IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2011 Term

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No. 101179

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent

v.

RHONDA KAY STEWART,
Defendant Below, Petitioner

Appeal from the Circuit Court of Kanawha County
Honorable Tod J. Kaufman, Judge
Criminal Case No. 09-F-393

REVERSED AND REMANDED

Submitted: October 18, 2011
Filed: November 28, 2011

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JUSTICE KETCHUM delivered the Opinion of the Court.

CHIEF JUSTICE WORKMAN concurs and reserves the right to file a concurring opinion.

JUSTICE MCHUGH concurs and reserves the right to file a concurring opinion.

JUSTICE DAVIS dissents and reserves the right to file a dissenting opinion.

JUSTICE BENJAMIN dissents and reserves the right to file a dissenting opinion.

Syllabus by the Court

1. "Where it is determined that the defendant's actions were not reasonably made in self-defense, evidence that the decedent had abused or threatened the life of the defendant is nonetheless relevant and may negate or tend to negate a necessary element of the offense(s) charged, such as malice or intent." Syllabus Point 4, *State v. Harden*, 223 W.Va. 796, 679 S.E.2d 628 (2009).

2. "Expert testimony can be utilized to explain the psychological basis for the battered woman's syndrome and to offer an opinion that the defendant meets the requisite profile of the syndrome." Syllabus Point 5, *State v. Steele*, 178 W.Va. 330, 359 S.E.2d 558 (1987).

3. In cases involving Battered Woman's Syndrome, evidence that a victim had abused the defendant may be considered by the jury when determining the factual existence of one or more of the essential elements of the crime charged, such as premeditation, malice or intent. It is generally the function of the jury to weigh the evidence of abuse and to determine whether such evidence is too remote or lacking in credibility to have affected the defendant's reasoning, beliefs, perceptions, or behavior at the time of the alleged offense.

Ketchum, J.:

Rhonda Kay Stewart ("defendant") appeals her conviction in the Circuit Court of Kanawha County for the first degree murder of her husband. The trial court observed at sentencing that the defendant was "*abused throughout her life . . . by the man she killed*." However, at trial, the circuit court prohibited the defendant from presenting evidence that she had been battered and abused by her husband during their thirty-eight-year marriage. The trial judge did not allow eyewitnesses to testify about this abuse, and did not allow an expert witness to testify as to how this abuse may have affected the defendant's state of mind and reasoning as it related to premeditation, malice or intent.

If the jury had been allowed to hear the abuse evidence, it could have reasonably found that the abuse affected the defendant's reasoning, and that she did not act with premeditation or malice, two required elements of first degree murder. The defendant does not rely on this evidence to excuse her from responsibility; instead, the evidence was to mitigate the offense. To receive a fair trial, the defendant, whom the trial judge observed was "abused throughout her life . . . by the man she killed," was entitled to present evidence that her crime was not first degree murder, but second degree murder or manslaughter. This has been our law for decades.

Based on well-established West Virginia precedent, the defendant was entitled to present evidence of Battered Woman's Syndrome and evidence of abuse through

eyewitnesses and expert witnesses. *See, e.g.*, Syllabus Point 4, *State v. Harden*, 223 W.Va. 796, 679 S.E.2d 628 (2009) (in cases not involving self-defense, evidence of abuse is "relevant and may negate or tend to negate a necessary element of the offense(s) charged, such as malice or intent."); Syllabus Point 5, *State v. Steele*, 178 W.Va. 330, 359 S.E.2d 558 (1987) ("[e]xpert testimony can be utilized to explain the psychological basis for the battered woman's syndrome and to offer an opinion that the defendant meets the requisite profile of the syndrome.").

The defendant did not get a fair trial. We reverse the defendant's conviction and remand this matter for a new trial.

I.

Background

The defendant, with one of her daughters, went to the Medical Intensive Care Unit ("MICU") at Charleston Area Medical Center to visit her husband, who had only hours earlier been taken off of a ventilator. At the time, the defendant was fifty-four years old and had been married for thirty-eight years (the defendant met her husband when she was fourteen years old and married him when she was sixteen years old). However, while still married, the defendant and decedent were estranged, with the defendant staying in the marital home located on an island in a river, and the decedent staying in a camping trailer on the river bank.

Shortly after arriving in her husband's hospital room, the husband ordered the defendant and their daughter to leave. When a nurse asked the husband if he knew who was there, he responded by saying that he did and it was "Rhonda Kay Boyd," the defendant's maiden name. After being ordered to leave, the defendant and her daughter separated, and the defendant returned to her home.

After arriving home, the defendant claims that she decided to return to the hospital and commit suicide in the presence of her husband even though she "knew . . . that without [her] there, the girls, the girls would have to be hurt," but that she "wouldn't feel the pain." When later asked why she did not just take her life then if that was her intent, the defendant explained that she "wanted [her husband] to know, [she] wanted him to know that [she] wouldn't bother him anymore." Asked why it was important for her husband to know, the defendant explained that "[b]ecause – because it was – it had lasted so long." After deciding to take her own life, the defendant wrote a note to her daughters, retrieved a pistol, and returned to the hospital. When asked what she was thinking, the defendant testified that "I wanted to stop the pain. I wanted to stop the pain. I wanted to stop the pain."

Arriving in her husband's hospital room, the defendant found him sleeping. It was when she went to wake him that her pistol discharged:

> I stepped into the bed. And I reached across him. And I nudged him. And he opened his eyes, and I was going to do this. I was going to do this, and he pulled my elbow down and pulled it down. And my – it was so fast. It was so fast. It was so fast. It was so fast. It was – there was blood. There was blood. There was blood.

> And I was – I needed to get help. I needed to get – I turned, I walked. I was walking. I knew [an ICU nurse] was there. I knew . . . she could help. I knew she could.

After the shooting, the defendant said that she remembered walking and that she "needed to get help. I was walking and I couldn't walk anymore. I couldn't move my legs. I needed to get help. My legs wouldn't go anymore."

Eyewitness testimony to the event included that of the health unit coordinator for the MICU unit. This witness testified that when the decedent's "monitor was ringing off," she looked up and saw the defendant "standing there with a gun to [his] head." Other hospital staff testified to seeing the defendant enter the MICU unit and that nothing appeared out of the ordinary until they heard the gunshot.

Following the shooting, the defendant walked from her husband's hospital room, handed the pistol to a doctor, went to a corner, lay on the floor and curled into a fetal position, crying. Police then arrived and the defendant was taken to the police station for questioning. A video of that questioning shows the defendant to have been extremely distraught, at times sobbing uncontrollably. When a detective asked why she went and got the pistol, the defendant stated: "Oh God . . . can't take any more pain." The defendant related that the decedent had been abusive and cruel towards her and their two daughters.

The defendant was arrested and subsequently indicted for first degree murder. In preparation for trial, the defense retained Dr. David Clayman, a clinical and forensic psychologist versed in Battered Woman's Syndrome, to evaluate the defendant and offer an

opinion as to how the defendant's history of abuse may have affected her mental condition at the time of the shooting. Dr. Clayman's report stated,[1] in part, that:

> If the information gathered is credible, she has a long history as a victim of verbal, emotional, physical, and sexual spousal abuse. These factors will justify consideration of the degree to which her status as a battered woman might be contributory to her mental state that led up to the shooting.[2]

Dr. Clayman's report was also described during the pretrial hearing as having concluded that the defendant "fits the mold of a battered spouse," "meets the definition of a 'battered spouse,'" "was suicidal just prior to [killing] her husband." The report also was described as concluding that the decedent's behavior "fits some of the characteristics of an individual who is comitting [sic] ongoing abuse."

The prosecution's theory of the case was that the defendant's actions reflected the intentional, malicious, and premeditated killing of a helpless man. Prior to trial the prosecution filed four motions *in limine*. These motions sought to exclude any testimony that the defendant had been abused by the decedent, and that she met the requisite profile of Battered Woman's Syndrome.

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[1]Dr. Clayman's report was not made part of the record; however, the report was read by the trial judge at the hearing on the prosecution's motion to exclude his testimony and the record contains several instances where the report was discussed, quoted and paraphrased by the parties and trial judge.

[2]Proffer of defense counsel, quoting Dr. Clayman's report.

On the morning that the defendant's trial was to begin, the trial court held a hearing on the prosecution's motions. During the hearing, the trial court asked the prosecution to explain "the law on that in terms of the [battered woman's] syndrome and the causal connection between the actions of – the alleged actions of the defendant and the decedent, and the use of it as a defense?" In reply, the prosecution reiterated its arguments that while "battered spouse syndrome . . . goes to negate criminal intent," it has "historically been used in . . . the context of self-defense." In the defendant's case, self-defense could not be claimed because the decedent posed no "immediate threat" to the defendant "at anytime during that day or several days prior" to the shooting. The key issue the trial court needed to determine was "[w]hether this defendant felt like she was in imminent danger of being hurt, harmed or killed" by the decedent at the time she shot him. The prosecution contended that as opposed to acting in self-defense, the defendant was "angry because the [decedent] referred to her by her maiden name, what [the defendant] felt to be a symbol of disrespect."

The defense disagreed with the prosecution's interpretation of the law and, citing Syllabus Point 4 of *State v. Harden,* 223 W.Va. 796, 679 S.E.2d 628 (2009),[3] argued that "imminency" of danger was not the proper standard for determining the admissibility of

[3]Syllabus Point 4 of *State v. Harden*, states as follows:

> Where it is determined that the defendant's actions were not reasonably made in self-defense, evidence that the decedent had abused or threatened the life of the defendant is nonetheless relevant and may negate or tend to negate a necessary element of the offense(s) charged, such as malice or intent.

a defendant's history of abuse in cases where self-defense was not being asserted. Instead, the defendant was entitled to introduce her history of abuse "occurring over the many years leading up to th[e] date" of the alleged crime without regard to issues of imminency. The defense argued that evidence of the Battered Woman's Syndrome can "be introduced to address [a defendant's] *mens rea* at the time of [an] alleged act" in any case.

Defense counsel explained to the trial court that the evidence would not prove the defendant innocent of any crime, but rather would be an alternative defense to show that her crime was not first degree murder:

> TRIAL COURT: . . . what you are saying is that she has – that the jury ought to be entitled to find some *less degree of culpability* based on the fact that your position is that she was previously abused. Correct?
>
> DEFENSE COUNSEL: Yes, Your Honor.
>
> TRIAL COURT: And as a result of her being previously abused, she carried that poison in her body.
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> DEFENSE COUNSEL: Yes.
>
> TRIAL COURT: Through the course of this conduct.
>
> DEFENSE COUNSEL: That is the question.
>
> TRIAL COURT: Or was it in her mind. The psychologist intends to opine it was in her mind. That this poison of abuse was in her mind.
> . . .
> TRIAL COURT: And . . . that the jury should be able to consider that through the testimony of the psychologist to determine that she was *less culpable* for killing her husband in this way?

> DEFENSE COUNSEL: Yes, sir. Or less – *had less ability to formulate say previous position or premeditated*.

(Emphasis added.).

The trial court ruled that the defendant could not introduce, through her expert or eyewitnesses, or through cross-examination of the prosecution's witnesses, evidence of her prior abuse or any evidence regarding Battered Woman's Syndrome. However, the trial court did hold that the defendant could testify to her history of abuse, but reiterated that the defendant's eyewitnesses and expert would not be allowed to testify about abuse or Battered Woman's Syndrome. Seeking clarification, the prosecution asked: "I take that to mean the Court has ruled that domestic battery, the battered spouse syndrome is not admissible[?]" The trial court replied, "I have already done that. That's twice." The defense then sought its own clarification whether the ruling meant that the defendant's expert could not testify.[4] In response, the trial court reiterated:

> . . . the Court has ruled as this case goes, that that opinion testimony, you know, can't come in. It does not go to weight. It does not go to question of fact. It goes to admissibility at this time. And everything that Dr. Clayman could say is admissible or not admissible, and the Court is saying no. That's a matter of law at this time. Under the facts of this case.

Later, the trial court further explained that:

[4]The trial court refused to hear Dr. Clayman's proposed testimony *in camera*.

> I'm just saying that there is no case law that existed in West Virginia that extends that defense to this remoteness in time. There is no evidence in this case, objective evidence in the case, that anything happened in the hours or time period immediately proceeding this.

Defense counsel objected to the trial court's exclusion of abuse evidence, as well as its conclusion that no abuse had occurred close in time to the decedent's death. On this latter objection, the defense argued that the trial court was relying on the prosecution's assertions as opposed to hearing the actual evidence.

At the conclusion of the defendant's trial she was found guilty of first degree murder. At sentencing, the trial court observed that the defendant had been "*abused throughout her life . . . by the man she killed.*" The defendant was sentenced to life imprisonment with the possibility of parole. It is from this conviction and sentence that she now appeals.

II.
Standard of Review

The dispositive issues in this appeal relate to the trial court's exclusion of the defendant's Battered Woman's Syndrome evidence and the decedent's history of physically and mentally abusing the defendant. In Syllabus Point 10 of *State v. Huffman*, 141 W.Va. 55, 87 S.E.2d 541 (1955),[5] we held that "[t]he action of a trial court in admitting or excluding

[5]*Overruled on other grounds by State ex rel. R.L. v. Bedell*, 192 W.Va. 435, 452 S.E.2d 893 (continued...)

evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion." In *State v. Blake*, 197 W.Va. 700, 478 S.E.2d 550 (1996), Justice Cleckley, writing for the Court, held that:

> Although erroneous evidentiary rulings alone do not lead to automatic reversal, a reviewing court is obligated to reverse where the improper exclusion of evidence places the underlying fairness of the entire trial in doubt or where the exclusion affected the substantial rights of a criminal defendant.

Syllabus Point 4, in part, *State v. Blake, id*.

We apply these standards to the record before us.

III.
Discussion

The defendant assigns as error the trial court's pretrial ruling barring her from introducing evidence, through eyewitnesses and expert witnesses, that she met the requisite profile of Battered Woman's Syndrome, and that her husband had physically and mentally abused her during the course of their thirty-eight-year marriage.

In its brief to this Court, the prosecution argues that the trial court did not commit reversible error in its pretrial rulings regarding the defendant's abuse evidence, and that any error that might have occurred on that issue was not properly preserved for appeal.

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[5](...continued)
(1994).

In explaining this argument, the prosecution maintains that all of the trial court's pretrial rulings regarding the defendant's abuse evidence were preliminary and that the trial court expressly reserved the right to revisit those rulings as the evidence came in during the defendant's trial; however, the defendant never asked the trial court to revisit its rulings. The prosecution also noted that even though the trial court's pretrial ruling expressly allowed her to testify about her history of being abused, the defendant did not testify that her husband abused her.

The prosecution further argues that abuse evidence was not relevant at the defendant's trial because the defendant's primary defense was that her husband's death was an accident – not that she had killed her husband as a consequence of any domestic abuse.

The issues, based on these facts, are twofold: first, the finality of the trial court's pretrial rulings excluding the defendant's abuse evidence; and, second, the relevancy and admissibility of the defendant's abuse evidence as negating, or tending to negate, malice and premeditation.

III-A.
Finality of the Trial Court's Ruling Excluding Abuse Evidence

In its brief to this Court, the prosecution argues that the trial court clearly specified at the pretrial hearing that its exclusion of the defendant's history of abuse and Battered Woman's Syndrome was preliminary, and that the trial court made those rulings with the express caveat that it would revisit them as the evidence came in. The record does

show that the initial statements of the trial court support the prosecution's argument; however, at the end of the hearing the trial court held that:

> . . . only two ways that the abuse would get in is if there was a diagnosable abused spouse syndrome.[6] There isn't one. Prior by an expert. There isn't one, either one of the experts. Or secondly, that it is self-defense. There isn't any evidence of self-defense. No evidence of self-defense in this case.

There is no question that this ruling was final. A review of the trial transcript makes it abundantly clear that the parties, and the trial court, also considered the pretrial ruling excluding abuse evidence as final. This is made apparent from several instances in the record where the prosecution, when objecting to defense witnesses or seeking to limit the content of a witness's testimony, relied on the trial court's pretrial ruling as final. One example of this comes from an *in camera* hearing held during the trial when the defense called its expert witness to the stand. During this hearing, the trial court offered its observation that Dr. Clayman's testimony was not relevant because the "[o]nly defense in this case is self-defense battered spouse." In response, defense counsel said that it was not putting on a battered spouse argument "[a]fter the Court excluded battered spouse

[6] By "diagnosable," the trial court was referring to its earlier finding that Dr. Clayman must be prepared to testify that the defendant suffered from Battered Woman's Syndrome to a reasonable degree of medical certainty. Because Dr. Clayman's report only opined that the defendant met the requisite profile of the syndrome, the trial court ruled that Dr. Clayman failed to meet the trial court's belief as to the appropriate standard for admitting opinion testimony on Battered Woman's Syndrome.

syndrome." When the prosecution was asked its position on Dr. Clayman's testimony, the prosecution stated:

> That's fine. If he stays within the rules, that's fine. He's not to discuss any kind of diagnosis or any discussion about any domestic violence in the past.
>
> . . .
>
> No discussion about domestic battery. No domestic.

At the end of the *in camera* hearing, the trial court reaffirmed its prior ruling, holding that Dr. Clayman could testify that the defendant was suicidal "as long as he doesn't get into battered spouse."

A similar *in camera* hearing was held when the defense called the defendant's sister to the stand. The prosecution objected to the witness being called, and asked the trial court to require the defense to explain the basis of her testimony. The prosecution asserted that "[t]he State wants to make sure [the defendant] does not contravene the Court's order with regard to the exclusion of domestic battery evidence." The trial court followed up this statement by saying to defense counsel that "[t]hey want to make sure there is no violation of the previous order."

Our review leads us to conclude that while the trial court may have vacillated in terms of the finality of its rulings earlier in the pretrial hearing, the ruling made towards the end of the pretrial hearing was unequivocal – the defendant could not introduce evidence of domestic abuse through eyewitnesses or have her expert testify about Battered Woman's Syndrome.

III-B.
Relevancy and Admissibility of the Defendant's Abuse Evidence as Negating, or Tending to Negate, Malice and Premeditation

At trial, the defendant claimed the shooting death of her husband was an accident. The defendant also sought to present an alternative defense based on Battered Woman's Syndrome by showing that her thirty-eight-year history of being abused by the decedent affected her reasoning, beliefs, perceptions, or behavior, and that she did not act with malice or premeditation. In this alternative defense, the defendant was not seeking an acquittal; instead, she sought to mitigate her crime to one of the lesser included offenses of second degree murder or manslaughter.

It is clear from the record that the prosecution and trial court failed to fully understand the relevancy and admissibility of evidence that a defendant meets the requisite profile of Battered Woman's Syndrome, or evidence that a defendant had been the victim of repeated domestic abuse. Accordingly, we give a brief overview of this issue.

III-B-1.
Battered Woman's Syndrome

As a general proposition, Battered Woman's Syndrome provides a clinical explanation of the psychological mindset, and behavior, of a woman who has been physically or mentally abused over a period of time by a domestic partner.[7] *See generally*, Walker,

[7]While the syndrome is termed "Battered Woman's Syndrome," some courts have recognized (continued...)

Lenore, "*The Battered Woman*" (Harper & Row, 1979); Walker, Lenore, "*The Battered Woman Syndrome*" (2d ed., 2000); Lenore E. Walker, *Psychology and Law Symposium: Women and the Law*, 20 Pepp. L. Rev. 1170 (1993).[8]

A review of our cases on Battered Woman's Syndrome makes clear that the syndrome has been part of our jurisprudence for more than three decades, and that West Virginia was one of the first states in the nation to recognize that the syndrome could aid a jury in understanding a defendant's mental state at the time of an alleged crime. In *State v. Dozier*, 163 W.Va. 192, 255 S.E.2d 552 (1979), we commented that the defendant was entitled:

> to elicit testimony about the prior physical beatings she received 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. Hardin*, 91 W.Va. 149, 112 S.E. 401 (1922); *See generally*, 6 Pepperdine L.Rev. "*The Battered Wife Syndrome: A Potential Defense to a Homicide Charge*" 213-219 (1978).

Id., 163 W.Va. at 197-198, 255 S.E.2d at 555. We again took up Battered Woman's Syndrome in *State v. Duell*, 175 W.Va. 233, 332 S.E.2d 246 (1985),[9] where the trial court

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[7](...continued)
that it is applicable generally to intimate partner relationships. *See*, *e.g.*, *Smith v. State*, 268 Ga. 196, 199 n. 3, 486 S.E.2d 819, 822 n. 3 (1997).

[8]The concept of Battered Woman's Syndrome as originated by Dr. Walker is used in explaining the behavior of battered women who do not leave their domestic partners who abuse them.

[9]Our decision in *Duell* was superceded by rule following our adoption of the West Virginia (continued...)

prohibited Duell's expert from giving a full explanation of "indices of the [defendant's] mental status," *id*., 175 W.Va. at 240, 332 S.E.2d at 253, including Duell's "inconsistent ability to recall the events surrounding her husband's death." In reversing Duell's conviction, we held that "the trial court's restriction on the testimony . . . constituted reversible error." *Id*.

In 1987, we held in Syllabus Point 5 of *State v. Steele*, *supra*, that "[e]xpert testimony can be utilized to explain the psychological basis for the battered woman's syndrome and to offer an opinion that the defendant meets the requisite profile of the syndrome."[10] In *State v. Wyatt*, 198 W.Va. 530, 542, 482 S.E.2d 147, 159 (1996), "we recognize[d] battered women's syndrome as a particularized version of post-traumatic stress disorder, of which, for instance, rape-trauma syndrome is another example . . . and anticipate that the testimony of a knowledgeable expert on those subjects . . . will assist the trier of fact in determining the issues of criminal intent." More recently, in *State v. Harden*, 223 W.Va. 796, 679 S.E.2d 628 (2009), we closely examined our precedent on the issue of abuse

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[9](...continued)
Rules of Evidence. *See State v. Sutphin*, 195 W.Va. 551, 466 S.E.2d 402 (1995). However, we expressly held in *Sutphin* that *Duell* remained a "source of guidance." *State v. Sutphin*, 195 W.Va. at 562, 466 S.E.2d at 413.

[10]The admissibility of a defendant's history of being abused is not conditioned on the defendant being found to meet the requisite profile of Battered Woman's Syndrome, or the defendant having an expert to testify in her behalf. Stated differently, while having an expert testify that a defendant meets the requisite profile of Battered Woman's Syndrome is very helpful, and perhaps even essential, in explaining the significance and relevance of a defendant's history of abuse, a defendant is entitled to introduce her history of abuse through eyewitnesses, her own testimony, and means other than the testimony of an expert witness.

evidence and its relevancy, as well as cases from other jurisdictions, and concluded that evidence of abuse is "relevant and may negate or tend to negate a necessary element of the offense(s) charged, such as malice or intent." Syllabus Point 4, in part, *Harden, id*. *See also Wickline v. House*, 188 W.Va. 344, 424 S.E.2d 579 (1992). *See generally* Jeffrey M. Shawver, *Battered by Men, Bruised by Injustice: the Plight of Women Who Fight Back and the Need for a Battered Women Defense in West Virginia*, 110 W. Va. L. Rev. 1139 (1988).

Our prior cases make clear that in cases involving Battered Woman's Syndrome, evidence that a defendant meets the profile of the syndrome is admissible to explain to the jury how domestic abuse may affect a defendant's reasoning, beliefs, perceptions, or behavior. This evidence is relevant because it may negate an essential element of the crime charged, such as premeditation, malice or intent. If premeditation is negated, then the defendant may only be convicted of second degree murder. If malice is negated, then the defendant may only be convicted of manslaughter.

III-B-2.
Exclusion of the Defendant's Abuse Evidence

The trial court agreed with the prosecution's argument that the defendant's history of abuse was not relevant because her case did not involve a claim of self-defense and that her evidence of abuse was too remote. The trial court also ruled that Dr. Clayman could not testify about Battered Woman's Syndrome, or the defendant's history of abuse, because

he did not "diagnose" the defendant as meeting the profile of Battered Woman Syndrome to a reasonable degree of medical certainty.

Lack of self-defense not a basis for excluding abuse evidence: In her appeal, the defendant argues that our precedent, discussed *supra*, makes clear that her history of being a battered and abused woman is relevant to her state of mind even when self-defense is not being asserted. We agree.

In *State v. Harden*, *supra*, we expressly rejected the type of argument advanced by the prosecution. We held in *Harden* that the relevancy of a defendant's history of abuse was *not dependent* on a claim of self-defense:

> Where it is determined that the defendant's actions were not reasonably made in self-defense, evidence that the decedent had abused or threatened the life of the defendant is nonetheless relevant and may negate or tend to negate a necessary element of the offense(s) charged, such as malice or intent.

Id., at Syllabus Point 4.

Syllabus Point 4 of *Harden* clarifies, in a single point of law, that evidence of prior abuse is relevant to a defendant's reasoning, beliefs, perceptions, or behavior at the time of the alleged criminal act. *Harden*, and the cases preceding that decision, recognize that the perceptions of a battered and abused person are different from the perceptions of a person who has not lived through an abusive relationship. These cases recognize that an abused person will sometimes behave "irrationally" and that a defendant should be permitted to offer

an explanation for that behavior. We emphasize "irrationally" because that term is typically measured by, or in comparison to, an "ordinary reasonable person." It is clear, however, that an "ordinary abused person," particularly a person who has endured abuse to the extent that they exhibit the characteristics of Battered Woman's Syndrome, may reason and react quite differently from someone who has not been abused.

Harden also made clear that when a defendant's state of mind is in issue, the defendant's history of abuse is a question of fact to be considered by the jury. The jury is entitled to have a full understanding of the facts before being asked to judge the defendant.[11]

Expert Witness Testimony on Battered Woman's Syndrome: The trial court ruled that Dr. Clayman did not "diagnose" the defendant as meeting the requisite profile of Battered Woman's Syndrome to a reasonable degree of medical certainty. Therefore, he could not testify about the syndrome or the defendant's history of abuse. While our precedent makes clear that an expert must form his or her opinion to a reasonable degree of certainty, we made clear in Syllabus Point 5 of *State v. Steele*, *supra*, that "[e]xpert testimony can be utilized to explain the psychological basis for the battered woman's syndrome *and to offer an opinion that the defendant meets the requisite profile of the*

[11]We note that the jury appeared to struggle with the issue of premeditation – even in the absence of knowing that the defendant was an abused woman who allegedly met the requisite profile of Battered Woman's Syndrome – as it twice requested clarification of the trial court's instruction of this essential element of first degree murder.

syndrome." (Emphasis added). The correct standard then is not as the trial court found; instead, the applicable standard is that the expert must form his or her opinion to a reasonable degree of certainty that the defendant "meets the profile" of Battered Woman's Syndrome. Stated differently, it is not that the defendant is "diagnosed" with the syndrome, but rather that *she exhibits the characteristics of an abused and battered person and meets the requisite profile* of Battered Woman's Syndrome.[12]

Issues of Remoteness: The trial court ruled that the defendant's expert witness and eyewitnesses could not testify about the defendant's history of abuse because it was too remote to affect her reasoning, beliefs, perceptions or behavior. The trial court held that the defendant's evidence was too remote because no abuse occurred or was threatened in the hospital room, and her case was not based on self-defense.

Based solely on the passage of time, incidents of abuse in a case involving Battered Woman's Syndrome may appear to be remote and of limited relevance. However,

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[12]Battered Woman's Syndrome does not presently have a separate categorization in the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition* (DSM–IV). It is questionable whether an expert could "diagnose" a person with the syndrome except to the extent that it is generally:

> acknowledged as a subcategory of Post Traumatic Stress Disorder (PTSD) by experts in the field. Similar to syndromes like Rape Trauma Syndrome and Battered Child Syndrome, experts have identified significant behavioral, affective, and cognitive symptoms which make up a recognizable syndrome.

Steffani J. Saitow, Note, *Battered Woman Syndrome: Does the "Reasonable Battered Woman" Exist?*, 19 New Eng. J. On Crim. & Civ. Confinement 329, 332 n 27 (1993).

these incidents may be essential to the jury's ability to understand the causal effect of the abuse on the defendant's reasoning or behavior. *See* Walker, L., "*The Battered Woman*," *supra*; and Walker, L., "*The Battered Woman Syndrome*," *supra* (noting that the causal effects of abuse, eventually resulting in a woman exhibiting the characteristics of Battered Woman's Syndrome, occur over a period of time that may span years).

Incidents of physical or mental abuse in a battered and abused woman's life are not static. The causal effect of the abuse may occur over a period of years. Walker, *supra*. For example, a second incident of abuse in a woman's life may build upon the first incident, just as a third incident may build upon the second and first incident. It is not possible to judicially segregate incidents of abuse in a battered woman's life and say that one alleged incident is remote and inadmissible while another is relevant and admissible—all incidents, for the abused woman, may be relevant to her reasoning, beliefs, perceptions, and behavior. This is particularly so in a pretrial hearing where no evidence was presented. In our decision *In Interest of Betty J.W.*, 179 W.Va. 605, 371 S.E.2d 326 (1988), we noted:

> Men who abuse their wives classically follow [a] pattern and the family follows that pattern. A man beats his wife, makes promises and they kiss and make up, and there is a period psychologists call 'the honeymoon'. At some point following the honeymoon there is a cycle of abuse and the cycle starts all over again.

Id., 179 W.Va. at 611, 371 S.E.2d at 332 (citations omitted). Where a defendant meets the requisite profile of Battered Woman's Syndrome, the causal effect of the abuse is an issue better suited for the jury.

We are not saying that a trial court must allow a defendant to make a mockery of the judicial process by introducing frivolous claims. Instead, we are reaffirming that:

> An abuse of discretion is more likely to result from excluding, rather than admitting, evidence that is relevant but which is remote in point of time, place and circumstances, and that the better practice is to admit whatever matters are relevant and leave the question of their weight to the jury, unless the court can clearly see that they are too remote to be material.

Yuncke v. Welker, 128 W.Va. 299, 311-12, 36 S.E.2d 410, 416 (1945) (citations omitted). *See also State v. Winebarger*, 217 W.Va. 117, 124, 617 S.E.2d 467, 474 (2005) ("[w]hile remoteness in time may weaken the probative value of evidence, such remoteness does not, in and of itself, necessarily justify exclusion of the evidence.").

Accordingly, we hold that in cases involving Battered Woman's Syndrome, evidence that a victim had abused the defendant may be considered by the jury when determining the factual existence of one or more of the essential elements of the crime charged, such as premeditation, malice or intent. It is generally the function of the jury to weigh the evidence of abuse and to determine whether such evidence is too remote or lacking in credibility to have affected the defendant's reasoning, beliefs, perceptions, or behavior at the time of the alleged offense.

Alternative Defenses: A final issue we address is that, in the particular fact pattern of the case before us, it is clear that the prosecution and trial court – by focusing on

issues of self-defense – failed to properly consider the fact that the defendant was seeking to present an alternative defense.

In her alternative defense, the defendant wanted to introduce evidence of Battered Woman's Syndrome and her history of abuse to prove that she did not act with malice or premeditate the shooting of her husband and, therefore, that her criminal culpability was no greater than one of the lesser included offenses, *i.e.*, second degree murder or manslaughter.

While a defendant's presentation of alternative theories in a criminal case can be fraught with peril – particularly where they are, as in the defendant's case, inherently inconsistent – our precedent not only permits defendants to do so, but requires trial courts to give instructions for any alternative theory that the evidence supports.

> As a general rule, a criminal defendant is entitled to an instruction on any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his/her favor. Consequently, a criminal defendant may present alternative defenses even when they are inconsistent, and the mere fact that a defense may be inconsistent with an alternate defense does not justify excluding evidence related to either defense.

Syllabus Point 2, *State v. McCoy*, *219 W.Va. 130, 632 S.E.2d 70 (2006).* We also noted in *McCoy* that:

> The mere "fact that [a] 'recognized defense' may be inconsistent with another defense the defendant is asserting does not justify excluding evidence and failing to give an instruction on the 'recognized defense.' " *Arcoren v. United States*, 929 F.2d 1235, 1245 (8th Cir.

> 1991). See also *Guillard v. United States*, 596 A.2d 60, 62 (D.C.Cir.1991) ("A defendant's decision ... to establish ... contradictory defenses does not jeopardize the availability of a self-defense jury instruction as long as self-defense is reasonably raised by the evidence."). It has been further noted that "[t]he rule in favor of inconsistent defenses reflects the belief of modern criminal jurisprudence that a criminal defendant should be accorded every reasonable protection in defending himself against governmental prosecution. That established policy bespeaks a healthy regard for circumscribing the Government's opportunities for invoking the criminal sanction." *United States v. Demma*, 523 F.2d 981, 985 (9th Cir.1975).

Id., 219 W.Va. at 134, 632 S.E.2d at 74.

IV.
Conclusion

The defendant was on trial for murdering her husband and facing the very real possibility that she would be imprisoned for the rest of her life. In order to convict the defendant of first degree murder, the prosecution was required to prove, beyond a reasonable doubt, that the defendant acted with malice, premeditation, and intent. The defendant was entitled to present evidence that negated, or tended to negate, one or more of those elements. For the defendant, this evidence took the form of her assertions that she had been battered and abused by her husband during her thirty-eight-years of marriage. At sentencing, even the trial court found it impossible to not comment that the defendant had been "abused

throughout her life . . . by the man she killed." But it was too late; the jury had already convicted the defendant of first degree murder without hearing her mitigation evidence.

Evidence informing the jury of the defendant's history of abuse was essential to her ability to present a viable defense, and she was entitled to present this evidence through eyewitnesses and expert witnesses. In *State v. Blake*, 197 W.Va. at 705, 478 S.E.2d at 555, Justice Cleckley noted that when an "error precludes or impairs the presentation of a defendant's best means of a defense, we will usually find the error had a substantial and injurious effect on the jury."

We find that this is such a case. The trial court abused its discretion, Syllabus Point 10, *State v. Huffman*, *supra*, and denied the defendant her right to a fair trial, by excluding evidence that the decedent had abused her during their thirty-eight-year marriage, and that she met the requisite profile of Battered Woman's Syndrome.

For the reasons set forth herein, we reverse the defendant's conviction and remand this matter for a new trial consistent with this Opinion.[13]

Reversed and Remanded.

[13]Because we have found the issues discussed dispositive, we need not address the defendant's remaining assignments of error. However, we offer guidance to the trial court on one issue that likely will remain upon remand: the admissibility of the defendant's video-taped confession to police. The prosecution sought to bar the video-taped confession on the grounds that it was self-serving, even though it was requested and taken by the police. Our review of the video shows that it is relevant to the defendant's state of mind regardless of the content of the defendant's statement – the defendant is very emotional in the video and the video was made shortly after the shooting – and is admissible by the defendant for that purpose.