance violence and lawlessness. By placing absolutely no limit on the use of evidence of 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 efforts of our legislature and courts, our society now works to educate, treat, aid, and prevent the scourge of violence among family members. Spouses who find themselves in abusive or threatening situations now have resources that previous generations of abused spouses did not. In the instant case, no reasonable person believes that the appellant should have quietly endured the abusive actions of the decedent. But once the decedent fell asleep or passed out on the sofa, the threat of imminent harm was over and the appellant had several options available short of resorting to homicide.

Finally, in ignoring the evidence presented by the State at trial, the majority of

this Court abandons our standard of review and usurps the fact-finding role of the jury. As quoted in the majority opinion, "the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." Syllabus Point 1, in part, *State v. Guthrie,* 194 W. Va. 657, 461 S.E.2d 163 (1995). First-degree murder is defined, in part, as any "willful, deliberate and premeditated killing." W. Va. Code § 61-2-1 (1991). The State presented evidence that the defendant took a shotgun, walked up behind her unconscious husband lying on the sofa, and fired the shotgun at close range into his right temple. From this evidence, the jury clearly could find that the defendant committed a willful, deliberate and premeditated killing. Further, as noted above, the State presented evidence from which a rational trier of fact could find beyond a reasonable doubt that the defendant's actions were not made in self-defense. This is because a person lying unconscious on a sofa with one hand raised above his head and the other hand clutching a blanket cannot pose an imminent threat of serious bodily injury or death. Therefore, if the majority had properly adhered to the standard of review, it would have been compelled to find that the State presented sufficient evidence to find the defendant guilty of first-degree murder.

In the instant case, the State presented evidence that the defendant shot the decedent from behind at close range in the right temple while the decedent was lying unconscious on the sofa. Because the decedent was unconscious, there was no imminent

threat to the defendant when she shot the decedent. The defendant's only real defense was that the decedent had abused and threatened her earlier that evening. Under our law, however, this is not a defense to murder. Therefore, the jury properly found the defendant guilty. Unfortunately, the majority improperly has replaced the sound verdict of the jury with its own idea of justice and created bad law in the process.

While there may be legal error herein on other grounds that merits the reversal of the defendant's conviction and the granting of a new trial, the majority's decision to vacate the defendant's conviction and bar retrial is contrary to the evidence at trial and without support under our law. Accordingly, I dissent.