No. 33037 - State of West Virginia v. Valerie Whittaker

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OF WEST VIRGINIA

Maynard, Justice, concurring:

Practically everyone knows who Paul Harvey is. He is a popular radio commentator who looks beyond the headlines and lets his listeners know "the rest of the story." I am writing separately because this is a "Paul Harvey" case and the rest of this story needs to be told. My dissenting colleagues, who deliberately omitted critical facts in their dissents, would have you believe that the appellant was a battered woman who, after suffering mental and physical abuse by Mr. Mills for ten years, shot him in self-defense and that because of certain rulings by the trial court, which were affirmed by the majority, she was prevented from offering evidence of that abuse. That is a preposterous and outrageous claim and is simply not what happened.

The record in this case shows that Ms. Whittaker shot and killed an unarmed man. After she killed him, she went to another room and retrieved a shotgun. She then placed that shotgun in the dead man's hands and put his finger on the trigger. Next, the appellant called the police and repeatedly lied about what happened. She lied when she told the police that Mr. Mills had the shotgun in his hands and was threatening to kill her when she shot him. She told this false story in two separate recorded statements. Only after further

questioning did the appellant finally admit that she had lied and that Mr. Mills was actually unarmed at the time she shot him. At trial, the appellant curiously claimed for the first time that Mr. Mills had mistreated their child immediately before she killed him, a story she never told in any of her many prior statements.

I do not dispute the fact that Mr. Mills was abusive toward the appellant and their daughter. He was a brute and a very bad man. The evidence in the record shows that the appellant obtained four domestic violence petitions against Mr. Mills during the course of their relationship and that she left him and went to a battered woman's shelter with their daughter. The jury heard this evidence. The jury also heard exactly what happened on the day Mr. Mills was shot and killed by the appellant. In particular, the jury heard all of the lies the appellant told the police about what actually happened at the time of the shooting. Moreover, the jury learned that the appellant placed a gun in Mr. Mills' hands after she shot him. Curiously, the dissenters make no reference to these facts.

On the day she shot Mr. Mills, the appellant left her aunt's house where she had been staying and went to a doctor's appointment knowing that Mr. Mills also had an appointment with the same doctor that day. Mr. Mills was there waiting for her with her purse. The appellant testified at trial that she attempted to leave the doctor's office, but Mr. Mills forced her to keep the doctor's appointment. Then, according to the appellant, even though they were in separate cars, Mr. Mills forced her to follow him to the pharmacy, a gas

station, and then home to her trailer where they were living. After being home for a short time, Mr. Mills decided to go to a friend's house to pick up a weed eater. According to the appellant, Mr. Mills forced her and their daughter to go along. After visiting the friend for an hour or so, they left and stopped at a convenience store before returning home. According to the appellant, as soon as they arrived home, Mr. Mills began threatening to kill her, their daughter, and other members of her family. Within a few minutes, Mr. Mills was dead. The appellant shot him from seventeen feet away with a gun she retrieved from a kitchen cabinet. Although the appellant claimed to have never used a gun before, she killed Mr. Mills instantly with a single shot to the head.

After she shot Mr. Mills, the appellant called the state police[1] and reported,

> I was at my home and I had a domestic violence petition against my baby's daddy and he was going to come in and he tried to kill me he grabbed the shotgun he pulled the trigger back when he did I had to shoot him[.]

When the state police arrived, the appellant told Trooper Christian that Mr. Mills had been threatening to kill her; that he went to the back of the trailer and got a shotgun; that he went out the back door; and then, he came back through the front door with the shotgun. The appellant told Trooper Christian that when she saw Mr. Mills with the shotgun, she grabbed

[1]The appellant called the state police rather than 911 and asked to speak to Trooper Christian. Apparently, she had called Trooper Christian weeks before and reported that Mr. Mills was driving his four-wheeler while drunk.

a gun she knew he kept in a kitchen cabinet and shot him. She further told Trooper Christian that her daughter was with her in the kitchen curled up in a ball on the floor and that after she shot Mr. Mills, she did not go near his body but rather, grabbed her daughter and went next door to her parents' house.

When Trooper Christian entered the trailer, he noticed that Mr. Mills was lying in the front doorway with a shotgun in his hand–his finger on the trigger and his thumb on the hammer. There were no blood splatters on the gun, but there were footprints in the blood on the floor. At that point, Trooper Christian became suspicious. The appellant had told him that no one else had been in or near the trailer during or after the shooting. Trooper Christian found it curious that a man who had fallen to the floor after being shot was holding a clean shotgun with his finger on the trigger.

Trooper Christian questioned the appellant again at the scene where she gave the following recorded statement,

> Then when I got there, I went into the trailer, he grabbed a pair of plyers [sic] and telling me to call you all and tell you that I was gonna drop the DVP. Then he laid it down, then he was cussing me and then he walked. I don't remember which way he went and [J.W.] was there. And then he . . .oh. . . he went back toward the bedrooms and then apparently he went outside and I was turned talking to [J.W.]. And then he, apparently he must have come around the trailer with the shotgun and come through the door.

The appellant further stated that she did not know if the shotgun was loaded, and at that point, she pulled out the gun that she knew Mr. Mills kept in the cabinet below the kitchen sink and shot him.

The appellant went to the state police detachment that evening where she consented to further questioning. During a third statement, the appellant finally admitted that Mr. Mills was not armed with the shotgun when she killed him. She said,

> He had picked up the pliers and he threatened to kill me with 'em, he'd done draw'd 'em back.
>
> . . . .
>
> [J.W.] hollered and he started to go ahead and hit me and he said no that he was gonna get the shotgun and blow us all away, that a shotgun wouldn't leave no trace.
>
> . . . .
>
> And then when he started like he was gonna go get the shotgun
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> . . . .
>
> I mean cause he was threatening to kill my baby, my mom, my myself, my mother, my daddy.
>
> . . . .
>
> My brother and sister. The first thing that went through my head was grab the gun and shoot him before he kills all of us.
>
> . . . .
>
> And that's just what I did. I grabbed the gun immediately and I just shot.

When asked about the shotgun in Mr. Mills' hands, the appellant said that she got it from their bedroom and placed it in his hands "because he said that he was gonna get it, so I just gave it to him."

In addition to Trooper Christian, the appellant spoke to two other police officers. She told Sergeant Mankins that she put the shotgun in Mr. Mills' hands because she wanted it to appear that he had threatened her and her daughter. She further told Sergeant Mankins that it was her daughter's idea to put the gun in Mr. Mills' hands. When she talked to Trooper Maddy, she said that her daughter had not been with her in the kitchen, but rather she had sent J.W. to her room before the shooting occurred. At trial, the appellant told the jury that before she shot Mr. Mills, "he run and grabbed [J.W.] by her hair and her shirt, like this (demonstrating), run her down the hall and he rolled her in her bedroom across the floor like bowlin' ball." She testified she did not tell the police this happened because she did not want to involve her daughter and did not want her to have to answer questions.

All of the above evidence was presented to the jury through the testimony of Trooper Christian, Trooper Maddy, Sergeant Mankins, and the appellant, who was her own first witness. The tape-recorded statements of the appellant were also played for the jury. In addition to this evidence, the jury heard a considerable amount of testimony about the character of the victim, especially his propensity for violence. In that regard, the appellant presented evidence from at least two witnesses who had confrontations with Mr. Mills while he was in possession of a firearm. The appellant was also permitted to present medical records showing that Mr. Mills had shot himself in the foot with a shotgun while riding around at night spotlighting deer. As discussed in the majority opinion, the appellant introduced into evidence Mr. Mills' cock fighting paraphernalia to show that he was engaged

in "blood sports." The appellant further introduced into evidence several hunting trophies and a stuffed and mounted head of a boar to show that Mr. Mills was an expert at "hunting, tracking, and killing."

The appellant also presented the testimony of several witnesses who related their observations regarding the relationship between Mr. Mills and the appellant. A cousin of the appellant, Michael Starkey, who was also a neighbor to her and Mr. Mills for some time, testified that he saw the appellant and Mr. Mills fighting in the middle of the road on one occasion. He said that Mr. Mills kept trying to grab the appellant by her arm. Mr. Starkey further testified that Mr. Mills would not let the appellant be outside for very long and that he frequently heard him telling her to get back in the house. Ermajean Hudgins, while not permitted to relate statements made to her by the appellant, nonetheless testified that the appellant came to her church approximately five times in the last two and a half years and appeared to be very fearful of Mr. Mills. She said that the appellant's daughter was "very clingy to her mother and afraid." Debra Fowler testified that Mr. Mills called her house three times looking for the appellant during the week before he was killed.

Despite the claims of my dissenting colleagues that the appellant was precluded from presenting evidence to support her theory of self-defense, a thorough reading of the transcript of the trial in this case shows that the appellant was permitted to present considerable evidence to support her claim that she acted in self-defense. The few hearsay

statements which the trial court properly precluded Ms. Hudgins, Ms. Fowler, and Ms. Brinkley from relating to the jury were just a small portion of the evidence which the appellant sought to and did introduce in her defense.

The fact of the matter is that the jury heard the appellant's version of events as well as substantial evidence that contradicted her story and established that she had made conflicting statements to the police. The appellant presented evidence to show that she suffered constant threats and abuse from Mr. Mills for ten years; that she filed four domestic violence petitions against Mr. Mills; that she believed that the police were never going to help her escape Mr. Mills' abuse; that she believed that Mr. Mills was going to kill her, their child, and her family; and finally, that she believed the only way she could protect herself and her daughter was to shoot him.

On the other hand, the prosecution established that the appellant had many opportunities to get away from Mr. Mills on the day she shot him. The prosecution's evidence showed that the appellant could have reported to her doctor that Mr. Mills was waiting for her when she arrived for her appointment and that he was forcing her and her child to leave with him; that she could have asked for help at the pharmacy, at the gas station, at the friend's house, or at the convenience store; and that she could have simply stopped at the police station when she passed by while following Mr. Mills in her own car. The prosecution's evidence further established that the appellant shot an unarmed man from

seventeen feet away and killed him with one bullet; that she put a shotgun in the deceased's hands after she killed him; that she lied to the police at every turn; and that her story changed even on the day she testified in court when she claimed for the first time that Mr.Mills had grabbed [J.W.] and "rolled her in her bedroom across the floor like bowlin' ball" right before she shot him.

Obviously, after hearing all of the evidence, the jury simply did not believe the appellant. In the end, self-defense cases are all about credibility. Long ago, this Court explained that self defense is "a question purely of fact, dependent absolutely upon the credibility of the witnesses, and the weight and effect of their evidence; purely a jury question." *State v. Dickey*, 48 W.Va. 325, 335, 37 S.E. 695, 699 (1900). Would I have made the same determination as the jury? It does not matter. This Court cannot second guess a jury when its decision is supported by sufficient evidence as is clearly the case here. This Court can only decide whether the defendant received a fair trial. She did.

The statements of the three witnesses that the appellant sought to introduce were clearly hearsay and were properly excluded. In *State v. Riley*, 201 W.Va. 708, 714, 500 S.E.2d 524, 530 (1997), this Court observed,

> We have previously permitted introduction of evidence regarding the battered spouse syndrome, and the lower court in the present case admitted substantial evidence on this issue offered by the Appellant. In syllabus point five of *State v. Steele*, 178 W.Va. 330, 359 S.E.2d 558 (1987), for instance, we held

> 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." Conferring the right of introduction of evidence upon a defendant, however, does not translate into authority to engage in an unlimited foray into the issue. The court still possesses the right to limit the testimony; when it becomes duplicative, the court may refuse to accept additional witnesses.

(Footnote omitted.). Clearly, the trial court also possesses the right to prohibit the introduction of hearsay testimony.

Finally, I would note that the appellant could have been convicted of first degree murder without mercy and could have spent the rest of her life in jail. The jury concluded, however, that she was only guilty of the lesser included offense of voluntary manslaughter. Now, nobody wants you to believe that the deceased was a nice guy. As I said earlier and as the record plainly shows, he was not! What kind of society would we live in if men were allowed to batter and abuse their wives and children with impunity. The law should never say that kind of conduct is acceptable. It is not. At the same time, we also do not want to make rules that allow someone to shoot and kill an unarmed man with impunity–even *a bad man.*

Because the appellant received a fair trial and because the evidence was more than sufficient to support the jury's verdict, I respectfully concur with the majority's decision in this case. And now, you know the rest of the story.