IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, PLAINTIFF
BELOW, RESPONDENT

vs.) No. 13-0745
(12-F-90)

MARCUS PATRELE McKINLEY, DEFENDANT BELOW,
PETITIONER.

PETITIONER'S REPLY BRIEF

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ARGUMENT

1. The trial court erred in admitting other bad act evidence.

The State relies upon its need to prove the "mental elements of first degree murder" to justify the admission of the other act evidence as intrinsic to the prosecution's case. In doing so, *State v. Dennis*, 216 W.Va. 331, 607 S.E.2d 437 (2004), is cited for the proposition that domestic violence incidents committed by the defendant should come into evidence to show the abusive and controlling nature of the defendant. When examining the facts in the *Dennis* case, the admittance of the evidence makes sense with regard to that defendant. In *Dennis*, the domestic violence evidence painted a picture of a defendant who was clearly the domestic violence perpetrator with no evidence of similar commission of domestic violence by the victim. *Id.* at 336, 442. The victim had terminated the relationship with the defendant and the other act evidence involved the controlling behavior of the defendant and threats he made to her and her companions. *Id.* The victim claimed that the defendant had kidnapped and sexually assaulted her. *Id.* The defendant asserted that the victim went with him voluntarily. *Id.* at 339-340, 445-446. The evidence was necessary to rebut the defendant's claims and to "complete the story of the crimes on trial." *Id.* at 352, 458.

In the case at bar, the factual scenario was far different. It is undisputed that Ms. Patton spent the night with the defendant willingly. The evidence of domestic violence shows far less violence than in *Dennis* and, most importantly, included significant evidence of domestic violence by Ms. Patton. Thus, the probative value of the other act evidence is questionable while the prejudicial effect is overwhelming. Regardless of whether this Court finds the evidence to be intrinsic or not, the balancing under R. 403 precludes admittance.

Further, as noted by Syllabus Pt. 8 of the decision, "[o]ther criminal act evidence admissible as part of the res gestae or same transaction introduced for the purpose of explaining the crime charge must be confined to that which is reasonably necessary to accomplish such purpose." *Id.* (citation omitted). It is hard to imagine how the car seat incident (one of two incidents admitted into evidence over the defense's objection) was necessary to explain the crime charged given that both Ms. Patton and Mr. McKinley were arrested. (*See* B134-138).

Respondent next asserts that petitioner invited the error concerning the other act evidence by putting on evidence to fully explain the alleged domestic violence history of the parties. However, the only reason that the defense introduced additional witnesses to discuss other domestic violence incidents was to provide a full picture to the jury. (B270-273). Had the trial court excluded all evidence of the conflicting and confusing domestic violence incidents in the first place, the petitioner would never have had to respond.

This argument is consistent with the Court's holding that invited error will not preclude appellate review "when application of the rule would result in a manifest injustice." *State v. Crabtree*, 198 W.Va. 620, 628, 482 S.E.2d 605, 613 (1996). The invited error rule does not apply when there are exceptional circumstances requiring reversal "to preserve the integrity of the judicial process or to prevent a miscarriage of justice." *Id.* Here, the introduction of the evidence by the defense was, as demonstrated by the record, compelled by the court's ruling admitting the other conduct evidence to which the defendant objected. To rule that trial counsel's attempts to respond to that wrongfully admitted evidence prevents appellate review is manifestly unjust and would be a miscarriage of justice.

The State argues that the various testimonies concerning Ms. Patton's fear of being killed were admissible to show defendant's "state of mind." In doing so, the State cites *State v.*

Sutphin, 195 W.Va. 551, 466 S.E.2d 402 (1995). In that case, the victim had reported to her father that the defendant had stated, three months before killing her, that he would kill the victim if she left him. *Id.* at 555, 406. This Court ultimately held that the statement could come in as a "manifestation of defendant's state of mind." *Id.* at 562, 413. The Court was convinced by the record that despite the passing of three months since the statement before the killing took place, it was the first time since the threat that the victim "attempted to commit the underlying act which would trigger the threat---leaving the defendant." *Id.*

The case at bar is far different. All but two witnesses testifying about the fear of being killed by Mr. McKinley involved her (Ms. Patton's) fear, concern, or opinion that Mr. McKinley was going to kill her. (*E.g.* B23, B109-110, B569, B594). This evidence is wholly irrelevant to the case as Ms. Patton's state of mind or opinion simply is not at issue.

The only witnesses that actually referenced a statement allegedly made by the defendant to Ms. Patton involved an incident from years earlier (2009) or provided no date reference at all. (B572, B579, B586-588). Each of those incidents were situations where the defendant alleged told her he would kill her if she reported the incident. There was no evidence that such actions by Ms. Patton prompted the shooting. Unlike the facts in the *Sutphin* case, here there was no evidence that an act prompting fulfillment of a threat occurred and the purported threat was years, not just three months, before the shooting.

Finally, the State argues, that despite objections interposed at trial as to the subjects discussed herein, that petitioner waived his right to appeal as to any witness who offered testimony on identical subject matter without an objection. Trial counsel did object to the subject matters identified herein. Trial counsel objected to admittance of the other act evidence from the two incidents. (A2). Trial counsel objected to witnesses testifying about decedent's

state of mind in expressing a belief that defendant would kill her. (B15-23, B109-110). The other evidence complained of was admittedly offered in response to the wrongful introduction of the other conduct evidence by the trial court. (B566).

If those objections were not sufficient to preserve the error, admission of the evidence cited herein clearly violated defendant's right to a fair trial, and seriously affected the proceedings by allowing the prosecution to buttress ambiguous domestic violence evidence with inadmissible and irrelevant hearsay, and was therefore plain error. *E.g. State v. LaRock,* 196 W.Va. 294, 316-317, 470 S.E.2d 613, 636-637 (1996).

2. The trial court erred in admitting the testimony of witness Sandra Dorsey.

The State contends that the highly prejudicial, unsupportable, and one-sided, quasi-opinion evidence of Sandra Dorsey was admissible pursuant to R. 106 of the West Virginia Rules of Evidence. In doing so, respondent cites the *State v. Guthrie* discussion of the curative admissibility rule. (Resp. Brief at 29). In *Guthrie*, this Court confirmed that any admission under the "curative admissibility rule" was subject to R. 403 balancing analysis. *State v. Guthrie*, 194 W. Va. 657, 682, 461 S.E.2d 163, 188 (1995). There, the Court found that the R. 403 analysis precluded admissibility. *Id.* at 682-683, 188-189.

That is the exact same ruling that the trial court should have made in this case. At trial defense counsel apparently asked one question about the letter written by Mrs. Dorsey to Scott Ash (that ended up being read in its entirety into the record.) That question was: "And you, by a letter to Mr. Ash, the prosecuting attorney in Mercer County, you basically complained that the fact that you didn't feel it was right that both of them got arrested in the incident over the car seat." (B36). The trial court allowed in the entirety of the letter and the other testimony not contained in the letter identified in petitioner's brief. (Pet. Brief at 30-32). Thus, for a single

sentence, without any consideration of the balancing required by R. 403, extensive, unsupportable opinion evidence was offered. The trial court had plenty of alternatives, including simply striking the defense counsel's question and the answer. Instead, all of the prejudicial and non-probative opinion evidence came in.

3. The trial court erred in excluding the testimony of defendant's psychiatric expert.

In support of the exclusion of Dr. Miller's testimony, the State offers its own analysis of the "extreme emotional disturbance" condition identified by Dr. Miller and asserts that a diminished capacity defense requires a finding of a mental disease or defect. However, this Court has allowed conditions short of a mental disease or defect to serve as the basis for a diminished capacity defense in murder cases. In *State v. Keeton*, 166 W.Va. 77, 272 S.E.2d 817 (1980), this Court expressly confirmed that voluntary drunkenness is generally never an excuse for a crime, but where a defendant is charged with murder, and it appears that the defendant was too drunk to be capable of deliberating and premeditating, in that instance intoxication may reduce murder in the first degree to murder in the second degree, as long as the specific intent did not antedate the intoxication. For intoxication to reduce an unlawful homicide from murder in the first degree, it must be such as to render the accused incapable of forming an intent to kill, or of acting with malice, premeditation or deliberation. *Id. at Syl. pt. 3, citing Syl. Pt. 4, State v. Burdette*, 135 W.Va. 312, 63 S.E.2d 69 (1950) (emphasis added).

Dr. Miller expressly stated that the defendant was suffering from a mental condition that resulted in diminished capacity at the time of the offense. (A194-195, A211-213). In the defendant's mental state, caused by the extreme emotional disturbance, premeditation and deliberation would not be possible. (A203). Thus, Dr. Miller's testimony concerning the

extreme emotional disturbance condition suffered by the defendant, recognized in other jurisdictions, should have been allowed in this case, much like intoxication, to show that a condition prevented deliberation and premeditation.

4. The trial court erred in rejecting defendant's plea agreement.

The State's response references the broad discretion given to the trial court in accepting or rejecting a plea agreement. Unquestionably, there is substantial discretion. However, as with all uses of discretion, trial courts need to identify the rationale behind their decision. In this case, there is virtually no explanation. The response also fails to address the fact that the complete reason for the rejection will never be known because the record was not properly preserved.

5. The trial court erred in permitting opinion evidence from a factual witness without sufficient foundation to support said opinions.

The State apparently concedes that opinion evidence from Trooper Ellison was improperly admitted, but that it was harmless. (See Resp. Brief at 36).

"[W]hen dealing with wrongful admission of evidence, [this Court has] stated that the appropriate test for harmlessness...is whether we can say with fair assurance, after stripping the erroneous evidence from the whole, that the remaining evidence was independently sufficient to support the verdict and the jury was not substantially swayed by the error." *State v. Guthrie*, 194 W.Va. 657, 684, 461 S.E.2d 163, 190 (1995) (citation omitted). "[T]his Court is obligated to see that the guarantee of a fair trial under our Constitution is honored. Thus, only where there is a high probability that an error did not contribute to the criminal conviction will we affirm." There must be a "sure conviction that the error did not prejudice the defendant." *Id.* at 685, 191.

In this case, it is impossible to be sure that the error did not prejudice the defendant. An example of how evidence can be misconstrued is present in respondent's brief. In describing the alleged "overwhelming evidence of the petitioner's guilt," respondent rhetorically recalls that the evidence showed that Mr. McKinley "got his gun from his pocket, cocked the gun, aimed at Ayanna, and fired at her." (Resp. Brief at 39). Thereafter, respondent asserted that petitioner cocked, aimed and fired the pistol for each of the next four shots. (*Id.*). While the evidence does support that Mr. McKinley cocked the weapon for the first shot, it is simply not necessary to cock a semi-automatic pistol for each subsequent shot. Rather, the pistol automatically grabs another shell and is ready to fire simply from the firing of the first shot with no other action by the defendant necessary other than pulling the trigger. (B444-445). If the State can get the evidence wrong, with all the education, experience, and expertise of its counsel, a jury can similarly make improper inferences from evidence wrongfully admitted and those errors arising from wrongfully admitted evidence can affect the outcome. Respondent's error overstates petitioner's deliberation and premeditation by requiring an additional conscious act with each shot after the first one. The wrongfully admitted blood opinion evidence allowed a jury to consider positioning of the shooter and victim that could have affected the jury's belief as to premeditation, deliberation or in numerous, other ways.

6. The trial court erred concerning potential evidence not properly disclosed to the defendant.

Likewise, the State asserts that Mr. McKinley was not prejudiced by the late disclosure of the facebook postings. (Resp. Brief at 36). According to the State, if error at all, it was harmless because petitioner did not demonstrate any prejudice and did not preserve the error by submitting the facebook postings to this Court. The record reflects significant prejudice from the late

disclosure of the postings because the defense changed trial strategy by not using other facebook evidence and in creating a rift between defendant and counsel that continued throughout the trial. That rift is evident in the record. (B248-251, 254-255). Mr. McKinley's dissatisfaction continued throughout the trial and is evident in his statement to the court before sentencing. (B704-705). Given the constitutional guarantees of effective assistance of counsel, such interferences with the attorney client relationship should not be dismissed as harmless when there is such strong evidence of intense damage to the working relationship between attorney and client during the course of the trial.

7. Defendant should be granted relief based on the cumulative effect of the errors cited herein.

The State's response concludes that none of the alleged errors cited in the appeal individually or together warrant relief. As stated in the petitioner's brief, this Court has held that "[w]here the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error." *Syl. pt. 5, State v. Smith*, 156 W.Va. 385, 193 S.E.2d 550 (1972). Here, the errors combine to prevent a fair trial. Multiple categories of inadmissible evidence were let in such as: (1) other act evidence, (2) the victim's state of mind, (3) opinion evidence from the victim's advocate, Sandra Dorsey, and (4) opinion evidence concerning blood splatter. Yet, Mr. McKinley's evidence to call into question his deliberation and premeditation through Dr. Miller was excluded. The combination of the rulings generated an unfair trial where copious amounts of unfair evidence were admitted while defense counsel was prevented from counteracting it with mitigating evidence.

CONCLUSION

For all these reasons, petitioner respectfully requests that this Court grant his appeal and provide that relief which is deemed just and appropriate, including, but not limited to, vacating the conviction in this matter and instructing the trial court to accept the plea agreement offered in this case, or alternatively, granting the petitioner a new trial.

RESPECTFULLY SUBMITTED,
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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have on this the 25th day of February, 2014 served a true copy of the foregoing "Petitioner's Reply Brief" upon the following Counsel:

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by placing a true copy thereof in the United States Mail, postage prepaid.

Paul R. Cassell