

Page 836
471 S.E.2d 836
267 Ga. 9
CHESTER

v.
The STATE.
No. S96A0236.
Supreme Court of Georgia.
May 6, 1996.
Reconsideration Denied July 12, 1996.

Glynn County Superior Court; Hon. James R. Tuten, Jr., Judge. No 9300497.

J. Jeffrey Lacy, Timothy L. Barton, Brunswick, for Anthony Bernard Chester.

Glenn Thomas, Jr., Dist. Atty., Woodbine, Michael J. Bowers, Atty. Gen., Dept. of Law, Atlanta, Stephen D. Kelley, Asst. Dist. Atty., Brunswick, for State.

Caroline Wight Donaldson, Asst. Atty. Gen, Dept. of Law, Atlanta.

CARLEY, Justice.

In an unprovoked attack, Anthony Chester fatally shot his girlfriend. He fled the scene, but surrendered to police within an hour of the homicide and gave a statement wherein he admitted firing the fatal shots. He was tried before a jury and found guilty of malice murder, possession of a firearm during the commission of a crime and possession of a firearm by a convicted felon. For the murder, he was sentenced to life and, for the two possession of a firearm offenses, he was given consecutive 5-year sentences. He appeals from the judgments of conviction and sentences entered by the trial court on the jury's guilty verdicts. 1

1. The evidence is sufficient to authorize a rational trier of fact to find proof of Chester's guilt of the murder and the two possession of a firearm offenses beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

2. Although Chester introduced expert opinion testimony that he suffered from the battered person syndrome, the following requested

Page 836

charges were not given by the trial court:

Expert testimony regarding the battered person syndrome authorizes a jury to find that, notwithstanding any lapse in time since the mate's last assault, Mr. Chester honestly was trying to defend himself although his mate was not at the moment physically attacking him. ... You may consider the testimony of an expert witness on the battered person syndrome to help explain why a person suffering the battered man syndrome would not leave his mate, would not inform the police or friends, and would fear increased aggression against himself. (Emphasis supplied.)

Urging that the syndrome was his sole defense, Chester enumerates as error the refusal to give these requested charges.

In this state, the battered person syndrome is not a separate defense and expert testimony as to that syndrome is admissible only to assist the jury in evaluating a defendant's claim of self-defense. *Pugh v. State*, 260 Ga. 874, 876(3), 401 S.E.2d 270 (1991); *Chapman v. State*, 259 Ga. 706, 707(4), 386 S.E.2d 129 (1989); *Smith v. State*, 247 Ga. 612, 619, 277 S.E.2d 678 (1981). When a defendant relies upon the battered person syndrome to justify his use of physical force against the victim, he must show that he previously was subjected to physical force employed against him by the victim. *Pugh v. State*, supra at 874, 401 S.E.2d 270 (defendant "had been severely abused throughout the seven years of her marriage to the victim"); *Chapman v. State*, supra at 706, 386 S.E.2d 129 ("[d]uring the courtship and their marriage, the deceased would frequently beat" the defendant); *Chapman v. State*, 258 Ga. 214, 215(2), 367 S.E.2d 541 (1988) ("the defendant testified that she shot the victim in self-defense after numerous beatings"); *Smith v. State*, supra at 613, 277 S.E.2d 678 (victim "had beaten [the defendant] periodically"). Although the evidence shows that the victim previously made verbal threats to Chester, there is no evidence that she ever had attacked him physically. It follows that, although an expert witness

Page 838

opined that Chester suffered from the battered person syndrome, there was no evidence that he was in fact a battered person who could claim self-defense as against the victim. Therefore, the battered person syndrome was not relevant to Chester's claim of self-defense and his refused requests to charge were not adjusted to the evidence. There was no

"last assault" by the victim since she never had committed any prior act of "physically attacking" Chester and he could not reasonably have feared "increased aggression" since he had not been the victim of any past aggression. It is never error to refuse to charge on an issue which is not adjusted to the evidence. *Bland v. State*, 210 Ga. 100, 107(8), 78 S.E.2d 51 (1953).

Moreover, even assuming that the battered person syndrome had been relevant to Chester's claim of self-defense, a trial court's charge "should contain no such summary of the evidence as might to a jury either seem to be an argument or amount to the expression or intimation of an opinion thereon." *Thomas v. State*, 95 Ga. 484, 485(3), 22 S.E. 315 (1895). Accordingly, a trial court is not required, "even after request, to specifically point out particular evidence in behalf of the defendants which the jury should specially consider." *Balark v. State*, 81 Ga.App. 649, 654(1)(c), 59 S.E.2d 524 (1950). Chester's requests "are more adjusted to the exhortation of counsel than to the impartial clarity which should characterize the instructions of the court," and this argumentativeness "is sufficient reason for their refusal." *Balark v. State*, supra at 654(1)(c), 59 S.E.2d 524. It follows that it was not error to refuse to give the requested charges. See *Pugh v. State*, supra at 876(3), 401 S.E.2d 270.

3. Over objection, the State's expert witness was allowed to remain in the courtroom during the testimony of Chester's expert witness and Chester urges that it was error to allow this witness to testify after he violated the rule of sequestration. However, even assuming, without deciding, that the rule was violated by the witness, it was not reversible error to allow him to testify, since a violation of the rule of sequestration goes only to the credibility, rather than the admissibility, of the violating witness' testimony. *Johnson v. State*, 258 Ga. 856, 857(4), 376 S.E.2d 356 (1989). Compare *Childress v. State*, 266 Ga. 425, 467 S.E.2d 865 (1996) (rule of sequestration violated by actions of witness outside of the courtroom).

4. Chester urges that it was error to allow the State's expert to give testimony regarding the battered person syndrome, since he was not shown to be an expert as to that specific syndrome. However, the record shows that, by virtue of his training and expertise, the State's witness was eminently qualified as an expert in the general field of forensic psychology. That, as the result of his general expertise, the State's witness had little regard for the viability of the battered person syndrome in specific would not disqualify him from testifying as to his opinion concerning whether Chester suffered therefrom. See *Taylor v. State*, 261 Ga. 287, 289(1)(a), 404 S.E.2d 255 (1991).

Judgments affirmed.

All the Justices concur, except BENHAM, C.J., FLETCHER, P.J., and SEARS and HUNSTEIN, JJ., who concur specially.

BENHAM, Chief Justice, concurring specially.

While I agree with the holdings of Divisions 1, 3, and 4 of the majority opinion, I write separately because I disagree with the majority's conclusion in Division 2 that a defendant relying on battered person syndrome as a defense must show the he/she was previously subjected to physical force at the hands of the victim of the defendant's aggression. Because I believe that the enumeration of error addressed in Division 2, the failure of the trial court to give jury instructions requested by the defendant, can be affirmed without sailing the uncharted waters on to which the majority has ventured, I join the majority's judgment of affirmance.

Citing the legal determination that battered person syndrome is not a discrete defense but serves only as evidence supporting the defendant's claim that he/she was justified in using force against the victim, this court has repeatedly rejected defendants' assertions

Page 839

that the trial court erred by failing to give requested jury charges on the battered person syndrome. See *Smith v. State*, 265 Ga. 495(2), 458 S.E.2d 347 (1995); *Pugh v. State*, 260 Ga. 874, 401 S.E.2d 270 (1991); *Chapman v. State*, 259 Ga. 706(4), 386 S.E.2d 129 (1989); *Chapman v. State*, 258 Ga. 214, 216, 367 S.E.2d 541 (1988). See also *Motes v. State*, 192 Ga.App. 302, 305, 384 S.E.2d 463 (1989) (written by Chief Judge, now Justice, Carley). In *Pugh*, supra, the defendant requested a charge which, like the charge requested by appellant, consisted of quoted language from this court's opinion in *Chapman*, supra, 258 Ga. at 216, 367 S.E.2d 541. This court affirmed the trial court's refusal to give the requested charge, and we again today affirm a trial court's refusal to give the requested charge because a separate charge on the syndrome is not authorized.

Expert testimony concerning the syndrome is admissible because the subject is complex (*Sinns v. State*, 248 Ga. 385(3), 283 S.E.2d 479 (1981)), and the testimony supplies an interpretation of the facts which differs from the ordinary lay perception, which questions why victims of the syndrome do not leave an abusive person or seek help, by showing that the syndrome's victims believe they are responsible for causing the abusive behavior, have low self-esteem, and are powerless. *Smith v. State*, supra, 247 Ga. at 618-19, 277 S.E.2d 678. Testimony concerning the syndrome is relevant to show that the defendant had the mental state necessary for a justification defense, i.e., that he/she reasonably believed force was necessary to prevent the victim's imminent use of force against the defendant.

Chapman, 259 Ga. 706(4), 386 S.E.2d 129, supra. See also Sanders v. State, 251 Ga. 70, 74, 303 S.E.2d 13 (1983), where this court noted that testimony concerning the syndrome was appropriate in certain cases as evidence of whether the defendant acted in fear of his/her life. The testimony also is relevant to the issue of the reasonableness of the defendant's fears concerning the threat the alleged abuser posed. See Cox v. State, 216 Ga.App. 86, 453 S.E.2d 471 (1995) (Pope, C.J., concurring specially). Testimony of the syndrome seeks to explain to the jury that the defendant reasonably believed he/she was in imminent danger even though no threat of harm immediately preceded the defendant's act against the abuser. Chapman, supra, 259 Ga. at 708, 386 S.E.2d 129. Thus, a complete charge on justification, coupled with a closing argument which sets out for the jury how the defendant personifies the syndrome and thus was justified in taking the action which forms the basis of the charge against him/her, is sufficient. The trial court did not err when it refused to give additional charges which, "in essence, argumentatively emphasized such evidence as may have supported appellant's theory that [he] had acted in self-defense." Motes v. State, supra, 192 Ga.App. at 305, 384 S.E.2d 463.

I am troubled by the majority's determination that a history of physical force inflicted by the victim upon the defendant is necessary before the defendant can rely on battered person syndrome to justify his/her own use of physical force. Placing such a contingency upon the presentation of syndrome evidence condones assault, the threat of physically abusive behavior, since it does not result in a physical blow being struck. Such an evidentiary prerequisite prevents one who is repeatedly threatened with physical harm from presenting expert testimony explaining why a defendant would continue to live under such circumstances without seeking help, and leaves that defendant with only one avenue to support the claim of justification--a recitation of specific violent acts committed by the victim against the defendant. Because such a defendant would not be allowed to rely on battered person syndrome under such circumstances, no explanatory expert testimony would be admitted and the jury would be left to mull the common lay person's perception that a person living in an abusive situation should leave it or report it rather than take violent action to prevent it from happening again.

This court has stated again and again that the battered-person-syndrome evidence supports the theory that the defendant was justified in taking the action he/she did. One is also justified in using force to prevent the threat of physical force against one. OCGA § 16-3-21; Council of Superior Court Judges of Georgia, Suggested Pattern Jury

Page 840

Instructions, Criminal Cases, Vol. II, at 43, § AA (1991). One who claims to be the victim of battered person syndrome should not be required to prove that physical force was used against him/her in order to present expert testimony that he/she was justified in using physical force against the alleged abuser.

SEARS, Justice, concurring specially.

Because the trial court in this case did not err by refusing to give Chester's requested charge on the battered person syndrome, as there simply was no evidence presented that Chester had ever been physically battered by his victim, I concur in the result of the majority opinion. However, I am concerned that the majority opinion could be misconstrued to mean that the defense of battered person syndrome is merely a form of the defense of justification, and that when the syndrome is properly asserted as a defense, a standard jury charge on justification will suffice. Because our prior case law establishes that the battered person syndrome is not subsumed entirely within the defense of justification, it follows that a standard jury charge on justification should not suffice when the syndrome is properly asserted as a defense.

1. The majority opinion states that "[t]he battered person syndrome is not an entirely separate defense, and ... is admissible only to assist the jury in evaluating a defendant's claim of self defense." 1 The majority then goes on to rule that because there was no evidence of battering in this case, the battered person syndrome was irrelevant to Chester's claim of self-defense. The majority's treatment of the battered person syndrome defense indicates an underlying assumption that the syndrome is subsumed entirely within the defense of justification, and that a standard jury charge on justification would be sufficient when a battered person defense is properly asserted. However, that assumption is not altogether supported by the case law the majority relies upon.

The majority reliance upon Chapman v. The State, an earlier opinion of this Court, is entirely accurate insofar as the defenses of battered person syndrome and justification both require a defendant's reasonable belief that the threat or use of force was necessary in order to defend against the use of unlawful force. 2 However, Chapman also indicates that the battered person's syndrome cannot be subsumed entirely within the defense of justification. Rather, Chapman establishes that the battered person's syndrome has at least one essential element that is entirely contradictory to an essential element of a standard justification defense:

[E]vidence of the [battered person] syndrome is admissible in an attempt to show that the defendant had a mental state necessary for the defense of justification, although the actual threat of harm does not immediately precede the homicide. 3

In contrast, the defense of justification requires that a defendant who uses force against another must reasonably believe that such force "is necessary to defend himself ... against such other's imminent use of unlawful force." 4 Under a justification defense, the use of deadly force is not justifiable unless the defendant reasonably believes that it is necessary to protect herself against imminent death or imminent serious bodily harm.

Thus, under Georgia law, the defenses of justification and battered person syndrome have at least one essential difference--the former applies where the threat or use of unlawful force is imminent, and the latter does not require that there be an imminent use or threat of force. It follows that a

Page 841

standard charge on justification cannot adequately permit a jury to consider a properly asserted defense of battered person syndrome, because such a charge incorrectly instructs that "imminence" is an element of the syndrome. 5

There are research studies and public policy reasons which support omitting the imminence requirement from the defense of battered person syndrome. For example, researchers report that the battered person syndrome frequently is characterized by several distinct and identifiable traits, including the psychological paralysis of the afflicted person and a firm belief that she is completely powerless to escape the violence perpetuated against her. 6 Such a person may feel so hopelessly trapped that the only means of possible escape she can discern is to target the source of her misery--the batterer. Over time and after repeated and severe batterings interspersed with relatively peaceful lapses, it is possible that the victim may become unable to predict when the batterings will resume, and she may experience a change in cognitive thinking ability, in which she may reexperience past incidents of abuse and believe that they are recurring again. 7 When that happens, the battered victim may believe that the use of deadly force against her is "imminent," regardless of whether that may be accurate in the legal sense, and she may go into a dissociative state and take what she sees as necessary lifesaving action. 8 It is incomprehensible to me to permit such severely battered individuals existing in such a deeply troubled state of mind to justifiably use defensive force only when the use or threat of unlawful force against them is in fact "imminent."

Of course, there is a solution to this concern that will accommodate the particularities of the battered person syndrome while remaining entirely consistent with our case law regarding the justification defense. As was recognized by the Chapman court, evidence that a defendant suffers from battered person syndrome may be sufficient to establish the defense of justification. In such instances, the threat or use of unlawful force need not be imminent, as is required with a standard justification defense. 9 As explained more fully below, I believe that we would do well in directing trial courts to instruct juries accordingly.

2. My second concern with the majority's treatment of the battered person syndrome stems from the fact that it could be construed to permit a jury charge on justification to suffice in cases where a battered person defense is properly asserted, when such a charge is based entirely upon a purely objective "reasonable person" standard. 10 As noted by other courts and commentators, the purely objective "reasonable person" standard does not permit juries to consider fully the defense of battered person syndrome.

Insofar as the objective "reasonable person" standard requires a jury to view the circumstances surrounding an accused at the time he uses defensive force from the standpoint of a hypothetical reasonable and prudent person, it simply cannot adequately contemplate

Page 842

the plight of a battered individual. 11 As discussed briefly above, the battered person syndrome is often characterized by numerous psychological features that in no way comport with the experiences and reactions of a reasonable and prudent person (even a hypothetical one). Moreover, it is manifestly unfair to hold a battered individual to the same standard as a typical reasonably prudent person, when at the time she uses defensive force, she may be existing in a dissociative state unsure of when the next physical attack upon her may begin and is unable to discern between her present and past realities. Consequently, I believe that in these cases, the "reasonable person" standard should be slightly modified in order to permit juries to consider the reasonableness of the defendant's belief that the use of force was necessary in light of both his circumstances at the time he used force, and any psychological condition resulting from such circumstances.

3. As noted, Chester failed to present evidence that he was the victim of physical batterings at the hands of his victim. Premitting the question of how many batterings an individual must endure while remaining in the same abusive environment before being eligible for the battered person syndrome defense, it seems apparent that there must be evidence of some battering. Hence, I agree with the majority that the trial court did not abuse its discretion in refusing to give the requested charge in this case.

However, in future cases, I believe that trial courts faced with a properly asserted battered person defense would be well advised to instruct juries that evidence that a defendant suffers from battered person syndrome may

be sufficient to establish that the defendant is justified in threatening or using force to the extent that they reasonably believe that such threat or force is necessary to defend against a third person's use of unlawful force, and under such circumstances the third person's use of force need not be imminent. In determining the reasonableness of a battered defendant's belief that defensive force was necessary, I would suggest that trial courts instruct juries to consider whether the circumstances were such as would excite not merely the fears of the particular defendant, but also the fears of a reasonable person possessing the same or similar psychological and physical characteristics as the defendant, and faced with the same particular circumstances surrounding the defendant at the time he or she used defensive force.

1 The crimes were committed on August 6, 1993 and Chester was indicted on August 11, 1993. The guilty verdicts were returned on April 1, 1994 and, on that same date, the judgments of conviction and sentences were entered. The motion for new trial was filed on April 29, 1994 and, on August 30, 1995, that motion was denied and the notice of appeal was filed. The case was docketed in this court on November 7, 1995 and was orally argued on February 23, 1996.

1 Op. at 837; citing Pugh v. The State, 260 Ga. 874, 876, 401 S.E.2d 270 (1991); Chapman v. The State, 259 Ga. 706, 707, 386 S.E.2d 129 (1989).

2 See 259 Ga. at 707-08, 386 S.E.2d 129; 192 Ga.App. at 305, 384 S.E.2d 463.

3 259 Ga. at 708, 386 S.E.2d 129 (emphasis added).

4 OCGA § 16-3-21(a) (emphasis added); see Council of Superior Court Judges of Georgia, Suggested Pattern Jury Instructions, Vol. II Criminal Cases at 43, § AA (1991). For purposes of this special concurrence, "imminence" is understood to mean "ready to take place" or "impending," see Webster, Third New International Dictionary, at 1130 (1961), and thus synonymous with "immediate."

5 In this regard, see Pugh v. The State, supra; Motes v. The State, 192 Ga.App. 302, 304, 384 S.E.2d 463 (1989), both of which provide, I believe incorrectly, that a standard jury charge on justification is sufficient to encompass a properly asserted battered person syndrome defense.

6 See Klis, Reforms to Criminal Defense Instructions: New Patterned Jury Instructions Which Account for the Experience of the Battered Woman Who Kills Her Battering Mate, 24 Golden Gate Univ. Law Rev. 131, 138-140 (1994).

7 See Walker, Understanding Battered Woman Syndrome, Trial at 32 (Feb.1995).

8 Id. See also the discussion at pp. 838-839, supra, regarding the need to particularize the "reasonable person" standard in battered person cases, and to remove it from a purely objective analysis.

9 See note 4 supra and accompanying text.

10 See Council of Superior Court Judges of Georgia, Suggested Pattern Jury Instructions, Vol. II Criminal Cases at 45, § AA (2)(b)(1) (1991) (identifying the standard for determining the reasonableness of a defendant's belief that the use of defensive force was necessary as "whether the circumstances were such that they would excite (not merely the fears of the defendant but) the fears of a reasonable person.").

11 See Klis, supra note 5, at 144-45; State v. Leidholm, 334 N.W.2d 811, 817 -18 (N.D.1983).