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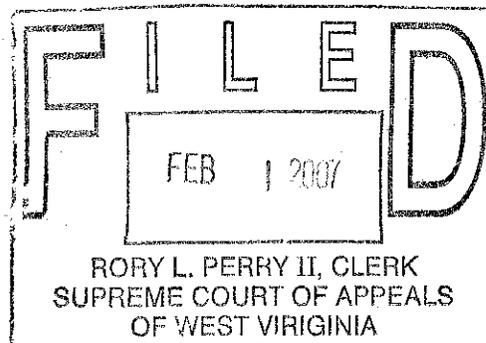
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January 31, 2007

Mr. Rory L. Perry II, Clerk
Supreme Court of Appeals of
West Virginia
State Capitol, Room E-317
1900 Kanawha Boulevard, East
Charleston, WV 25305



RE: State of West Virginia v. Valerie Whittaker
Indictment No. 33037

Dear Mr. Perry:

Please find enclosed an original and nine (9) copies of the "*Appellant's Reply Brief*" in regard to the above styled matter. Please file in your usual manner and acknowledge receipt thereof by copy of this letter also enclosed hereto.

If you should have any questions, please do not hesitate to contact me.

Thank you for your kind and courteous attention to this matter.

Sincerely,

A handwritten signature in dark ink, appearing to be "DCS", written over a horizontal line.

David C. Smith

DCS/kcs

Enclosure

cc: Ms. Dawn E. Warfield, Esquire (w/enc.)
Mr. Timothy Boggess, Prosecuting Attorney (w/enc.)
Ms. Valerie Whittaker (w/enc.)

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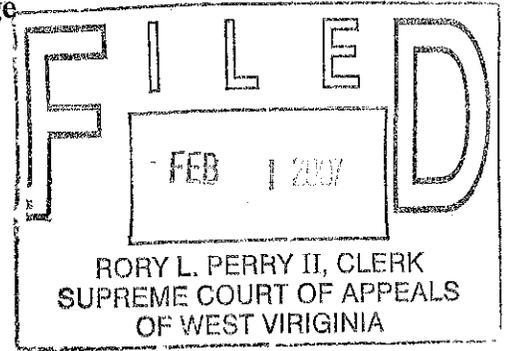


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

APPELLEE

vs.

INDICTMENT NO: 33037

VALERIE WHITTAKER,

APPELLANT

REPLY BRIEF

STATEMENT OF CASE

This is an appeal by Valerie Whittaker from her jury conviction of voluntary manslaughter in the Circuit Court of Mercer County, West Virginia.

STATEMENT OF FACTS

The facts of this matter are properly before this Court. Essentially, Appellant was run out of her house by the deceased on a cold Spring night. After being found by security guards at Princeton Hospital, huddled in the parking lot with her infant daughter, she was placed at the local Domestic Violence Shelter.

Domestic Violence petitions were then sought against the deceased, who was known for his violence, his love of blood sports, and his drug usage. He evaded service of the same. He did have actual knowledge of the petitions.

The deceased tracked down the Appellant as she was keeping a doctors appointment. He then pursued her across half of Mercer County, before she shot him, between the eyes, for a distance of seventeen (17) feet, in her kitchen which he had been Court ordered out of, in self defense.

Appellant does disagree with the State on one pertinent fact. Appellant's stay at Pam's Place

was her first trip there. She had not resided there for fifteen (15) months prior to the shooting. The fifteen (15) months discussed at page 604-605 of the transcript was the total time Appellant had spent at Pam's Place, on virtual house arrest pending trial of this matter.

LAW & ARGUMENT

I

The verdict of the jury is contrary to the law of the evidence.

Appellant argues that the evidence established self defense as a matter of law.

Appellant, Valerie Whittaker first argues that the evidence established self defense as a matter of law. Appellant acknowledges that she faces a heavy legal burden in so contesting. As the Court held in Syllabus, Point 3 of State v. Guthrie, 194 W.Va. 657, 461S.E. 2d 163 (W.Va. 1995).

The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, 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.

A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.¹

¹Syl. Pts. 1 and 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E. 2d 163 (W.Va. 1995)

In the case at Bar, Appellant, Valerie Whittaker argues that she meets this test because there is no credibility determination to be made and the objective facts demonstrates self defense as a matter of law.

Counsel for the State makes much ado over the fact that Appellant could have engaged presumably in a high speed chase and escaped the deceased. Appellant responds first that this argument is of the specious blame the victim genre that fails the reality test.

It is undisputed that there were domestic violence petitions chasing the deceased, of which he had actual knowledge. Given the State's track record with three unserved petitions, Appellant's lack of confidence in the ability of the state to protect her is understandable. From Appellant's perspective, had she run to the police for help, she had good reason to expect little more from law enforcement other than to be told to go home and take her beating.

Moreover, Jacklyn Whittaker testified as to their fear and the deceased's threats during their trek across Mercer County at page 10 of her testimony:

A Well, we went there, and they started fussing, and my dad made her stay there, cause he kept on threatening us, if we didn't stay there, so we had to stay there.

Q Okay. What do you mean, your dad was threatening you to – made you stay there?

A Like if we left, something bad was going to happen or something.

Q Okay.

A I can't really half remember.

Q How did that make you feel?

A Just scared.

Q Okay. Do you believe your mother was trying to protect you?

A When?

Q During that day.

A Yes.

This testimony is uncontroverted. Further, Appellant would respond that all this evidence demonstrates that the deceased had ample opportunity to be a law abiding citizen and obey court orders finding him to be dangerous and leave the Appellant alone.

Indeed, all the significant uncontroverted facts demonstrate self defense. It was undisputed that the deceased was a large, strong mountain man, who enjoyed killing, and was of violent repute from threatening neighbors with firearms while drunk, to killing the family pet for sport. It was undisputed that he had previously run Appellant and her daughter out of their home to the battered woman's shelter. It was undisputed that she had taken legal papers against him in the form of a Domestic Violence Petition of which he had actual knowledge. It would seem obvious that the deceased, now that he had the Appellant home was going to pound her.

Oddly enough, the undisputed testimony of Jacklyn demonstrated that the pounding was getting underway when he was shot. Jacklyn Whittaker testified at page 17:

Q So you were rolled – So he threw you –

A (Interposing.) Yes.

Q So –

A Then he smacked me in the mouth. He just went. (Demonstrating)

Q Did he say why he did that?

A No.

Q Did you do anything to him?

A No. Then he was just stomping back and forth back between the kitchen and my room, telling – he was going to get – Let’s see. “It only needs six shots for you first – I’m going to make your mom suffer ...” – and then Mom, then go next - door and to shoot Marty, Vicky, Paw-Paw, and Maw-Maw and blow the oxygen tank up.

Q Where were you at when you heard this?

A My room. I was curled up in –

Q (Interposing.) What were you doing?

A This. (Demonstrating curling up and hits head on table.) Ow, my head – That. I was staying in my room like this (demonstrating), but my legs were right here, so –

The deceased undisputed last words are likewise indicative of self defense and the decedent’s intentions. Jacklyn Whittaker testified at page 19:

Q (Interposing.) You heard a bang.

A Yeah, like a big bang. Cause he’s like, “I’m going for the gun, Val.”

Cause I heard that, because it was loud, and –

Q (Interposing.) But you heard him say that he was going for a gun?

A Yes.

This testimony is likewise uncontroverted. Although the State attempted to impeach Jacklyn Whittaker by prior inconsistent statement, it was the investigating officer who most materially changed his story. At page 621, Trooper Christian testified:

Q Okay, so you wish to change that one a little bit, amend – amend to your

statement, is that what you're telling me?

A I'm telling you that the statement was taken between – somewhere between 9:00 and 10:00 o'clock.

Q Okay.

A But to be exact it was, after just readin' it, I think it was 2107.

Q Okay and this question was asked; "and was that consistent with Ms. Whittaker's first taped statement?" And your response was, "The daughter couldn't remember anything whatsoever." Are you now changing your sworn testimony, Officer?

A I don't recall saying that she can't remember anything whatsoever, if you'll read the statement that she gave me she gave me some details, and then towards the end she says she can't remember anything.

Q As you say you don't remember exactly what you said then, so you don't know if you said I couldn't remember anything whatsoever, do I have to go get the tape on that one, Officer?

Again, Trooper Christian testified as to the point at page 622:

A I think if she didn't understand anything at all she wouldn't have answered any of the questions with – with any relevancy at all.

Q Well she didn't answer very many of 'em did she?

A Mm-m there wasn't a whole lot of questions asked.

Q Right, and most of the tie she said I don't remember, or I don't know, didn't she?

A Uh-h towards the end it was more I don't remember, I don't know.

Q How many times did she tell you I don't remember, I don't know?

A I - I'd have to get the statement out to see.

Q Can you give me an estimate, Officer?

A I have no - maybe three or four, depending on the question that was asked.

(Pause)

Q If I count six or seven times in that statement, just offhand, would you dispute that?

A If - if it's there in paper that's what it wa- what it is.

Perhaps Trooper Christian needs to learn to use his State issued tape recorder, so the truth would be presented. As matters stand, what happened to Jacklyn Whittaker that night in a police car in the shadow of her father's corpse, her feet wet with her father's blood , being surrounded by strange armed men, amounts to little more than State sponsored child abuse. As a mandatory reporting agency, the police should have called DHHR, and involved professionals who deal with abused children, and through their auspices gotten a fair and full statement from Jacklyn.

CONCLUSION

Appellant, Valerie Whitaker succinctly says that the domestic petition she filed involved a judicial finding of probable cause of dangerousness of the deceased by clear and convincing evidence (See West Virginia Code § 48-27-403). The existence of the domestic order in and of itself should give rise to a presumption of self defense. This would be in accord with the purpose of the statute. As the Legislature voted at West Virginia

Code § 48-27-101 (b) (1) and (2).

(b) This article shall be liberally construed and applied to promote the following purposes:

(1) To assure victims of domestic violence the maximum protection from abuse that the law can provide;

(2) To create a speedy remedy to discourage violence against family or household members with whom the perpetrator of domestic violence has continuing contact;

This, supported by the uncontested facts in testimony demonstrates beyond a reasonable doubt that Appellant was defending herself and her child from a big man of violent propensities in her kitchen when she shot him. Self defense as a matter of law has been established and this Court should so rule.

Appellant further says that this Court should not denigrate the domestic order to being just another piece of paper as the State Attorney argued. Appellant, like too many other in this State, literally staked life and well being upon this piece of paper. This Court should give it the respect it deserves. To ignore its effect, in this instance, is to render it meaningless. The Legislature in, West

Virginia Code § 48-27-101 (b) (5) said:

(b) This article shall be liberally construed and applied to promote the following purposes:

(5) To recognize that domestic violence constitutes serious criminal behavior with potentially tragic results and that it will no longer be excused or tolerated; and ...

Appellant respectfully submits that this should give effect to the promises contained in West Virginia Code § 48-27-101 to domestic abuse victims, and hold as a matter of law, that in this instant, tragic as it may be, that self defense as a matter of law has been established.

II

OTHER PENDING ISSUES

Appellant, Valerie Whittaker, submits that the other issues pending before the Court have been adequately briefed and no further response is needed.

Appellant would add on her Project Innocence Due Process Agreement as to the need to tape record statements that the State of California is in the process of requiring all confession/statements to be tape recorded. A bill pending before the California legislature would require police taping of statements. Where statements are not recorded, the proposed statute would mandate the giving of a stern cautionary instruction to the jury.

Further, Appellant, Valerie Whittaker, says naught.

WHEREFORE, Appellant, Valerie Whittaker, prays that this Honorable Court would reserve her conviction herein.

VALERIE WHITTAKER,

By Counsel:


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STATE OF WEST VIRGINIA,

APPELLEE

vs.

NO. 33037

VALERIE WHITTAKER

APPELLANT

CERTIFICATE OF SERVICE

I, David C. Smith, do hereby certify that I have served a true and correct copy of the foregoing Appellant's Reply Brief upon Dawn E. Warfield, Attorney General's Office- Capitol; Building 1, Rm. E-26; 1900 Kanawha Boulevard, East; Charleston, WV 25305, by United States mail, postage prepaid.

Dated this the 31st day of January, 2007.



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