State v. Harden: Muddying the Waters of Self-Defense Law in West Virginia

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I. INTRODUCTION ................................................................................................................. 971
II. THE UNDISPUTED, UNCORROBORATED, AND IGNORED FACTS .......... 977
   A. A “Night of Domestic Terror:” The Undisputed Facts of State v. Harden ................................................................. 977
   B. Tanya’s Version—and the Court’s Endorsement of That Version—of Events Immediately Before the Shooting .......... 978
   C. Expert Testimony Suggested That Danuel was Unarmed, Unconscious, and Shot in the Head at Close Range ....... 980
III. DROPPING THE PROCEDURAL BALL .............................................................. 982
   A. Giving Lip Service to the Standard of Review .......................................................... 982
   B. Usurping the Fact-Finding Role of the Jury .......................................................... 983
   C. Misapprehending the Law vs. Misapprehending the Evidence: Distinguishing State v. Harden from State v. Cook .......... 985
      1. Evidentiary Distinctions Between Harden and Cook ........................................ 987
      2. Legal and Procedural Distinctions Between Harden and Cook .......................................................... 989
IV. THE GOOD, THE BAD, AND THE UGLY LAW ..................................................... 991
   A. Reconciling Reasonableness, Imminent Danger, and Previous Apprehensions of Danger: Ridding Jury Instructions of McMillion Confusion .......................................................... 991
   C. Moving from the Minority to the Majority: Eliminating the Duty to Retreat from an Attacking Co-Occupant and Overruling State v. Crawford .............................................................. 996
V. CONCLUSION ...................................................................................................................... 998

I. INTRODUCTION

That domestic violence in general and the abuse of women in particular are serious problems in West Virginia would be a dramatic understatement. Victims and witnesses of domestic violence are permanently scarred, both physically and emotionally. Lives are destroyed and the collateral damage done to families is incalculable. The calculable statistics are staggering and tragic. In 2008 alone, over 13,500 incidents of domestic violence were reported to West Virginia law enforcement and seventy-five percent of those incidents involved
female victims. Domestic violence cost thirty-two people their lives. Of the 13,500 plus reported incidents, over 8,300 involved either a current, estranged, or former spouse or an intimate partner. Worse yet, these figures only represent the number of reported incidents of domestic violence, meaning that the true figures are much higher.

The West Virginia Legislature has taken notice of this crisis, finding that “[d]omestic violence is a major health and law enforcement problem in this State with enormous costs to the State in both dollars and human lives. Domestic violence can be deterred, prevented or reduced by legal intervention that treats this problem with the seriousness that it deserves.” While improvements to the overall prevention, treatment, education, and public awareness of domestic violence are recognized, many commentators have argued that these legislative and legal remedies do not go far enough in protecting all women from their abusive partners. This problem presents difficult legal issues when battered women resort to deadly force and then argue self-defense at trial, particularly where the evidence suggests that their assailants were sleeping or otherwise incapacitated. The West Virginia Supreme Court of Appeals was recently confronted with a case set in this unfortunate factual context which presented these

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2 Id. at 683. The categories include murder, non-negligent manslaughter, and negligent manslaughter. Ten males and twenty two females were killed.
3 Id. at 677.
4 See Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 891–92 (1992) (citing American Medical Association research which indicates that domestic violence figures are “marked underestimates,” because the nature of these incidents discourages women from reporting them,” and that “researchers on family violence agree that the true incidence of partner violence is probably double the above estimates”).
5 W. VA. CODE § 48-27-101(a)(3), (4) (2010). Closely pertinent to this Note, the West Virginia Legislature also specifically recognized that “[c]hildren are often physically assaulted or witness violence against one of their parents or other family or household members, violence which too often ultimately results in death.” Id. § (a)(2).
6 This is not to say that men never need protection from abusive partners or are unaffected by domestic violence. This statement merely reflects the reality that a strong majority of domestic violence is perpetrated by males upon female victims, as was the situation in the case upon which this Note comments.
8 While countless books, treatises, and articles have been written about the “battered woman syndrome” and the “battered spouse defense,” these topics are largely beyond the scope of this Note.
difficult legal issues. It is this case, *State v. Harden*, upon which this Note comments.

In order to better understand these legal issues, a brief overview of the six elements of self-defense is in order. West Virginia, like most other states, has used the common law to establish the necessary elements of self-defense. First, the defendant must show that she was not the aggressor, and that she did not provoke the attack. Second, the defendant must show that she actually believed she was in danger. Third, the defendant’s belief must be objectively reasonable, “which is to say that another person, similarly situated, could have reasonably formed the same belief.” Fourth, the risk of death or serious bodily injury that the defendant faces must be imminent. Fifth, the defendant’s actions of self-defense must be proportionate to the danger she faces. Finally, if the defendant puts on sufficient evidence of these five elements, the burden then shifts to the State to prove beyond a reasonable doubt that the defendant did not act in self-defense.

One tough legal issue then, when an abused or battered woman kills her husband, is that the elements of self-defense evolved from a male-dominated perspective. Therefore, this masculine self-defense paradigm does not apply particularly well to the cases where a woman kills her usually bigger, stronger husband. Another hotly-debated issue in this area of the law is whether, given

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10 *Id.* at 641 (“This requirement reflects the common law rule that ‘one who is at fault or who is the aggressor can not rely on self-defense.’”) (citing *State v. Smith*, 295 S.E.2d 820, 822 (W. Va. 1982)).

11 *Id.* at 635 (“[A] defendant [must] ‘actually believe that [she] is in danger . . . .’”) (citing *State v. Cook*, 515 S.E.2d 127, 137 (W. Va. 1999)).

12 *Id.*

13 *Id.* at 641 (“[T]he defendant [must] believe, that he or she was at ‘imminent’ risk of death or serious bodily injury.”). “Imminent” is defined as “ready to take place[,]” or “hanging threateningly over one’s head[.]” *Merrim-Webster’s Dictionary* 535 (11th ed. 2006); *see also* JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 246–47 (4th ed. 2006) (“In the context of self-defense, force is said to be ‘imminent’ if it will occur ‘immediately,’ or ‘at the moment of . . . danger.’ The danger must be ‘pressing and urgent . . . .’ Indeed, even if it seems clear that the harm at the hands of another is inevitable, use of force is premature until the threat is immediate.”) (citations omitted).

14 *Harden*, 679 S.E.2d at 641 (citing *State v. W.J.B.*, 276 S.E.2d 550, 554 (W. Va. 1981)).

15 *Id.* (citing Syl. pt. 4, *State v. Kirtley*, 252 S.E.2d 374 (W. Va. 1978)).

16 *See supra* note 6.

17 *See Cynthia K. Gillespie, Justifiable Homicide* 35, 41 (1989) (“The body of case law that began very early to grow up about self-defense in the centuries following the Conquest inevitably reflected the male-centered point of view of a rigorously male-centered society . . . . It should begin to be clear why, when the courts two hundred years later began to try to apply self-defense law to situations in which battered women killed their husbands, it was so hard to make the law fit.”); Kathleen Mahoney, *Theoretical Perspectives on Women’s Human Rights and Strategies for their Implementation*, 21 BROOK. J. INT’L L. 799, 813–14 (1996) (“[T]he traditional common law self-defense is gender biased . . . . [T]he law’s traditional concept of self-defense
the gender bias inherent in the self-defense requirements, courts should relax the "imminent danger" requirement by replacing it with a "necessary" requirement when battered women kill their abusers in non-confrontational situations, similar to the approach taken by the Model Penal Code. The Model Penal Code § 3.04 (1985) ("(1) . . . the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself . . . ") (emphasis added); see also id. § (2)(c) (" . . . a person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be when the force is used . . . ") (emphasis added); but cf. Syl. pt. 8, State v. Cain, 20 W. Va. 679 (1882) ("In such a case as to the imminence of the danger, which threatened the prisoner, and the necessity of the killing in the first instance the prisoner is the judge; but he acts at his peril, as the jury must pass upon his action in the premises, viewing said actions from the prisoner's standpoint at the time of the killing[.]") (emphasis added); DRESSLER, supra note 13, at 247 ("The imminence requirement is controversial. Some scholars advocate its abolition on the ground that '[i]f the concern is to exclude threats of harm that are too remote to require a response, the problem is adequately handled by requiring simply that the response be necessary.'") (citing 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES 78 (1984)).

On the one hand, proponents for a more lenient "imminent danger" requirement argue that a strict requirement wrongly deprives battered women the opportunity to pre-empt an inevitable (as opposed to an imminent) attack. Without the ability to pre-empt a deadly attack, it is argued that women become perpetually victimized and dominated by their bigger, stronger abusers and are forced to roll the dice by risking their lives while waiting until the threat of death is truly imminent before repelling the attack with deadly force. On the evolved out of a 'bar-room brawl' model that comprehends only a male concept of reasonableness.

18 MODEL PENAL CODE § 3.04 (1985) ("(1) . . . the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself . . . ") (emphasis added); see also id. § (2)(c) (" . . . a person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be when the force is used . . . ") (emphasis added); but cf. Syl. pt. 8, State v. Cain, 20 W. Va. 679 (1882) ("In such a case as to the imminence of the danger, which threatened the prisoner, and the necessity of the killing in the first instance the prisoner is the judge; but he acts at his peril, as the jury must pass upon his action in the premises, viewing said actions from the prisoner's standpoint at the time of the killing[.]") (emphasis added); DRESSLER, supra note 13, at 247 ("The imminence requirement is controversial. Some scholars advocate its abolition on the ground that '[i]f the concern is to exclude threats of harm that are too remote to require a response, the problem is adequately handled by requiring simply that the response be necessary.'") (citing 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES 78 (1984)).

19 See Stephen J. Morse, The "New Syndrome Excuse Syndrome," 14 CRIM. JUST. ETHICS 1, 3, 12 (1995) ("If death or serious bodily harm in the relatively near future is a virtual certainty and the future attack cannot be adequately defended against when it is imminent and if there are no reasonable alternatives, traditional self-defense doctrine ought to justify the pre-emptive strike.")

20 See Judith E. Koons, Gunsmoke and Legal Mirrors: Women Surviving Intimate Battery and Deadly Legal Doctrines, 14 J.L. & POL’y 617, 692 (2006) (Arguing that "as a consequence of the . . . imminence doctrine[,] the safety of many women who live with battering men is discounted."); id. at 656–57 ("Battering . . . is distorted when read through doctrines such as imminence . . . Infused with suppositions about gender roles and behavior, imminence often functions as a retreat rule to enforce unspoken societal assumptions that women should leave battering relationships before episodes of violence take place."); V.F. Nourse, Self-Defense and Subjectivity, 68 U. CHI. L. REV. 1235, 1300–01 (2001) ("[A] state that denies the opportunity for self-defense, that asks its citizens to die rather than protect themselves, recreates the very same fears that citizens will become the slavish victims of the strong.").
other hand, those who argue that the strict imminent danger requirement should be left intact say that this safeguard properly distinguishes retaliatory or preemptive killings to redress a previous wrong from killings in true self-defense. These commentators further argue that the absence of the imminent danger requirement would give rise to lawlessness, and an increase of violent self-help vigilantism.\textsuperscript{21} Commentators and courts also debate whether, from a moral perspective, a habitual abuser has forfeited his rights to life and due process even after the abuse ends, and whether courts should relax the legal standards under which the abused can simultaneously act as the judge, jury, and executioner.\textsuperscript{22}

While vast amounts of literature have been written debating these controversial issues, settling the debate once and for all is not the goal of this Note. The broad topic of the Battered Spouse Syndrome is also largely beside the

\textsuperscript{21} See Whitley R. P. Kaufman, Self-Defense, Imminence, and the Battered Woman, 10 NEW CRIM. L. R. 324, 364 (2007) ("[T]he very rationale for a bright-line rule . . . in the case of violent self-help is to minimize the room for the exercise of human judgment as to when and how much to impose harm on others in order to protect oneself. Without it, people are likely to overestimate future risks and to err in the direction of acting preemptively . . . ."); DRESSLER, supra note 13, at 248 ("The difficulty in reforming the law is that when one moves away from an imminency requirement to something less . . . the risks of error in predicting the future and in predicting whether options less extreme that deadly force . . . are greatly enhanced." Dressler continues, "The benefit of the imminency requirement, or at least of a rule requiring that a threat be fairly close to occurring, is that it reduces the risk of unnecessary deadly force."); State v. Harden, 679 S.E.2d 628, 648 (W. Va. 2009) ("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.") (Benjamin, C.J., dissenting).

\textsuperscript{22} State v. Norman, 378 S.E.2d 8, 21 (N.C. 1989) (Martin, J., dissenting) (referring to an abuser who was killed by his wife while asleep, "By his barbaric conduct over the course of twenty years, [he] reduced the quality of the defendant’s life to such an abysmal state that, given the opportunity to do so, the jury might well have found that she was justified in acting in self-defense for the preservation of her tragic life."); Kaufman, supra note 21, at 369 ("[I]t is an essential element of the rule of law [th]at each person—even batterers—have a right to due process of law, especially when their lives are at stake."); but cf. DRESSLER, supra note 13, at 264 (Even if the controversial moral forfeiture doctrine is an otherwise acceptable principle, its application [in a non-confrontational battered woman homicide scenario] is troubling. First, in the traditional self-defense context, an aggressor only temporarily forfeits his right to life. If he withdraws from the conflict . . . his right to protect himself is restored. In the case of the abuser, however, the implication is that the constancy of his immoral conduct renders his right to life nearly permanently forfeited. He becomes fair game for killing day or night, awake or asleep, in ambush or otherwise. Second, the logic of the forfeiture position is that the abuser is fair game for killing by anyone . . . . After all, if the abuser has no right to life, why should it matter who kills him? It is unlikely that many people would want to take the forfeiture doctrine to its logical conclusion.; see also Allen v. United States, 150 U.S. 551, 555 (1893) ("When can a man slay another? When can he sit as a judge passing on the law, and a jury passing upon the facts . . . and then go[,] out as a marshal or sheriff and executing that judgment, all at the same time, . . . determining the facts as judge, jury, and executioner all at the same time? This is a mighty power in the hands of the citizen."). Obviously, this same logic would apply to abusers of either sex.
point, given that it was not argued at the *State v. Harden* trial or appeal. Nevertheless, this case did involve a homicide preceded by violent spousal abuse. Indeed, as one commentator stated, “One reason the resulting cases are difficult is that [battered women who kill] do not fit neatly into the categories of good and evil drawn by the criminal law.” Professor Rosen elaborates: “American courts and criminal justice officials have a difficult time dealing with these cases because they often involve sympathetic defendants who . . . have no defense if the law was strictly applied.” After identifying the domestic violence problem plaguing West Virginia, and framing these tough legal questions, requirements and issues beforehand, the reader is hopefully provided with a helpful introduction and background from which a meaningful analysis of *State v. Harden* is possible.

The ruling of the West Virginia Supreme Court of Appeals (“the Court”) in *State v. Harden* will certainly affect all future self-defense trials in the state, but the ruling’s impact will be especially significant when the case involves a homicide preceded by domestic violence. This Note will comment on this controversial decision and is organized as follows: Part II will provide factual background to the case for context; Part III will examine how the Court mishandled the case procedurally; and Part IV will outline the substantive additions and subtractions to West Virginia self-defense law. Deserved praise and sharp criticisms will be offered throughout the Note. To be more specific, the Note critiques how—instead of confronting these difficult issues mentioned above head-on, or deferring to the West Virginia Legislature to wrestle with the difficult public policy implications—the Court forced the square peg into the round hole by pretending that the evidence fit the traditional self-defense requirements perfectly while completely ignoring much of the State’s compelling expert testimony. Despite citing appropriate, binding standards of review, the Court failed to adhere to them. And although the Court created new law (some good, some bad, some painfully unclear) and overturned a lot of old, confusing precedent, the Court made its own findings of fact and denied a retrial consistent

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23 The Battered Woman Defense was not raised, nor was evidence of Battered Woman Syndrome put on by defense counsel at Tanya Harden’s trial. *Harden*, 679 S.E.2d at 649 (Benjamin, C.J., dissenting) (distinguishing the case from a case cited by the majority, “However, *Wyatt* concerned the Battered Spouse Syndrome which was not raised by the defendant at trial and was not supported by the evidence.”); see also *Brief of Appellee* at 2, *State v. Harden*, No. 34268 (W. Va. Dec. 18, 2008) [hereinafter *Brief of Appellee*] (“The couple had been married for eleven years. Although Mr. Harden had been verbally abusive in the past, the Appellant conceded that she had never seen her husband this violent. Nor did she claim that he had a violent temper. She attributed his behavior to his drinking which allegedly began earlier that day.”).


25 *Id.* *Harden* certainly involves a sympathetic defendant.

26 679 S.E.2d 628 (W. Va. 2009).
with the new law it created. It ordered an immediate judgment of acquittal and release of Mrs. Harden instead.27

II. THE UNDISPUTED, UNCORROBORATED, AND IGNORED FACTS

A. A "Night of Domestic Terror:" The Undisputed Facts of State v. Harden

On the evening of September 5, 2004, Tanya Harden was arrested after admitting that she shot and killed her husband, Danuel, with a shotgun.28 However, she first told her children, Danuel’s parents, and the first law enforcement officer to arrive on the scene that Danuel had committed suicide, and then contended that he violently beat her in a drunken rage and left her no choice but to shoot him in self-defense.29 Her murder trial began in March of 2007.30

The events leading up to the shooting were truly disturbing. Like so many other tragedies, this one had its beginnings with Danuel’s heavy drinking.31 At the time of his death, Danuel’s blood alcohol content measured at 0.22%, nearly three times the legal limit in West Virginia.32 As the night wore on, Danuel became increasingly verbally and physically aggressive, subjecting Tanya to a “knock-down-drag-out” beating, as the State described, that lasted for several hours.33 In its closing argument, the prosecution conceded that Tanya had suffered “a night of domestic terror.”34

Tanya received brutal injuries during this extreme violence. The treating physician at the emergency room testified that Tanya had been “struck . . . about the head and back with the butt of a gun and [had been] threatened . . . with the gun.”35 The doctor further testified that “she was struck with a fist[,]” that “she had contusions of both orbital areas, the right upper arm, a puncture wound with a foreign body of the right forearm, contusions of her chest, left facial cheek, the left upper lip[,]” and that “X-rays done at the time demonstrat-ed a nasal fracture.”36

27 Id. at 647. This result “shocked” even Mrs. Harden’s appellate counsel, Russell Cook, who admitted that he was hoping for, at best, a new trial. Mr. Cook spoke at a Women’s Law Caucus panel discussion regarding State v. Harden at the West Virginia University College of Law during the spring semester, 2010.
28 Id. at 631.
30 Harden, 679 S.E.2d at 643 n.11.
31 Id. at 632.
32 Id. at 644. The legal limit in West Virginia is 0.08%. Id.
33 Id. at 632.
34 Id.
35 Id. at 643.
Photographs consistent with the doctor’s findings were introduced, showing two large black eyes, a battered and swollen nose, bruised lips, and multiple bruises on her chest, arms, and legs.\(^\text{37}\) In addition to the physical beating she endured, the State also acknowledged that Danuel sexually abused Tanya.\(^\text{38}\)

Even more heartbreaking is that the Harden’s two children and one of their friends were in the house that night for a sleepover.\(^\text{39}\) The daughter and her friend testified that, although they were in the daughter’s bedroom, they were frightened and were repeatedly awakened by the arguing and fighting in the living room. At one point, the girls saw Tanya’s black eyes when she came into the room to tell them to go to sleep.\(^\text{40}\)

The State did not dispute any of the evidence described thus far, but argued that notwithstanding the intense and prolonged physical and sexual abuse Tanya sustained at Danuel’s hands, there was evidence suggesting that Tanya pulled the trigger during a “cooling off” period while Danuel was lying on the couch either sleeping, or passed out.\(^\text{41}\) Such evidence would be legally significant because, as the Court acknowledged, one of the required elements of self-defense is that the defendant had to believe that “she was at ‘imminent’ risk of death or serious bodily injury.”\(^\text{42}\) Tanya’s testimony contradicted the State’s evidence on this issue. Thus, the jury had to weigh the conflicting evidence of the existing circumstances at the time of Danuel’s death.

**B. Tanya’s Version—and the Court’s Endorsement of That Version—of Events Immediately Before the Shooting**

Tanya testified that her husband repeatedly threatened to kill her, and that she saw “a change in him, and . . . knew it was going to happen.”\(^\text{43}\) In addition, Tanya testified that Danuel threatened the children, telling her that “[they] wouldn’t live[,]” and he “put the shotgun to [her] son’s head and said he was going to kill him.”\(^\text{44}\) Tanya testified that she then had to distract Danuel so that

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\(^{37}\) Id. at 643–44.

\(^{38}\) Id. at 632; see also id. at 644.

\(^{39}\) Id. at 642.

\(^{40}\) Id.

\(^{41}\) Id. at 634. The specific evidence that would further the State’s theory of a “cooling off” period will be specifically discussed in Part II.C., infra.

\(^{42}\) State v. Harden, 679 S.E.2d 628, 641 (W. Va. 2009) (emphasis added); see also id. (“[T]he elements of our self-defense doctrine as follows: ‘[A] defendant who is not the aggressor and has reasonable grounds to believe, and actually does believe, that he is in imminent danger of death or serious bodily harm from which he could save himself only by using deadly force against his assailant has the right to employ deadly force in order to defend himself.’”) (quoting State v. Hughes, 476 S.E.2d 189, 195 (W. Va. 1996)).

\(^{43}\) Id. at 644.

\(^{44}\) Id.
he would leave their son alone and go back to beating her. After being sexually assaulted, Tanya testified that Danuel “started taunting her, daring her to shoot him or that he would shoot her, and that it was at this point she got the decedent’s shotgun and shot him.” Tanya further testified that “I thought I was going to die. I knew I was,” and that Danuel “would have killed [the children], too . . .”

The opinion does not recount further testimony from Tanya regarding the precise circumstances she faced at the moment she pulled the trigger. However, perhaps attempting to bolster Tanya’s testimony as to the imminency of the danger and the reasonableness of her belief of the same, the Court used the synonyms “precipitously” and “immediately” eight total times throughout the opinion to describe the brief passage of time between her violent abuse and Danuel’s death. The Court also tried to bridge the evidentiary gaps by describing the photographic evidence of Tanya’s injuries, together with her testimony and the fact that Danuel was found naked from the waist down, as “overwhelming evidence [which] demonstrate[d] that any reasonable person similarly situated would have believed that death or serious bodily injury were imminent.” This evidence, the Court continued, “established that the decedent’s death precipitously followed the decedent’s having physically and sexually assaulted the defendant.”

Despite the Court’s declaration that it was “mindful” of previous precedent requiring that “[a]n appellate court must review all the evidence, whether direct or circumstantial” and notwithstanding a hollow assurance of “[h]aving fully considered the record in this appeal,” the Court simply ignored important expert testimony put on by the State as illustrated in the next section. The evidence that was not swept under the rug was quickly dismissed by the Court as insufficient “suspicion and conjecture[,]” and “supposition . . .” A separately-filed dissenting opinion was needed to fill in the evidentiary holes left by the majority.

45 Id.
46 Id.
47 Id.
49 Id. at 647.
50 Id.
51 Id. at 645–46 (quoting Syl. pt. 3, State v. Guthrie, 461 S.E.2d 163 (W. Va. 1995)) (emphasis added).
52 Id. at 646.
53 Id. at 632 n.3; see also id. at 647.
C. Expert Testimony Suggested That Danuel was Unarmed, Unconscious, and Shot in the Head at Close Range

As previously noted, Danuel’s blood alcohol content measured 0.22% at the time of his death, nearly three times the legal limit in West Virginia.\(^{55}\) The Court admitted that Danuel was found lying naked on the couch, but rejected the inference that he was there because he was asleep or passed out drunk.\(^{56}\) The Court pointed to the fact that “the State cannot say with any certainty the decedent’s disposition at the time of his death” as “compelling evidence of reasonable doubt on this issue.”\(^{57}\) The Court continued:

Evidence that the decedent had sexually assaulted the defendant, and thereafter lay sprawled naked from the waist down on the living room couch does not amount to proof beyond a reasonable doubt that the defendant was asleep or passed out drunk; instead, it is equally plausible that the decedent could have been doing exactly what the defendant testified he was doing, which was renewing his threats to kill her and the children and again becoming physically aggressive.\(^{58}\)

This statement makes it obvious which evidence the Court found more credible.\(^{59}\) Presumably, the inference that the Court wished to create was that Danuel, naked from the waist down, landed on the couch after being shot. However, in light of other expert testimony ignored by the Court, this theory becomes hard to defend.

The majority failed to mention the findings of the investigating police officer, Sergeant David Castle, who testified that the “high and low velocity blood spatter and blood pooling present on the carpet indicated that [Danuel] was lying flat on his back when he was shot from behind.”\(^{60}\) Sergeant Castle also testified from the blood stain evidence that Danuel’s “left hand was lying just above his head and resting on a pillow, and the decedent’s right hand was

\(^{55}\) Id. at 632.

\(^{56}\) Id. at 646.

\(^{57}\) Id.

\(^{58}\) Id.

\(^{59}\) A full critique of the Court’s actions on this issue will be provided in Part III, infra.

\(^{60}\) State v. Harden, 679 S.E.2d 628, 648 (W. Va. 2009) (Benjamin, C.J., dissenting). The expert testimony paints the picture that Tanya was standing behind the couch upon which Danuel was resting at the time of the shooting, not directly behind Danuel. Indeed, it would be impossible to be directly behind Danuel if he was lying flat on his back on the couch. This position—Danuel laying (lower) on the couch and Tanya standing (higher) behind the couch—also explains why the gun shot’s trajectory was downward entering just above Danuel’s right temple. See infra notes 61–68 and accompanying text.
clutching a blanket."65 Sergeant Castle used these findings to support his expert opinion that Danuel could not have been holding a weapon when he was shot.66

The State also called Dr. Hamada Mahmoud, a forensic pathologist and the Chief Deputy Medical Examiner, as an expert witness.67 Dr. Mahmoud examined Danuel’s body, and testified that Danuel was “shot above his right ear with a left and downward trajectory.”68 More importantly, Dr. Mahmoud testified that “the stippling found around the entrance wound as well as the 25 shotgun pellets and the shell’s wadding found in [Danuel’s] brain cavity indicate[d] that the shotgun blast came from close range, specifically one to five feet away.”69 Taken together, Dr. Mahmoud and Sergeant Castle’s expert findings seemingly undermine the implausible landed-on-the-couch scenario the Court re-created by relying upon the hospital photos and Tanya’s testimony. At trial, the jury was faced with all the evidence produced at trial and was charged with finding the facts. Furthermore, it was instructed that in order to successfully assert self-defense, the evidence had to show that Tanya had to have reason to believe that she faced imminent danger of death or serious bodily harm and that proportionate deadly force had to be used to repel that danger.70 The jury ultimately weighed all the evidence and concluded that, beyond all reasonable doubt, the circumstances were not such as to indicate that Tanya faced imminent danger when she shot Danuel. It would also follow that, given the State’s expert testimony as to the lack of the imminent danger requirement, the jury could have also concluded that the deadly force Tanya used was not proportionate to the danger she faced when she pulled the trigger. Consequently, the jury convicted her of first degree murder.71

After discussing the expert testimony that the Court failed to mention on appeal, dissenting Chief Justice Benjamin gave proper deference to the jury’s findings of fact and noted the inferences that the jury could have drawn from the expert testimony:

From this evidence, a reasonable trier of fact could conclude that [Tanya], while standing behind [Danuel], fired a shotgun blast from close range into [Danuel’s] right temple . . . as he lay flat on the sofa. A rational trier of fact could also infer that be-

61 Id.
62 Id. This expert opinion has legal ramifications as it relates to the “proportionate danger” self-defense requirement.
63 Id.
64 Id.
65 Id.
66 State v. Harden, 679 S.E.2d 628, 634 n.4 (W. Va. 2009). While the Court took issue with another section of the jury instruction that will be discussed hereafter, it later affirmed that “‘imminent’ risk of death or serious bodily injury[]” was still a required element of self-defense. See id. at 641.
67 Id. at 631.
cause [Danuel] made no effort to prevent [Tanya] from walking up to him and firing a shotgun blast into his right temple, [Danuel] must have been unconscious. Finally, a rational trier of fact could additionally infer that because [Danuel] was unconscious, he could not pose an imminent risk of serious bodily injury or death to [Tanya]. These reasonable conclusions drawn from the evidence negate [Tanya’s] theory of self-defense.\textsuperscript{68}

After crediting the jury with the inferences that could have been, and probably were drawn from the State’s expert evidence, Chief Justice Benjamin correctly noted that first, the Court simply abandoned the appropriate standard of review, and second, it usurped the fact-finding role of the jury.\textsuperscript{69} Part III will further illustrate these two points.

III. DROPPING THE PROCEDURAL BALL

A. Giving Lip Service to the Standard of Review

Although the Court cited many binding principles regarding the standard of review to be applied on appeal, it failed to adhere to them. It first cited a prior holding that “[a] reviewing court should not reverse a criminal case on the facts which have been passed upon by the jury. . . .”\textsuperscript{70} The Court listed an exception to this rule, explaining that two prerequisites must be met in order for an appellate court to overturn a jury verdict: (1) there must be reasonable doubt of guilt; and (2) the verdict had to have resulted from “misapprehension, or passion and prejudice.”\textsuperscript{71} Later, the Court cited another precedent that explained what was necessary for the appellate court to find that the first prerequisite had been met: “[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.”\textsuperscript{72}

The Court also recognized that it had a duty to view the evidence in the light most favorable to the State as the verdict winner below.\textsuperscript{73} However, “this

\textsuperscript{68} \textit{Id.} at 648–49.

\textsuperscript{69} \textit{Id.} at 650.

\textsuperscript{70} \textit{Id.} at 633 (quoting Syl. pt. 3, State v. Sprigg, 137 S.E. 746 (W. Va. 1927); Syl. pt. 1, State v. Easton, 510 S.E.2d 465 (W. Va. 1998)).

\textsuperscript{71} \textit{Id.}


\textsuperscript{73} \textit{Id.} ("[W]e clearly must, according to our precedent, construe the evidence in the light most favorable to the State where a defendant challenges the sufficiency of the evidence. . . ."); see also \textit{id.} at 633 ("[T]he 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."); \textit{id.} at
is not to say that [the Court] must abandon sound reasoning in so doing."

Ironically, not only did the Court abandon sound reasoning, but worse, it abandoned the standards of review it purported to follow when it ignored important expert testimony to conclude that the State’s evidence created only “suspicion or conjecture” that the brutal beating had already ended when Tanya killed Daniel. Because there was evidence in the form of expert testimony from which the jury could (and did) find guilt beyond a reasonable doubt, as Chief Justice Benjamin made clear in his dissent, the first prerequisite to overturn the jury verdict could not have been met. Because one of the prerequisites could not have been met, the Court did not adhere to the standard of review when it overruled the jury verdict.

B. Usurping the Fact-Finding Role of the Jury

It has long been the practice of the West Virginia Supreme Court of Appeals not to disturb the jury’s ultimate findings of fact where, as in State v. Harden, there was conflicting evidence at trial, unless in the rare instance where “there was absolutely no evidence of the crime charged.” An early case emphasizing this fundamental principle of juror deference was State v. Piscioneri, where the defendants appealed their convictions for wounding a young man with the intent to maim, disfigure, disable, or kill him and for conspiring to steal his property. They filed a broad writ of error relating to the general refusal and admission of evidence. Noting that there was conflicting evidence at trial, the Court affirmed the defendants’ convictions and convincingly explained why it could not second-guess the jury’s findings of fact regarding the conflicting evidence:

The jury were the sole judges of the conflicting testimony. The witnesses were before them. They saw the manners and the countenances of those witnesses. They were in a position to judge as to credibility. It was peculiarly the province of the jury to do so. The jury had the right to believe one, if they deemed him alone credible, and to disbelieve others they deemed not credible. We have no legal power to disturb the finding of the jury, since it is deduced from conflicting testimony and involves

645 (“A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden.”) (citing Syl. pt. 1, Guthrie, 461 S.E.2d at 169).

74 Id. at 646.
75 Id. (internal citations omitted).
76 See supra notes 68–69 and accompanying text.
78 Id. at 376.
79 Id.
judgment as to the credibility of witnesses. If there were absolutely no evidence of the crime charged, it would be otherwise. "To set aside a verdict in such a case, approved by a circuit court, would be an abuse of power. Of what force the constitution in its guaranty of a jury trial, if in such case an appellate court can set aside a verdict only because it differs with the jury?" 80

Indeed, in West Virginia and elsewhere, "no principle is more firmly established than that, where the evidence is sufficiently conflicting to warrant a difference of opinion, the verdict of the jury, after confirmation by the trial court, must prevail." 81

This bedrock principle of appellate deference to the jury where there is conflicting evidence also applies to cases such as State v. Harden where a defendant appeals his or her guilty verdict after unsuccessfully pleading self-defense at the murder trial. For example, in State v. Roberts, the Court recognized that there was conflicting oral evidence regarding the issue of self-defense. 82 The Court deferred to the jury verdict, stating that the case was "dependent upon conflicting oral evidence, thus making the credibility of witnesses an important factor," and concluded that "the verdict approved by the trial court must stand, even if we can say there was excess in quantum of evidence in behalf of defendant." 83 The Court also noted that "it [would be] an abuse of power for this court to set aside a verdict merely because its members would not have so found." 84

The principle of appellate deference has stood the test of time. In Strachin v. Cleavenger, a case decided in 2004, the plaintiff was seriously injured after he was shot in the arm by the defendant. 85 In the civil suit for damages, the jury found that the plaintiff was thirty percent liable based on the element of foreseeability, and the defendant was seventy percent liable for his intentional shooting of the victim. 86 Thus, the plaintiff was held jointly and severally liable for the jury’s award of over one million dollars in damages. 87 In a separate opinion, Justice Starcher of the West Virginia Supreme Court of Appeals concurred with the Court’s ruling to affirm the jury’s finding of facts, and "respond[ed] to the implication raised by the dissent that we should have made findings of fact—and thereby intrude upon the province of the jury—in order to reach a...

80 Id. at 377 (emphasis added) (quoting State v. Stowers, 66 S.E. 323, 326 (W. Va. 1909)).
81 State v. Hurst, 116 S.E. 248, 250 (W. Va. 1923) (citations omitted).
82 63 S.E. 282, 282 (W. Va. 1908).
83 Id. (citations omitted).
84 Id.
86 Id. at 204.
87 Id. at 211 n.14.
contrary conclusion regarding foreseeability. Justice Starcher admonished, "We cannot usurp the role of the jury nor substitute our judgment when we may differ with a fact-driven outcome." In the same vein, the Court in *Harden* even reaffirmed a previous holding requiring that it "must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution... . . . Credibility determinations are for a jury and not an appellate court." 

Given the firmly embedded precedent on the issue, how could the Court in *Harden* possibly manage to substitute its version of the facts for the jury's findings without running afoul of the well-established principle of appellate restraint and respect for the jury's role as fact-finder when there is conflicting evidence? By not bothering to address the State's expert testimony regarding the downward trajectory of the shotgun blast; the stippling, pellets, and wadding inside Daniel's brain cavity that suggested that the shotgun was fired at a very close range; the blood spatter and stain evidence that suggested that Daniel was lying flat on his back with one arm clutching a blanket and the other resting behind his head, the Court painted an evidentiary picture in which there was no other evidence that seriously conflicted with Tanya's testimony and the hospital photos. This crafty sidestepping of the principle of appellate deference to the jury's findings of fact and credibility determinations also relieved the Court of having to credit the State with the inferences that the jury drew from the State's evidence, as outlined in Chief Justice Benjamin's dissent.

Although one may disagree with the jury's findings of fact or its credibility determinations in light of conflicting evidence, the fact remains that those decisions were the jury's alone to make. Where, as here, an appellate court reaches a contrary conclusion after reviewing conflicting evidence from a cold record, the result is a textbook abuse of appellate power.

C. Misapprehending the Law vs. Misapprehending the Evidence: Distinguishing State v. Harden from State v. Cook

It was noted earlier that in order to reverse a criminal conviction, a reviewing Court must find that the guilty verdict "must have been the result of misapprehension, or passion and prejudice." Ultimately, the Court disposed of the *Harden* case by reversing Tanya's guilty verdict and sentence, barring a retrial, and ordering an immediate acquittal. In reaching this disposition, the

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88 *Id.* at 213 (Starcher, J., concurring).
89 *Id.*
91 See *supra* notes 68-69 and accompanying text.
92 See *supra* note 71.
93 *Harden*, 679 S.E.2d at 647. In a discussion hosted by the Women's Law Caucus at the West Virginia University College of Law in April 2010, Mrs. Harden's appellate counsel, Russ Cook,
Court relied on a prior case, State v. Cook, and paternalistically noted that "while we must be '[m]indful of the jury's province over the evidence presented . . . this Court will not permit an injustice to occur because a jury failed to adequately understand the evidence presented at trial." 94

With no explanation as to how the Harden jury misunderstood the evidence as did the Cook jury, the Court simply said that "[w]e agree with that principle, and conclude that '[t]his is such a case." 95 Surprisingly, the Court did not analogize to Cook or attempt a case illustration, and a closer look at the Cook case reveals why. It is easily distinguishable from Harden because at its core, the Cook case illustrates a jury's misapprehension of the evidence (thereby satisfying the standard of review); whereas Harden illustrates a jury's misapprehension not of the evidence, but of the law. The significant evidentiary and legal distinctions between the two cases will be identified below, but a brief overview of the facts of Cook is necessary to understand the distinctions.

In Cook, the defendant appealed her second degree murder conviction, alleging that the State failed to prove beyond a reasonable doubt that she did not act in defense of another when she shot and killed her husband's attacker with a shotgun. 96 A few months before the fateful day the Cooks purchased a two acre tract of land and prepared to build a house upon it, but one of their neighbors, Homer Buckler, continually harassed and threatened the Cooks, tore down their fence, harassed Mr. Cook's ninety-two year old father, piled rocks and dirt in their driveway, and vandalized the Cook's cabin. 97 The Cooks contacted the local sheriff, who asked Mr. Buckler to apologize to the Cooks, but instead of apologizing, Mr. Buckler told them he would kill them if they dared call the authorities again regarding his conduct. 98

On May 7, 1997, Mrs. Cook heard a loud truck engine racing outside her home and saw Mr. Buckler throwing rocks at her property and at her husband. 99 She loaded a shotgun, went outside, and fired a warning shot hoping Mr. Buckler would leave. 100 When the menacing conduct escalated, Mrs. Cook rushed to her husband's side, loaded another shot, and Mr. Buckler asked, "What are you going to do, shoot me?" 101 Mrs. Cook told him she did not want to hurt anybody, and she pleaded with Mr. Buckler to just leave them alone.

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admitted that the best result he initially hoped for was a retrial. He was pleasantly surprised and "shocked" when he read the opinion ordering the immediate acquittal of his client.

94 Id. (quoting State v. Cook, 515 S.E.2d 127, 138 (W. Va. 1999)).
95 Id. (quoting Cook, 515 S.E.2d at 138).
96 Cook, 515 S.E.2d at 129.
97 Id. at 130–31.
98 Id.
99 Id. at 131.
101 Id.
102 Id.
After learning that Mrs. Cook had called the police, Mr. Buckler, standing at six feet, four inches and weighing over three hundred pounds, turned to Mr. Cook, who was only five feet, six inches and weighed only one hundred and forty pounds, and threatened, "You’re a [expletive] dead man. I warned you, I told you to never call them." 103

As the Cooks turned to walk away, Mr. Buckler spun Mr. Cook around, threw him to the ground, and started swinging his fists and beating him. 104 As Mr. Cook was begging for mercy, Mrs. Cook rushed to his side, and tried pulling Mr. Buckler away with one hand while holding the shotgun in the other. 105 Mr. Buckler stopped beating Mr. Cook long enough to hit Mrs. Cook and rip her shirt open, who later testified that at this point, she was terrified that Mr. Buckler was going to make good on his threat and kill her husband. 106 Even after getting hit, Mrs. Cook still pleaded for Mr. Buckler to stop, but he ignored her and continued beating her husband. 107 Fearing for her husband’s life, and after unsuccessfully trying to pull Mr. Buckler off her husband, Mrs. Cook took aim at Mr. Buckler’s right arm. 108 As she shot, Mr. Buckler lifted up his right arm to hit Mr. Cook again, so the blast hit Mr. Buckler in the right armpit, causing him to fall off Mr. Cook. 109 Mrs. Cook reloaded the shotgun in case she needed to fire a second shot, but she did not fire again because Mr. Buckler was on the ground and the violence had ended. 110

1. Evidentiary Distinctions Between Harden and Cook

There are two important evidentiary distinctions that should be noted between Harden and Cook. First, unlike in Harden, where the only eyewitness to Daniel’s death was Tanya, there were three neighbors who saw and heard the entire exchange between Mr. Buckler and the Cooks and testified as eyewitnesses, corroborating the testimony of Mr. and Mrs. Cook. 111 There was no corroborating eyewitness testimony supporting Tanya’s story. The testimony of these additional eyewitnesses in Cook confirmed that the Cooks did everything in their power to avoid the confrontation: Mr. Buckler threatened Mr. Cook and spun him around as he was walking away, Mr. Buckler threw him to the ground

103 Id. at 130–31.
104 Id. at 131.
105 Id.
106 State v. Cook, 515 S.E.2d 127, 131 (W. Va. 1999)
107 Id. at 132.
108 Id.
109 Id.
110 Id. Mr. Buckler lived for a short time after the shot, but was pronounced dead a few hours later at a Cumberland, Maryland hospital. Id. at 133.
111 Id. at 131. Clayton Brent, Rebla Jackson, and her daughter, Norma Jackson, were all neighbors who lived close to the Cooks. After hearing Mrs. Cook’s first warning shot, they all went outside to see what was going on. Id. at 131–32.
and started “wailing” with his arms, “coming down with a lot of force,” and Mr. Buckler also struck Mrs. Cook.\textsuperscript{112}

Second, unlike in \textit{Harden}, where the Court disregarded the State’s compelling testimony which conflicted with Tanya’s testimony, the \textit{Cook} Court addressed the State’s evidence which conflicted with the Cooks’ testimony and the corroborating testimony of three eyewitnesses.\textsuperscript{113} The State called Mr. Buckler’s twelve-year-old son to the stand, who testified that he was in the cab of his dad’s truck with his brother during the entire incident, and that he heard more than he actually saw because it took place behind the truck.\textsuperscript{114} The Court noted that “a careful reading of the child’s testimony reveals that he selectively informed the jury of what he saw and heard.”\textsuperscript{115} After illustrating the child’s selective testimony and comparing it with the overwhelming corroborating eyewitness testimony of the Cooks and their neighbors, the Court concluded:

[T]he law cannot allow empathy for the child to sway the balance of justice. In light of the corroborated testimony of three eyewitnesses we must conclude that Mrs. Cook presented sufficient evidence to force the state to have to prove beyond a reasonable doubt that she \textit{did not} act in defense of another when she used deadly force. The state failed to carry its burden on this issue.\textsuperscript{116}

Therefore, the \textit{Cook} case—from an evidentiary standpoint—is significantly different from \textit{Harden} because (1) the jury verdict in \textit{Cook} was inconsistent with the overwhelming, corroborating testimony of three eyewitnesses whereas the verdict in \textit{Harden} was only inconsistent with the defendant’s uncorroborated testimony; and (2) the State’s key witness upon whose testimony the \textit{Cook} jury relied was the victim’s biased twelve year old son who heard more than he saw whereas the State’s key witnesses upon whose testimony the \textit{Harden} jury relied were unbiased experts who testified to the gun’s distance and trajectory when fired, and the victim’s body position when he was killed as as-

\begin{footnotes}
\item[113] \textit{Id.} at 139–40.
\item[114] \textit{Id.} at 139.
\item[115] \textit{Id.} at 139–40. The following exchange with the child took place on cross examination:  
  Q. Did you ever see Gerald start to walk away from your father? A. No. Q. Did you see your father walk behind Gerald? A. No. Q. Did you see Gerald turn and try to push your father away? A. No. Q. Did you see your father pull Gerald to the ground? A. No. Q. Did you see your father standing over top of Gerald? A. No. Q. He wasn’t hitting him. A. No. Q. You don’t remember Brenda Cook saying, stop, stop, please stop? A. No.
\item[116] \textit{Id.} at 140. ("The manner in which the child chose to testify is understandable. His father was killed.").
\end{footnotes}
certained by a blood pooling and spattering analysis. For these two evidentiary reasons, the Court was certainly more justified in its reversing Mrs. Cook’s conviction than Mrs. Harden’s.

Moreover, as Justice Workman clarified in a concurring opinion in Cook, only in “rare and exceptional” cases should the West Virginia Supreme Court of Appeals overturn a jury verdict. It follows that if a subsequent majority on the West Virginia Supreme Court of Appeals cites Cook when reversing a guilty verdict and barring a retrial, then the Court should at least try to closely analogize to Cook, and establish what it is about that case that makes it as “rare and exceptional” as Cook was. Ironically, the Harden Court ignored an important principle enunciated by the Court in Cook: “the law cannot allow empathy for the child to sway the balance of justice.” However, the Harden Court seemingly swayed the balances of justice out of empathy for an abused woman whereas in Cook it was unwilling to do so out of empathy for a young child who lost his father. These multiple, significant evidentiary distinctions between these two cases should have easily barred the Harden Court from citing Cook to dispose of the case in the same manner.

2. Legal and Procedural Distinctions Between Harden and Cook

In addition to the evidentiary differences between Harden and Cook, two important legal and procedural differences between the cases should have prevented the Harden Court from a Cook-style disposition. These two related differences are what make Cook a case about the jury’s misapprehension of the evidence and Harden a case about the jury’s misapprehension of the law. First, the Cook Court did not overturn any previous case law or make any substantive changes to the law of the law of defense of another. Second, and as a result, the Cook Court approved of the jury instructions given on the law of defense of

\[117\] Id. at 140 (Workman, J., concurring) ("I write separately only to emphasize that it is the rare and exceptional case in which I would embark on overturning a jury verdict . . . Justice Davis, however, has made an obviously thorough review of all the evidence and has artfully set forth why this case is that rare and exceptional one.").


\[119\] Id. at 139.

\[120\] This statement should not be read to minimize or take lightly the seriousness of Tanya Harden’s brutal abuse at the hands of her husband.

\[121\] See Cook, 515 S.E.2d at 134–36 (stating that “[o]ur cases have succinctly articulated the development and scope of the doctrine of self defense . . . [h]owever, we have not had occasion to thoroughly discuss the defense of another doctrine. The facts of the instant case require that we fully explore this doctrine’s principles.”). The Court, after reviewing dozens of past West Virginia Supreme Court cases, decisions from courts of other states, decisions from the U.S. Supreme Court, law review articles, treatises, stated, “[i]n this Court’s review of its past decisions . . . the doctrine of defense of another may be succinctly articulated.” Id.
others at the original trial. Because there was no confusion about which law the jury was to apply and there were no new changes to incorporate to the law in Cook, there was no need to remand back to the trial court for a new trial. In other words, the jury in Cook misapprehended the evidence, not the law.

In contrast, the Court in Harden made significant new additions to the law of self-defense and also overruled multiple precedential cases that will be explained in greater detail in Part IV. The Court also objected to the jury instructions regarding self-defense because a portion of the instruction was premised on one of the cases which the Court ultimately overruled. Similarly, the Court took issue with some arguments made by the State during closing argument because again, they were based on precedent that the Court overruled on appeal.

For these reasons, the Court cannot persuasively argue that the Harden jury misapprehended the evidence, as did the jury in Cook. Instead, it is more accurate to say that the Harden jury misapprehended the law ex ante, but only because the Court had not yet made those significant changes. But even this is a stretch. Can a jury be fairly faulted for “misapprehending” the law it does not yet have—the law that the Court would later create?

Normally, under these circumstances one would expect a reviewing court to remand back to the circuit court for a new trial to give the jury an opportunity to apply the law consistent with the appellate court’s holdings. The

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122 Id. at 138 ("The trial court gave an adequate instruction of the law regarding the defense to the jury.").

123 Syl. pt. 4, State v. Harden, 679 S.E.2d 628, 631 (W. Va. 2009) ("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"); see also id. at 649 (Benjamin, C.J., dissenting) ("[N]ew Syllabus Point 4 was created by the majority from whole cloth and has absolutely no support in the precedent of this Court.").

124 Syl. pt. 3, id. at 631 ("Our holding in Syllabus Point 6 of State v. McMillion . . . is expressly overruled.") (citation omitted); Syl. pt. 5, id. ("Our decision in Syllabus Point 2, State v. Crawford . . . is expressly overruled.") (citation omitted).

125 Id. at 634, 637 ("It is clear from the record that the State bases its arguments largely on Syllabus Point 6 of our decision in State v. McMillion . . . It is also clear that the State bases its argument on the trial court’s self-defense instruction." After reviewing and overruling McMillion, the Court stated, "[h]aving thus concluded, we find the State’s arguments above-described unpersuasive."); see infra Part IV.A.

126 Harden, 679 S.E.2d at 637 (Before concluding that an occupant of a home no longer had a duty to retreat if attacked by a co-occupant, the Court pointed out that “during closing arguments the State advanced this argument, telling the jury that the defendant ‘could have walked out of that trailer. Period. But she didn’t.’ Implicit in this argument is that the defendant had a duty to retreat from her.").

127 Indeed, as detailed in supra note 93, this is the best-case scenario that Harden’s appellate counsel, Russ Cook, had hoped for. Also, it should be noted that this result does not conflict with the constitutional protection against double jeopardy. See Burks v. United States, 437 U.S. 1, 9 (1978) ("It is elementary in our law that a person can be tried a second time for an offense when
Court, however, barred a retrial, and on remand ordered the circuit judge to enter an immediate order of acquittal. Did the Court perhaps deny a retrial and order the immediate acquittal out of fear that, even if the jury applied the new law and had new jury instructions reflecting the new law, the jury would still reach the same guilty verdict? Because the Court did not explain its motivations other than by citing to Cook, which was significantly different from Harden on evidentiary and legal grounds, one can only speculate about why the Court did not provide for a retrial on remand consistent with the new law it created.

IV. THE GOOD, THE BAD, AND THE UGLY LAW

After a review of the procedural flaws of the Court’s decision in Harden, it is now an appropriate time to outline the Court’s substantive changes to the law of self-defense. Part IV.A. outlines how the Court cleared up a lot of confusion by overruling State v. McMillion. Part IV.B. discusses how the Court backtracked by injecting more confusion to the law of self-defense by creating a new syllabus point which is wholly unsupported by previous precedent. Finally, Part IV.C. addresses how the Court took the positive step of moving West Virginia from the minority to the majority of the other states regarding the duty to retreat.

A. RECONCILING REASONABLENESS, IMMINENT DANGER, AND PREVIOUS APPREHENSIONS OF DANGER: RIDING JURY INSTRUCTIONS OF McMILLION CONFUSION

As alluded to above, the Court correctly overruled a previous case upon which a portion of the jury instructions on self-defense and the State’s argument was based. Specifically, the Court took issue with the poorly-phrased precedent: “No apprehension of danger previously entertained will justify the commission of the homicide; it must be an apprehension existing at the time the defendant fired the fatal shot.” This precedent was woven into the jury instruction given at Tanya’s trial, “[Y]ou must find that the apprehension existed at the time that the defendant attacked the victim. No apprehension of danger previously entertained will justify the commission of homicide.”

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128 See supra note 93 and accompanying text.
129 See supra note 94 and accompanying text.
130 138 S.E. 732 (W. Va. 1927).
131 See supra note 124.
133 Id. at 634 (citing Syl. pt. 6, McMillion, 138 S.E. 732).
134 Id.
When read in context, however, the McMillion holding was just a confusing, somewhat archaic way of describing the imminent danger requirement of self-defense, which the Court ultimately left intact. The sentence immediately preceding the McMillion language about previous apprehensions of danger illustrates this point: "Under his plea of self-defense, the burden of showing the imminency of the danger rests upon the defendant. No apprehension of danger previously entertained . . ." Even so, the Court characterized the McMillion language not as if it spoke directly to the imminent danger requirement itself, but as though it absolutely prohibited the admission of any evidence of previous misapprehensions of danger to help the jury evaluate the reasonableness of the defendant’s belief of the imminent danger.

As the Court correctly explained, the reasonableness of the defendant’s belief that when she acted in self-defense, she was in imminent danger of death or serious bodily injury, involves a two-part inquiry, with subjective and objective components. The Court summarized this two-part inquiry:

First, a defendant’s belief that death or serious bodily injury was imminent must be shown to have been subjectively reasonable, which is to say that a defendant actually believed, based upon all the circumstances perceived by him or her at the time deadly force was used, that such force was necessary to prevent death or serious bodily injury. Second, that the defendant’s belief must be objectively reasonable when considering all the circumstances surrounding the defendant’s use of deadly force, which is to say that another person, similarly situated, could have reasonably formed the same belief.

It then follows that, to the extent that McMillion could be understood by prosecutors, defense attorneys, and especially lay jurors to prohibit the admission of any evidence of previous misapprehensions of danger, this two-part inquiry would be meaningless. How could a jury effectively evaluate the reasonableness of a defendant’s belief that his or her life was imminently in danger if it could not hear evidence regarding the prior circumstances leading up to the defendant’s actions in self-defense? This absolute prohibition would certainly exclude many of the circumstances that had bearing on the defendant’s mental state when she acted in self-defense. Accordingly, this absolute prohibition, as

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135 See supra note 13 and accompanying text.
136 Harden, 679 S.E.2d at 634 (citing Syl. pt. 6, McMillion, 138 S.E. 732).
137 Id. at 635 (noting that "[o]ur precedent since McMillion clearly establishes that a defendant . . . is 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.") (quoting State v. Dozier, 255 S.E.2d 552, 555 (W. Va. 1979)).
139 Id. at 635.
the Court correctly noted, would conflict with more recent case law establishing
that "the reasonableness of the [defendant's] conduct may depend upon past
actions of the decedent, including threats, violence, and general reputation."[140]

Ultimately, in expressly overruling McMillion, the Court held that
"where a defendant has asserted a plea of self-defense, evidence showing that
the decedent had previously abused or threatened the life of the defendant is
relevant evidence of the defendant’s state of mind at the time deadly force was
used."[141] Therefore, the Court’s minor mischaracterization of the McMillion
language is excusable for two reasons. First, there is very little difference be-
tween the imminent danger requirement itself and the requirement that the
defendant’s belief of the imminent danger be reasonable. Second, and more im-
portantly, eliminating the outdated and confusing McMillion language was abso-
lutely necessary to clear up any future confusion and possible blurring of these
two self-defense requirements. The Court is to be commended for clearing up
any confusion caused by McMillion. Fortunately for future criminal defendants,
self-defense instructions free of references to this outdated and puzzling syllab-
us point will be more readily understood by the jury.

B. New Syllabus Point 4: Negating Necessary Elements of the Offenses
Charged, Despite a Lack of Evidence of Self-Defense?

After clarifying the law of self-defense in this regard, the Court erased
its gains by creating a new syllabus point which lacked any significant explana-
tion or support in prior case law. After overruling McMillion, the Court went on
to hold that "where it is determined that the defendant’s actions were not rea-
sonably made in self-defense, evidence that the decedent had abused or threat-
ened 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 in-
tent."[142] The Court’s failure to provide any guidance or examples to aid in the
interpretation of this groundbreaking new syllabus point is deeply troubling and
inexcusable.

What does the Court cite in support of this new holding? The
Court stated that, "We have similarly held that evidence of prior threats and
violence is relevant to ‘negate criminal intent.’"[143] The Court also explained
that “a defendant’s domestic abuse was relevant ‘to establish either the lack of
malice, intention, or awareness, and thus negate or tend to negate a necessary
element of one or the other offenses charged.’"[144] Notice the italicized, signifi-

[140] Id. (citing State v. W.J.B., 276 S.E.2d 550, 556 (W. Va. 1981)); see also supra note 137,
and accompanying text.
[141] Harden, 679 S.E.2d at 636.
[142] Id. at 637 (emphasis supra).
[143] Id. at 635 (quoting State v. Lambert, 312 S.E.2d 31, 35 (W. Va. 1984)).
Wyatt, 482 S.E.2d 147, 149 (W. Va. 1996)).
cant addition that the Court inserted right before the actual language from the prior case. That the Court felt the need to graft the italicized phrase onto the prior precedent, attempting to ground its new holding in a previous one, is a telltale sign that the Court went out on a limb.

Chief Justice Benjamin in dissent correctly called foul on the Court’s dramatic stretching of past precedent. Specifically, the Court mistakenly relied on State v. Lambert which concerned the effects of the defenses of compulsion, coercion, and duress upon criminal intent and provided 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.” Moreover, in Lambert, there was sufficient corroborated testimony and evidence to establish a legitimate defense of coercion, negating an element of the offense of welfare fraud. In contrast, under new syllabus point 4, sufficient evidence of self-defense is not needed to negate an element of the offense charged as long as there is sufficient evidence of past abuse or threats. Thus, it is hard to see how Lambert provides any support for new syllabus point 4.

In addition, the Court wrongly relied upon State v. Wyatt, a case which largely revolved around the Battered Spouse Syndrome. Chief Justice Benjamin easily distinguished Wyatt from Harden: “The majority also cites State v. Wyatt . . . . [h]owever, Wyatt concerned the Battered Spouse Syndrome which was not raised by the defendant at trial [in this case] and was not supported by the evidence.”

Apart from the untenable legal grounds which the Court cited in creating new syllabus point 4, its sweeping implications are equally disconcerting. A fair reading of the syllabus point indicates that even when the evidence shows that a defendant did not act in self-defense, he or she could still be legally justified upon a showing that the decedent previously abused the defendant. Therefore, if at least one of the six elements of self-defense is lacking, a defendant would still be justified in killing as long as the decedent previously abused the

145 Id. at 649 (Benjamin, C.J., dissenting) (“[N]ew 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.”).

146 Id. (quoting Lambert, 312 S.E.2d at 33).

147 Lambert, 312 S.E.2d at 34 (“In the present case, the appellant’s testimony concerning the coercion of her husband was not corroborated, and was sufficient to warrant the giving of a coercion instruction to the jury.”) (emphasis added).


149 Id. (emphasis added); see also Brief of Appellee, supra note 23.

150 See supra notes 10–15 and accompanying text.
defendant. Does this mean that from here on out, the imminent danger requirement has been relaxed, or abolished altogether for battered spouse defendants, as so many scholars and commentators desire? Could this also mean that one would still be justified if another self-defense requirement was lacking—for instance—that the defendant was not the aggressor? What of the proportionality requirement? Could a hypothetical battered spouse be justified in shooting her abuser at point-blank range after he merely grabs her by the arm? What about the objectively reasonable requirement that the defendant claiming self-defense must have an objectively reasonable belief that deadly force was necessary? Could this, too, be excused as long as there is evidence of domestic violence? Finally, what about the passage of time between the domestic violence and the homicide? Would evidence of domestic violence which occurred a day before, a week before, a year before, or a decade before the homicide still be sufficient to negate a necessary element of a murder charge?

Under a fair reading of new syllabus point 4, these are all possible outcomes, which is exactly why the Court’s complete failure to confine or explain this syllabus point is so unnerving. Without any further guidance or clarification from the Court, new syllabus point 4 seemingly creates gaping loop holes through which defense counsel representing battered clients may end-run around any one of the self-defense requirements simply by putting on evidence of domestic abuse, no matter when it last occurred or how serious it was. An adequate explanation addressing these legitimate questions is sorely needed for lower court judges and practitioners.

These hypothetical, yet plausible scenarios perfectly exemplify the fears of one commentator who noted, “When one seeks to pull at the thread of imminence, the fabric of self-defense unravels.” While future jury instructions will be easier to understand without references to the confusing language of McMillion, the Court generated much more confusion when it created new syllabus point 4 with no guidance, explanation or valid support from past precedent.

151 See supra notes 19–20 and accompanying text.

152 See supra note 14 and accompanying text.

153 See Harden, 679 S.E.2d at 649–50 (Benjamin, C.J., dissenting) (fearing the resulting effects of new syllabus point 4: “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.”).

C. Moving from the Minority to the Majority: Eliminating the Duty to Retreat from an Attacking Co-Occupant and Overruling State v. Crawford

The Court buried a West Virginia precedent that had survived for far too long when it seized upon the State’s naïve argument made at closing: that Tanya “could have walked out of that trailer [while Danuel was either passed out or asleep]. Period. But she didn’t.”155 The Court disagreed with this statement by saying, “Implicit in this argument is that the defendant had a duty to retreat from her home.”156 In fact, as the law of self-defense stood in West Virginia prior to Harden, if an unlawful intruder invaded the sanctity of another’s home, the latter had no duty to retreat, but could stand his or her ground and defend the “castle.”157 However, State v. Crawford, a case decided over a century ago, carved out a baffling exception to the castle doctrine: if a person was under attack by a lawful co-occupant of the home (as opposed to an intruder), the former was under a legal duty to retreat.158

After a thorough review of various cases from other courts, surveying the majority and minority states in regards to the duty to retreat,159 and after examining the public policy consequences of this duty, the Court rightly overruled Crawford,160 specifically holding that:

An occupant who is, without provocation, attacked in his or her home, dwelling or place of temporary abode, by a co-occupant who also has a lawful right to be upon the premises, may invoke the law of self-defense and in such circumstances use deadly force, without retreating, where the occupant reasonably believes, and does believe, that he or she is at imminent risk of death or serious bodily injury.161

156 Id. To be fair, if the State really wanted to imply that there was a duty to retreat or make it a part of their case theme, it probably would have used stronger language than “could have walked out of that trailer.” Id.
157 Id.
158 Syl. pt. 2, State v. Crawford, 66 S.E. 110 (W. Va. 1909) (“On a trial for murder, instructions to the jury asserting defendant’s right to stand his ground and not retreat . . . are inapplicable where the evidence shows defendant and deceased were at the time of the homicide jointly occupying the house where the killing occurred . . . .”).
159 Harden, 679 S.E.2d at 638. As of 1999, only Connecticut, Kentucky, Massachusetts, New Hampshire, New Jersey, North Dakota, Rhode Island, and West Virginia imposed a duty to retreat upon a person under attack from a co-occupant. As of the summer of 2009, when Harden was decided, the states of Alabama, Arkansas, Florida, Iowa, Maryland, Michigan, Minnesota, New York, North Carolina, Ohio, Pennsylvania, and now West Virginia do not impose a duty to retreat on persons under attack from co-occupants of the home. Id. at 637 n.7, 638.
160 Id. at 637–40.
This much-needed decision recognizes the reality that when a battered spouse retreats from an attacking co-occupant, often times she is worse off than she would have been had she just stayed and succumbed to the violence. For instance, as the New Jersey Supreme Court correctly noted, "During repeated instanced of past abuse, she has ‘retreated,’ only to be caught, dragged back inside, and severely beaten again. If she manages to escape, other hurdles confront her. Where will she go if she has no money, no transportation, and if her children are left behind . . . ?" Justice Cardozo, pointing out the inherent unfairness of such a duty, rhetorically asked, "‘Flight is for sanctuary and shelter, and shelter, if not sanctuary, is in the home . . . Why . . . should one retreat from his own house, when assaulted by a partner or co-tenant, any more than when assaulted by a stranger who is lawfully upon the premises?’" The Court, recognizing the absurdity and danger of the distinction, promoted sound public policy by abandoning the duty to retreat altogether when the circumstances give rise to the use of deadly force in self-defense.

In addition, the Court was careful to give guidance to future judges and practitioners by explaining the scope of its new holding in a footnote. Under the "castle doctrine," the threat threshold is relatively low, meaning that one is justified in defending herself and her home with deadly force if the intruder merely threatens her or threatens to commit a felony. But the Court, in removing the duty to retreat from an attacking co-occupant, was careful to explicitly state that the threat threshold remained high in cases of self-defense. The Court reasoned that, "Given that heated exchanges may be commonplace between household occupants, we believe the greater threat of imminent death or serious bodily injury is necessary to justify the use of deadly force between co-occupants."

Even though the removal of the duty to retreat was a very positive step in the self-defense law of West Virginia, as Chief Justice Benjamin conceded in dissent, he argued that this new holding was completely irrelevant to the facts of Harden:

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

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162 Id. at 639 (citing New Jersey v. Gartland, 694 A.2d 564, 570–71 (N.J. 1997)).
163 Id. at 639–40 (citing People v. Tomlins, 107 N.E. 496, 499–500 (N.Y. 1914)).
164 Id. at 640 n.9.
165 Id.
166 Id. at 640.
Syllabus Points 5 is wholly irrelevant to the decision of this case.\footnote{State v. Harden, 679 S.E.2d 628, 649 (W. Va. 2009) (Benjamin, C.J., dissenting).}

This statement acknowledges the State’s expert testimony that the Court ignored, and credits the jury with the reasonable inferences that could have been drawn from it, as the proper standards of review require.\footnote{See supra note 67 and accompanying text.} Although syllabus point 5 is perhaps irrelevant to the facts of Harden, it nevertheless represents a positive and encouraging advancement in self-defense law of West Virginia. This holding moves the state to the commanding position of the majority of other states which do not place a duty to retreat on occupants of a home when they are attacked by a co-occupant.

V. CONCLUSION

Whether one agrees with the decision in State v. Harden, there is no doubt or disagreement that its holdings will reverberate upon and affect all future self-defense cases. Especially those involving evidence of battered spouses, even though the Battered Spouse Defense was not raised at Tanya’s trial. Procedurally, the Court mishandled this case. It gave only lip service to the standard of review by failing to even acknowledge the State’s most compelling expert testimony. It also failed to credit the jury with the inferences it drew from all the evidence, and ignored the credibility determinations the jury made during trial. The Court painted an evidentiary picture that conveniently fit the requirements of self-defense. This amounted to a usurpation of the jury’s fact-finding role by an appellate court. Also, by relying upon an easily distinguishable case to bar a retrial, even after significantly altering the self-defense legal landscape, the Court opened the door for future courts to follow in its footsteps when it differs with a factually-driven outcome below. This in turn eats away at the notion that in order to dispose of a case as the Cook court did, the case has to be rare and exceptional.

Substantively, the Harden decision was a mixed bag. To be sure, the Court made positive changes in the law by eliminating the archaic and perplexing language of McMillion and the unfair duty to retreat from an attacking co-occupant established by Crawford. However, new syllabus point 4 should raise eyebrows. Even when there is insufficient evidence of self-defense, meaning that one or more of its elements are lacking, the defendant could still be justified in using deadly force if it can be shown that he or she had previously been threatened or abused. This is an enormous upheaval in the law that will surely impact future battered spouse cases. The policy implications of the Court’s decision should be thoroughly debated by the West Virginia House of Delegates. At a minimum, the Court should take the next available opportunity to give any
meaningful guidance and clarification as to how syllabus point 4 should be interpreted.

Time will tell whether Chief Justice Benjamin’s fears regarding this landmark decision will come to fruition:

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... 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.169

When one views the result of State v. Harden in the context of its facts, Chief Justice Benjamin’s fears and concerns seem entirely sensible. At no point in time during the Harden’s marriage—until the night of Danuel’s death—had Tanya been physically or sexually abused by her husband. Danuel’s heavy drinking led to the one “night of terror” wherein he physically and sexually assaulted Tanya. If Tanya’s self-help actions, judged by the jury as not done in true self-defense in light of the State’s expert testimony, were ultimately excused and justified by the Court after only one night of domestic violence, won’t the women who have been subjected to years of domestic violence have all the more reason to take “justice” (as they—not a court of law or a jury of their peers—see it) into their own hands when there is no imminent danger?

While acknowledging that there are inadequacies to current methods of domestic violence detection, prevention, treatment, education, and deterrence, the solution to domestic violence should not be an implicit condoning by the

169 Id. at 648 (Benjamin, C.J., dissenting); see also Kaufman, supra note 20, at 369 (“If the rules of self-defense permit an exception to this principle in the case of imminent danger, it is an exception that is best kept to an absolute minimum. As Joshua Dressler cautions, ‘we should hesitate long and hard before we promote a criminal defence [sic] that categorically justifies the taking of life before it is immediately necessary.’ Before we proceed with any modification (let alone elimination) of the imminence restriction, we had better consider very carefully the implications of such a radical change in the long-established and highly effective principles controlling the private resort to violence.”) (citations omitted).
West Virginia Supreme Court of Appeals of the abused taking matters into his or her own hands at the most convenient time to permanently end the violence by killing the abuser. Instead of a judicial unraveling of the delicate legal fabric of self-defense, a better approach to addressing the serious domestic violence problem in West Virginia would be through the legislative enactment of stiffer laws and penalties, providing greater funding for and access to victims' rights organizations, implementing more effective educational efforts and programs, and beefing up law enforcement responses.

Regardless of whether one reacts to State v. Harden by applauding, cringing or both, one thing is certain: criminal practitioners and judges must take notice of this landmark case to know how to argue and apply the new law to self-defense cases as best as they can.

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