

**STATE OF NEW JERSEY**

**v.**

**YOLANDA LOVELACE,  
Defendant - Appellant**

A-04-1234-T3

Superior Court, Appellate Division

Submitted August 18, 2004 - Decided September 13, 2004

Before Judges GRIM, REAPER and MERCY.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Cr-03-523.

Trevor Atkin argued the cause for the appellant (Atkin, Winner, Sherrod & Vanes, L.L.P., attorneys for defendant-appellant, Mr. Atkin, of counsel and on the brief).

Ellyn Epstein, Assistant Atlantic County Prosecutor, for the State of New Jersey (Michael Francis, Atlantic County Prosecutor, attorney; Ms. Epstein, of counsel and on the brief).

REAPER, J.A.D. joined by GRIM, J.A.D.

On December 17, 2003, following a seven-day jury trial in the Superior Court, Law Division, Atlantic County, defendant Yolanda Lovelace was convicted of second degree robbery in violation of N.J.S.A. 2C:15-1. She was sentenced on January 15, 2004 to a 10-year term of imprisonment.

In this appeal, the defendant contends that the trial court's refusal to require a unanimous jury finding as to specifically which of the defendant's acts constituted the use or threat of force required by the robbery statute deprived her of the right to due process of law. Additionally, the defendant contends that the trial judge improperly limited her right to introduce evidence and argue that she suffered from Battered Women's Syndrome and acted under duress during the commission of the robbery.

We disagree, and hold that the trial court properly concluded that the identity of a robbery victim is immaterial in a prosecution for robbery so long as all of the jurors agreed that force or the threat of force was exerted against some victim. Additionally we hold that the trial court properly concluded that Battered Women's Syndrome is not an appropriate basis for a claim of duress under New Jersey law.

## *The Facts*

The Plantea Court Casino was in the middle of its grand opening. Positioned about a mile off the downtown strip, the no frills casino was a gamblers' oasis that stood in stark contrast to the glitz and glamour associated with New Jersey gambling.

At exactly noon, on August 28, 2003, Vincent Vega and Jules Winnfield boarded a white cargo van driven by Vega's long-time girlfriend Yolanda "Honey Bunny" Lovelace and headed down the one-mile, unpaved stretch that lead to the Plantea. According to eyewitnesses from the casino, Vega and Winnfield were dressed in black suits with a white shirt and black tie. Eyewitness accounts reveal this to be the same attire as every pit boss in the Plantea Casino.

At approximately 12:45 p.m., Vega and Winnfield were seen side-by-side in the middle of the casino floor, presumably taking note of the pit boss shift change that occurred every 30 minutes. At 12:50 p.m., Vega and Winnfield entered the blackjack pit. Winnfield initiated the conversation with the pit boss, telling him to take off because "we got you covered."

Ringo, a dealer transplanted from the Hard Rock Casino in Las Vegas, had just finished dealing a hand that left the house \$500 richer than just a minute before. He stated in a police interview that the stacks of chips were just beginning to push against the tray's spring-loaded arms when he heard a voice behind him. "Everything okay?" Ringo swiped the cards from the table and nodded. "Great," said Vega. "We're pulling chips."

According to Ringo, Vega and Winnfield chatted with the now stalled gamblers: "You fellas doing okay this afternoon? This'll just take a second." As Ringo stepped aside, Winnfield slipped behind the table. He counted the \$50, \$100, and \$500 chips, calling off the totals to Vega who noted them on a clipboard. Ringo told police, "they knew the routine." When finished, they tucked the cash and the count-sheet into a black zippered deposit bag. This mundane exercise was repeated, exactly, at each of the five running blackjack tables, after which Vega and Winnfield left the pit.

Ringo continued dealing and after about five minutes he heard another voice over his shoulder: "How's everything going? We're going to pull chips now." The sentence hung in the air. "You just pulled chips," replied Ringo. The pit boss seemed slightly dazed, according to Ringo, and replied: "No, we didn't." At that point, the robbery was reported.

By the time of the report, the white van driven by defendant had sped away from the casino. According to witness Lance Busey, a limo driver perched in front of the casino, he had approached the driver of the white cargo van to ask her to move the vehicle when he saw two men jump in holding money bags. He said the driver threatened to run over him if he did not get out of the way, and he barely avoided injury when the van's side mirror hit him as the driver sped away from the casino.

At approximately 1:45 p.m., while out to lunch, Plantea Casino security officers Butch Coolidge and Marsellus Wallace received a radio report concerning the robbery, including a description of the vehicle possibly involved in the crime. In an unmarked car, Coolidge and Wallace quickly drove to the area of 19th and Benson and positioned themselves so they could see the traffic coming from the direction of the casino and toward the strip. About a minute and a half after the broadcast, Coolidge and Wallace saw a van fitting the description just given. It was on Benson Street, driving from the direction of the Plantea. The car had no license plates and Wallace could see a female driver. Wallace noticed two men, one black and one white, also in the van.

When the security officers pulled in behind the van they followed it at a normal rate of speed for approximately one mile. While stopped at a traffic light, defendant noticed officers Coolidge and Wallace behind her. The moment the light turned green she accelerated rapidly, swerving through the intersection to avoid a collision. In doing so, defendant lost control of the van and slammed into a nearby tree.

Seconds later the driver's side door opened and defendant began to run. Vega and Winnfield were injured and appeared to give up. Officer Coolidge started to take them into custody. Officer Wallace testified he did not want to leave his partner so he shouted "Stop her!" in the direction of defendant. A good samaritan by the name of Marvin Wright gave chase after defendant. Wright quickly caught up to defendant and tackled her to the ground. A struggle ensued. Eyewitnesses testified that defendant struggled to free herself, kicking and punching Marvin Wright. By approximately 2:30 p.m., less than two hours after the robbery began, Vincent Vega, Jules Winnfield and Yolanda Lovelace were in custody. Found in the van were five black zippered bags with more than \$1,000,000 in Plantea Court Casino chips.

Each of the three was charged with robbery in violation of N.J.S.A. 2C:15-1; the indictment alleged that in the course of committing a theft they used or threatened the use of force against Lance Busey and/or Marvin Wright, in violation of N.J.S.A. 2C:15-1(a). Vega and Winnfield each plea-bargained, and agreed to plead guilty to second degree theft in return for which the robbery charges were dismissed; both were subsequently sentenced to prison terms. Defendant alone went to trial.

Just prior to jury selection, the trial court, Hon. Winston Wolfe, J.S.C., presiding, ruled on a prosecution motion to preclude defendant from offering the affirmative defense that she suffered from Battered Women's Syndrome and thus was coerced by her fear of Vega into participating in the commission of this robbery. Defendant noted that she intended to support her claim with the expert testimony of a psychologist who interviewed defendant over the course of several months. The trial court concluded, however, that the evidence could do no more than evidence the defendant's state of mental health, a matter that is not relevant to the issues in this case. It therefore held that such expert testimony was inadmissible and that Battered Women's Syndrome was not relevant to the affirmative defense of duress.

The trial then proceeded. At the conclusion of the evidence, the jury deliberated for more than three days. On the fourth day of deliberations, the foreperson of the jury sent a note to the trial judge that stated that all jurors agreed that “defendant knowingly used or threatened the use of force against” either Lance Busey or Marvin Wright, but six jurors believed defendant knowingly used or threatened the use of force on Busey but not Wright, and the other six believed defendant used or threatened the use of force on Wright but not Busey. The jury asked whether this constituted “a unanimous vote.”

Defense counsel asked the trial court to instruct the jurors that they must be unanimous as to the identity of at least one victim. Instead, over the objections of defense counsel, the trial court instructed the jurors that they need only be unanimous as to the fact of the use or threat of use of force and not as to the identity of the victim(s). The jury then returned its verdict, finding defendant guilty.

Defendant was sentenced on January 15, 2004 to a 10-year term of imprisonment. She filed her appeal to this court on March 1, 2004.

### *Discussion*

Defendant raises two issues in this appeal. First, the defendant claims that her constitutional right to a unanimous jury verdict was violated when the trial court concluded that the jury need only be unanimous as to the fact that force or a threat of force was used by the defendant in committing or participating in the commission of a theft, but that the jury need not be unanimous as to the identity of the specific victim of the force or threat of force. The defendant further asserts that the trial court erred when it barred defendant from introducing evidence of Battered Women’s Syndrome as it bore on the affirmative defense of duress. We reject both of her arguments.

First, there is no doubt that juror unanimity is a requirement both of procedure, R. 1:8-9, and of constitutional dimension. See Article I, paragraph 9, of the New Jersey Constitution. However, a jury verdict in a criminal case requires juror unanimity only as to the essential elements of the offense and not as to each and every fact relied upon by the prosecution in making its case. “[P]lainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict.” *McKoy v. North Carolina*, 494 U.S. 433, 449 (1990). Thus, jury unanimity must occur with regards to the facts that make up the elements of the underlying offense as the term “essential element” is defined in N.J.S.A. 2C:1-14(h), or, in other words, only the material facts.

In the instant case, elements of the offense of second degree robbery are that, in the course of committing a theft, a person “(1) Inflicts bodily injury or uses force upon another; or (2) Threatens another with or purposely puts him in fear of immediate bodily injury”. N.J.S.A. 2C:15-1(a). Clearly, from the note sent out by the jury foreperson, the jury was unanimous that force was used or threatened, and that it was used on “another.” Clearly, the jury found, unanimously, that the elements of a charge of robbery charge

were proved beyond a reasonable doubt. The statutory elements of the offense of robbery emphasize the use or threat of use of force, not the specific identity of the victim.

In our view, this case directly parallels *State v. Parker*, 124 N.J. 628 (1991), cert. denied, 503 U.S. 939 (1992). The allegations were “conceptually similar” and, therefore, did not require specific unanimity instructions. It was simply not relevant whether jurors may have been divided as to which parts of this overall set of acts defendant may have committed. *Id.* at 639. Only the fact as to whether defendant used or threatened the use of force is material in determining that all elements of the offense are present. Against whom the force was used is inconsequential to the underlying offense. This is no different from the conclusion that it is irrelevant to the charge of burglary whether a defendant pried open a window with a screwdriver or a crowbar. Unanimity on the fact that he “broke and entered” was sufficient to secure a conviction for burglary. See *Schad v. Arizona*, 501 U.S. 624, 656-57 (1991).

Additionally, as we see the law in this area, the lack of juror unanimity will be deemed insignificant if an apparent disagreement about one factual event or circumstance does nothing more than suggest -- as it did here -- that an alternate basis for guilt is true. We regard what happened here as no different from the case where some jurors conclude that force had been used and the rest of the jurors conclude that force had been threatened. The statute permits conviction where force is used or threatened, and a lack of unanimity is thus irrelevant.

Defendant was, therefore, not entitled to any further instruction as to unanimity, and her constitutional right to a unanimous verdict was not impaired.

The second issue raised by the defendant concerns whether the jury should have been able to consider evidence that she suffered from Battered Women's Syndrome in determining whether she was coerced into committing or participating in the robbery. We conclude that the trial court properly found such evidence inadmissible.

It is clear, of course, that evidence concerning Battered Women's Syndrome is allowed in New Jersey courts for purposes of explaining behavior associated with self-defense. See, e.g., *State v. Gartland*, 149 N.J. 456 (1997); *State v. Kelly*, 97 N.J. 178 (1984). This case, however, deals not with the subject of self-defense but rather with the argument that defendant was coerced, either through the use of force or threatening the use of force against her and her children, into committing the robbery. In other words, this case involves the defense of duress.

The defense of duress is established by statute. N.J.S.A. 2C:2-9(a) provides that “it is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.”

In adopting N.J.S.A. 2C:2-9, our Legislature plainly established its intention to establish an objective rule and permit only people of reasonable firmness to claim the defense. The 1971 commentary to the Criminal Code makes it clear that the commission considered, but rejected, the view that the actor's ability to resist coercion should be part of the defense of duress. People who are more suggestible than usual or more easily cowed than usual or have been browbeaten to the point of humiliation and submission do not have the right to offer their personal case histories to the factfinder as a reason why they could not withstand the coercive efforts of another person.

The commentary makes it clear that courts can consider "stark, tangible factors" such as "size or strength or age or health," but not "matters of temperament." Size, strength, age, and even health (by which the commission plainly intended physical health) are all objective factors. Indeed, they are precisely the factors that an average juror would use when determining whether the defendant on trial was a person of reasonable firmness. These factors tell the factfinder something reasonably permanent about the person and his ability to resist: a person is six feet tall or he is five feet tall; a person is big and brawny or small and weak, a person is 19 or a person is 35; a person is healthy, or a person is physically ill.

What the commission calls "matters of temperament," however, tells the factfinder nothing about the person and his ability to resist: surely, a person's ability to withstand coercion to commit a crime should not depend upon the fact that he is a doormat at work or at home. A rule permitting such a person to claim duress is particularly unacceptable when the fate of a third, innocent person is concerned.

Had the Legislature intended to add a subjective element to duress, it could have done so. Absent such a provision, it is not the business of the courts to rewrite the statutes. See e.g. *State v. Copeland*, 928 S.W.2d 828, 838 (Mo. 1996) (en banc) ("Had the legislature intended battered spouse syndrome to be a general defense, it could easily have made provision for that defense. If self-defense is not in the case, there is no authority for admitting such evidence unless in support of a claim of mental disease or defect."); *State v. Sonko*, 1996 Ohio App. LEXIS 2010, at 9 (Ohio Ct. App. May 22, 1996) (relying on statutory limitation to affirm conviction of woman who sought to use evidence of the battered woman syndrome to excuse her participation in drug distribution); *Campbell v. State*, 999 P.2d 649, 660 (Wyo. 2000) (holding that statute regarding battered woman syndrome "expressly limits its reach to the affirmative defense of self-defense" and therefore did not apply to assist duress defense against charges of child endangerment).

Moreover, the application of the battered woman syndrome in duress cases is frankly reminiscent of the old marital coercion doctrine, which presumed that women acted at the command of their husbands. See Anne M. Coughlin, *Excusing Women*, 82 Cal. L. Rev. 1, 56-59 (1994).

We therefore agree with the majority of courts that have confronted this issue and hold that evidence of Battered Women's Syndrome is irrelevant to the affirmative defense of

duress. See e.g. *United States v. Willis*, 38 F.3d 170, 175 (5th Cir. 1994), cert. denied, 515 U.S. 1145 (1995); *United States v. Johnson*, 956 F.2d 894, 898 (9th Cir. 1992); *United States v. Sixty Acres in Etowah County*, 930 F.2d 857, 860 (11th Cir. 1991); *State v. Mott*, 931 P.2d 1046 (Ariz. 1997), cert. denied, 520 U.S. 1234 (1997); *State v. Dunn*, 758 P.2d 718 (Kan. 1988); *State v. Lundgren*, 1994 Ohio App. LEXIS 1722 (Ohio Ct. App. April 22, 1994).

Independent of the inadmissible evidence of Battered Women's Syndrome, the factual evidence produced here was insufficient to support the defense of duress. When questioned about the circumstances surrounding her role in the robbery, defendant told the police she feared Vega would hurt her or her children if she did not serve as the getaway driver. Defendant made the following statements to the police:

Police: Did you help plan the robbery?

Lovelace: No. Vincent grabbed me this morning on his way out of the house and told me I was driving him and Jules somewhere. He told me not to ask any questions and do exactly as I was told or I'd be sorry.

P: When did you suspect you were participating in a robbery?

L: I guess a part of me knew before I even left the house, I don't know.

P: When the robbery was happening, were you, at that point, ever afraid of what Vincent would do to you or your children if you refused to participate?

L: Well, yeah . . . I mean, he was always threatening me and my kids.

P: Did he threaten either you or your children with physical harm at that time?

L: Well, I mean, I knew what he meant when he said I'd be sorry. He's hit me before after telling me I'd be sorry . . . I knew what he meant.

P: Has Vincent ever harmed your children before?

L: No, but he's always threatened to.

P: Did Vincent have any weapons on him at this time?

L: He had a ... I think he ... I thought he had, I don't know.

These facts simply do not make out the affirmative defense of duress.

Accordingly, the decision of the trial court is hereby **affirmed**.

MERCY, J.A.D., dissenting

The majority today holds that a battered woman coerced into committing or participating in the commission of a crime by her fear of violence against herself or her children may not interpose the affirmative defense of duress and offer expert testimony as to the effects of the battering on her ability to exercise "reasonable firmness in [her] situation". See N.J.S.A. 2C:2-9(a). It further holds that a jury need not be unanimous as to the specific acts or threats of force committed by a defendant in the course of a robbery, so long as the jurors all agree that there was some act or threat of force.

I find these conclusions to be irreconcilable with Constitutional concepts of due process and, therefore, I respectfully dissent.

The majority here first concludes that Battered Women's Syndrome may be relevant to the affirmative defense of self-defense but not to the affirmative defense of duress. I cannot agree. Given that the elements of self-defense, see N.J.S.A. 2C:3-4, are so similar to the elements of duress, see N.J.S.A. 2C:2-9, I agree with the analysis set forth in *United States v. Marenghi*, 893 F. Supp. 85, 94-97 (D. Me. 1995). I too "cannot envision that such evidence [i.e., expert testimony concerning Battered Women's Syndrome] should be excluded in a duress defense when it is admitted in an overwhelming majority of state courts in self-defense cases." *Id.* at 96.

It seems to me self-evident that battered women's syndrome may be at the heart of an offense against a third party committed under duress and that its relevance to that defense is, or should be, recognized here as it is in other jurisdictions. See, e.g., *United States v. Marenghi*, 893 F. Supp. at 94-97 (observing the similarities between the elements of self-defense and duress, and declining to adopt a per se rule excluding expert testimony of battered woman syndrome in duress cases); *United States v. Brown*, 891 F. Supp. 1501 (D. Kan. 1995) (proffering testimony that battering relationship compelled defendant to commit drug-related crimes); *State v. Williams*, 937 P.2d 1052, 1058 (Wash. 1997) (en banc) (reversing battered woman's conviction for receiving public assistance overpayments because trial court should have given a duress instruction in light of the defendant's history of abuse); *State v. Lambert*, 312 S.E.2d 31, 34-35 (W. Va. 1984) (holding that history of violence was admissible to negate criminal intent in prosecution for fraud); *People v. Romero*, 13 Cal. Rptr. 2d 332 (Cal. Ct. App. 1992), rev'd on other grounds, 883 P.2d 388 (Cal. 1994) (extending the use of evidence about past abuse from self-defense to duress claims by finding counsel ineffective for failing to proffer battered woman syndrome testimony in a duress case).

A number of commentators have reviewed the issues of battered women and the defense of duress. I am convinced, as are the majority of the commentators, that the defense should be available. See e.g. Susan D. Appel, Note, *Beyond Self-Defense: The Use of Battered Woman Syndrome in Duress Defenses*, 1994 U. Ill. L. Rev. 955, 977-980 (1994) (arguing that evidence of the battered woman syndrome theory should be admitted to support claims of duress by battered women); Kelly Grace Monacella, Comment, *Supporting a Defense of Duress: The Admissibility of Battered Woman Syndrome*, 70 Temp. L. Rev. 699 (1997) (arguing that evidence of the battered woman syndrome theory should be admitted to support claims of duress by battered women).

The evidence here clearly established that Battered Women's Syndrome was critical to the jury's understanding of defendant's participation in the robbery. According to defendant, Vega said nothing to her that day before getting into the van, but began talking up the robbery as soon as he and Winnfield got into the van. He said, according to defendant, that "...this is it for me . . . I'm out after this one. Honey Bunny and I are out . . . so this has to go down right." When defendant spoke up and said, "I'm not sure I'm up for this. I can't keep living like this", Vega quickly responded: "Shut up Honey Bunny!"

You'll do exactly what I say or you can forget about ever seeing your kids. Do as your told or you'll be very sorry.”

When defendant continued to express concern, Vega hit her hard enough to draw blood and reminded her that she would be sorry if she did anything other than what he told her to do. “You know I mean it,” defendant quoted Vega as having said. Defendant testified that she was not entirely certain what it was Vega had hit her with, but believed it was a handgun. She proferred, but was not permitted to testify, that Vega had often pistol-whipped her in the past, leading her to file domestic violence complaints against him, but that she had been forced to withdraw two of the complaints when he threatened to kill her children. She proferred, but was not permitted to testify, to many episodes of extreme violence over the entire course of her relationship with Vega, a pattern that resulted in what the psychologist’s expert report called “learned helplessness”.

These facts, taken together with the psychologist’s proferred testimony that a reasonably firm person in defendant’s specific situation would have been unable to resist the coercion, could well have changed the outcome of this case, and such evidence should have been considered by the jury in support of an affirmative defense of duress.

Further, I cannot agree that six votes to convict as to each of two victims is the same as 12 votes to convict as to one victim. I conclude as a result that the jury’s verdict may well not have been unanimous and that defendant is therefore entitled to a new trial with an appropriate jury instruction as to the requirement of unanimity.

Our Supreme Court has been emphatic that unanimity is required as to each and every element of an offense, especially when a conviction may occur as the result of different jurors concluding that the defendant committed different acts. *State v. Parker*, 124 N.J. 628, 636 (1991), cert. denied, 503 U.S. 939 (1992). In such a case, the defendant is absolutely entitled to a specific unanimity instruction. *Id.* at 637.

N.J.S.A. 2C:15-1(a)(1) requires the use of force against another. *Which* other is not an academic question. There is no evidence here that the jury would have been able to agree that force had been used against Busey. There is no evidence here that the jury would have been able to agree that force had been used against Marvin. Here, as in *State v. Frisby*, 174 N.J. 583 (2002), the proofs were different; the theories were different. Clearly the jurors could not easily agree on either act. That is apparent from the fact that the jury deliberated for four days before sending out the note yet took no more than 10 minutes to return its verdict of guilty after receiving the judge’s instruction that they need not be unanimous as to which act or acts of force or threats of force defendant committed.

It seems to me self-evident that a defendant goes into a trial reasonably expecting to defend each and every aspect of a charge separately, especially where it comes to the identity of separate victims. He or she will not evaluate the credibility of each victim as if they were all one; he or she will not evaluate the proofs as to each victim as if they were all one. It is unfair in the extreme to permit the State to aggregate the votes for conviction

on each one until it finally reaches the magic number of 12. What if there had been three victims here, each with four votes for conviction? What if there had been 12 victims here, each with one vote?

Finding both the trial court's failure to permit evidence of the Battered Women's Syndrome to be considered by the jury on the issue of the defense of duress and the trial court's failure to charge the jury as to the requirement of unanimity as to each victim of the alleged robbery to have been improper, I would reverse the defendant's conviction and remand for a new trial.

I dissent.

