

Faculty Publications

1993

Battered Woman Syndrome

Paul C. Giannelli

Follow this and additional works at: https://scholarlycommons.law.case.edu/faculty_publications

 Part of the [Criminal Law Commons](#)

Repository Citation

Giannelli, Paul C., "Battered Woman Syndrome" (1993). *Faculty Publications*. 312.
https://scholarlycommons.law.case.edu/faculty_publications/312

This Article is brought to you for free and open access by Scholarly Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Scholarly Commons.

PUBLIC DEFENDER REPORTER

KFO
578
.A115
P82
c.1

Vol. 16, No. 1

Winter 1993

OCT 23 1993

BATTERED WOMAN SYNDROME

Paul C. Giannelli

*Albert J. Weatherhead III & Richard W. Weatherhead
Professor of Law, Case Western Reserve University*

The battered woman syndrome (BWS) describes a pattern of violence inflicted on a woman by her mate. In 1979, Dr. Lenore Walker, one of the principal researchers in this field, published her seminal text, *The Battered Woman*. She described a battered woman as follows:

A battered woman is a woman who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights. Battered women include wives or women in any form of intimate relationships with men. Furthermore, in order to be classified as a battered woman, the couple must go through the battering cycle at least twice. Any woman may find herself in an abusive relationship with a man once. If it occurs a second time, and she remains in the situation, she is defined as a battered woman. L. Walker, *The Battered Woman* xv (1979)

Dr. Walker's initial findings were based on a nonrandom sample of 110 battered women who were mostly white and middle-class. A later study, published in her second book, involved a more representative sample of 435 women. In the second book, Walker defined the syndrome by incidents of violence. "A battered woman is a woman . . . who is or has been in an intimate relationship with a man who repeatedly subjects or subjected her to forceful physical and/or psychological abuse." Two acute battering incidents qualified as "repeated" incidents. L. Walker, *The Battered Woman Syndrome* 203 (1984). See also L. Walker, *Terrifying Love: Why Battered Women Kill and How Society Responds* (1989).

CYCLE OF VIOLENCE

The violence associated with this type of relationship is neither constant nor random. Instead, it follows a pattern. Dr. Walker identified a three-stage cycle of violence. L. Walker, *The Battered Woman* at 55-70.

The first stage is the "tension building" phase, during which small abusive episodes occur. These episodes gradually escalate over a period of time.

The tension continues to build until the second stage — the acute battering phase — erupts. During this

phase, in which most injuries occur, the battering is out of control. Psychological abuse in the form of threats of future harm is also prevalent.

The third phase is a calm, loving period during which the batterer is contrite, seeks forgiveness, and promises to refrain from future violence. This phase provides a positive reinforcement for the woman to continue the relationship in the hope that the violent behavior will not recur. The cycle then repeats itself.

In addition, the batterer is often extremely jealous of the spouse's time and attention, a factor that further isolates her from friends and outside support. Note, "Self-Defense: Battered Woman Syndrome on Trial," 20 Cal. W. L. Rev. 485, 487 (1984). Moreover, numerous obstacles, both psychological and economic, often prevent the battered spouse from leaving her mate. Walker used Martin Seligman's theory of "learned helplessness" to explain the woman's condition. L. Walker, *The Battered Woman* at 43-54.

In sum, the battered woman feels "trapped in a deadly situation." Walker, Thyfault & Browne, "Beyond the Juror's Ken: Battered Women," 7 Vermont L. Rev. 1, 12 (1982). Caught in this cycle, she sometimes strikes back and kills.

CRITICISMS

The evidentiary use of the BWS is not without its critics. In 1986, Professor Faigman questioned the validity of the underlying research:

The prevailing theories of battered woman syndrome have little evidentiary value in self-defense cases. The work of Lenore Walker, the leading researcher on battered woman syndrome, is unsound and largely irrelevant to the central issues in such cases. The Walker cycle theory suffers from significant methodological and interpretative flaws that render it incapable of explaining why an abused woman strikes out at her mate when she does. Similarly, Walker's application of learned helplessness to the situation of battered women does not account for the actual behavior of many women who remain in battering relationships. Faigman, "The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent," 72 Va. L. Rev. 619, 647 (1986).

Public Defender Hyman Friedman
Cuyahoga County Public Defender Office, 100 Lakeside Place, 1200 West 3rd Street, N.W., Cleveland, Ohio 44113

Telephone (216) 443-7223

The views expressed herein are those of the author and do not necessarily reflect those of the Public Defender.
Copyright © 1993 Paul Giannelli



Faigman, however, does argue that "courts should allow juries to consider *valid* social science research and the battered woman's own history of abuse in evaluating her self-defense claim." *Id.* at 622.

Another critic wrote: "Reduced to its essence, battered-woman syndrome is not a physicians' diagnosis but an advocate's invention. It means: Blame the deceased." Caplan, "Battered Wives, Battered Justice," *National Review* 39, 40 (Feb. 1991).

A 1992 review of the research literature, however, indicates that BWS now has attained, to a large extent, scientific acceptance. Citing a survey of experts in the field, Schuller and Vidmar conclude:

The degree of expert consensus shown in the Dodge and Greene survey tends to suggest that the scientific literature bearing on a battered woman's circumstances and situation is sound. There are, however, some aspects of the testimony — the cycle pattern of violence and the development of learned helplessness — that are not universal across battering relationships. Schuller & Vidmar, "Battered Woman Syndrome Evidence in the Courtroom: A Review of the Literature," 16 *Law & Hum. Behav.* 273, 281 (1992) (citing Dodge & Greene, "Jurors and Expert Conceptions of Battered Women," 6 *Victims & Violence* 271 (1991) (18-item survey of 45 professionals who have published in the field)).

The widespread legal acceptance of BWS is a product of the work of feminist scholars, who have attacked the traditional law of self-defense as based upon a male-oriented perspective. Such scholarship, however, also recognizes that the BWS may perpetuate stereotypes: "Dwelling stereotypes are likely to become the focus of the trial process. While the prosecution attempts to discredit the defendant for not living up to the standard of a 'good woman', the defense counters with an equally distorted portrayal of the defendant as ultra-feminine: a passive, helpless victim." Jenkins & Davidson, "Battered Women in the Criminal Justice System: An Analysis of Gender Stereotypes," 8 *Behav. Sci. & Law* 161, 169 (1990).

See also Crocker, "The Meaning of Equality for Battered Women Who Kill Men in Self-Defense," 8 *Harv. Women's L. J.* 121, (1985) ("She is held liable for having lived as a woman, and she is held responsible for having reacted, even if only once, as a man"); Schneider, "Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering," 9 *Women's Rts. L. Rptr.* 195, 216-17 (1986) ("Yet, to the degree that the explanation is perceived to focus on her suffering from a 'syndrome,' a term which suggests a loss of control and passivity, the testimony seems to be inconsistent with the notion of reasonableness. . ."); Mahoney, "Legal Images of Battered Women: Redefining the Issue of Separation," 90 *Mich. L. Rev.* 1 (1991) ("Yet the expert testimony on battered woman syndrome and learned helplessness can interact with and perpetuate existing oppressive stereotypes of battered woman.").

Another author suggests, however, that most proposals for law reform concerning this subject are based on two assumptions, both of which are wrong. The first assumption is that a majority of cases involve nonconfrontational situations (e.g., spouse asleep or hired killer); however, a survey of the cases reveals that approximately 75% of

the cases involve confrontations. Maguigan, "Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals," 140 *U. Pa. L. Rev.* 379, 397 (1991) (surveying appellate decisions). The second assumption is that traditional self-defense law excluded a female perspective. The author argues that while it is true that self-defense law developed in cases with male defendants, it is not true that the law ignored "the context of a battered woman's actions." *Id.* at 405.

ADMISSIBILITY: SELF-DEFENSE

The admissibility of expert testimony on BWS has produced much commentary and initially divided the courts. It was first introduced in the 1979 case of *Ibn-Tamas v. United States*, 407 A.2d 626, 634-35 (D.C. 1979), *aff'd* on appeal after remand, 455 A.2d 893 (D.C. 1983).

Several different evidentiary issues are raised.

Relevancy

The first issue concerns the relevancy of BWS evidence. Typically, the evidence is offered in support of a self-defense claim in a homicide prosecution. A few courts have declared that BWS evidence is simply irrelevant to a self-defense claim. See *People v. White*, 90 Ill. App. 3d 1067, 1072-73, 414 N.E.2d 196, 200-01 (1980); *State v. Necaise*, 466 So. 2d 660, 663-65 (La. App. 1985); *State v. Thomas*, 66 Ohio St. 2d 518, 521, 423 N.E.2d 137, 140 (1981), overruled by *State v. Koss*, 49 Ohio St. 3d 213, 551 N.E.2d 970, 974 (1990).

This seems wrong. While being a battered woman by itself is no defense to homicide, the syndrome may explain two elements of a self-defense claim: (1) the defendant's subjective fear of serious injury or death and (2) the reasonableness of that belief. See *generally* W. LaFave & A. Scott, *Criminal Law* § 5.7 (2d ed. 1984); 2 P. Robinson, *Criminal Law Defenses* § 132 (1984).

Numerous courts have recognized the relevancy of BWS evidence for this purpose. *E.g.*, *People v. Aris*, 215 Cal. App. 3d 1178, 1196-99, 264 Cal. Rptr. 167, 179-81 (1989); *Terry v. State*, 467 So. 2d 761, 763-64 (Fla. App. 1985); *Hawthorne v. State*, 408 So. 2d 801, 806-07 (Fla. App. 1982); *State v. Hundley*, 236 Kan. 461, 467-69, 693 P.2d 475, 479-80 (1985); *State v. Anaya*, 438 A.2d 892, 894 (Me. 1981); *State v. Kelly*, 97 N.J. 178, 202-05, 478 A.2d 364, 375-77 (1984); *People v. Torres*, 128 Misc.2d 129, 133-34, 488 N.Y.S.2d 358, 362 (N.Y. Sup. 1985); *State v. Leidholm*, 334 N.W.2d 811, 820 (N.D. 1983). See also *May v. State*, 460 So. 2d 778, 785 (Miss. 1984) ("[T]he battered wife syndrome has important informational and explanatory power . . .").

For example, the evidence explains why a battered woman has not left her mate. According to the New Jersey Supreme Court, "[o]nly by understanding these unique pressures that force battered women to remain with their mates, despite their long-standing and reasonable fear of severe bodily harm and the isolation that being a battered woman creates, can a battered woman's state of mind be accurately and fairly understood." *State v. Kelly*, 97 N.J. 178, 196, 478 A.2d 364, 372 (1984). See also *Fielder v. State*, 756 S.W.2d 309, 319 (Tex. Crim. App. 1988).

Another court admitted BWS evidence to help explain a battered woman's conduct after killing her mate. *People*

Faigman, however, does argue that "courts should allow juries to consider *valid* social science research and the battered woman's own history of abuse in evaluating her self-defense claim." *Id.* at 622.

Another critic wrote: "Reduced to its essence, battered-woman syndrome is not a physicians' diagnosis but an advocate's invention. It means: Blame the deceased." Caplan, "Battered Wives, Battered Justice," *National Review* 39, 40 (Feb. 1991).

A 1992 review of the research literature, however, indicates that BWS now has attained, to a large extent, scientific acceptance. Citing a survey of experts in the field, Schuller and Vidmar conclude:

The degree of expert consensus shown in the Dodge and Greene survey tends to suggest that the scientific literature bearing on a battered woman's circumstances and situation is sound. There are, however, some aspects of the testimony — the cycle pattern of violence and the development of learned helplessness — that are not universal across battering relationships. Schuller & Vidmar, "Battered Woman Syndrome Evidence in the Courtroom: A Review of the Literature," 16 *Law & Hum. Behav.* 273, 281 (1992) (citing Dodge & Greene, "Jurors and Expert Conceptions of Battered Women," 6 *Victims & Violence* 271 (1991) (18-item survey of 45 professionals who have published in the field)).

The widespread legal acceptance of BWS is a product of the work of feminist scholars, who have attacked the traditional law of self-defense as based upon a male-oriented perspective. Such scholarship, however, also recognizes that the BWS may perpetuate stereotypes: "Dwelling stereotypes are likely to become the focus of the trial process. While the prosecution attempts to discredit the defendant for not living up to the standard of a 'good woman,' the defense counters with an equally distorted portrayal of the defendant as ultra-feminine: a passive, helpless victim." Jenkins & Davidson, "Battered Women in the Criminal Justice System: An Analysis of Gender Stereotypes," 8 *Behav. Sci. & Law* 161, 169 (1990).

See also Crocker, "The Meaning of Equality for Battered Women Who Kill Men in Self-Defense," 8 *Harv. Women's L. J.* 121, (1985) ("She is held liable for having lived as a woman, and she is held responsible for having reacted, even if only once, as a man"); Schneider, "Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering," 9 *Women's Rts. L. Rptr.* 195, 216-17 (1986) ("Yet, to the degree that the explanation is perceived to focus on her suffering from a 'syndrome,' a term which suggests a loss of control and passivity, the testimony seems to be inconsistent with the notion of reasonableness. . ."); Mahoney, "Legal Images of Battered Women: Redefining the Issue of Separation," 90 *Mich. L. Rev.* 1 (1991) ("Yet the expert testimony on battered woman syndrome and learned helplessness can interact with and perpetuate existing oppressive stereotypes of battered woman.").

Another author suggests, however, that most proposals for law reform concerning this subject are based on two assumptions, both of which are wrong. The first assumption is that a majority of cases involve nonconfrontational situations (e.g., spouse asleep or hired killer); however, a survey of the cases reveals that approximately 75% of

the cases involve confrontations. Maguigan, "Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals," 140 *U. Pa. L. Rev.* 379, 397 (1991) (surveying appellate decisions). The second assumption is that traditional self-defense law excluded female perspective. The author argues that while it is true that self-defense law developed in cases with male defendants, it is not true that the law ignored "the content of a battered woman's actions." *Id.* at 405.

ADMISSIBILITY: SELF-DEFENSE

The admissibility of expert testimony on BWS has produced much commentary and initially divided the courts. It was first introduced in the 1979 case of *Ibn-Tamas v. United States*, 407 A.2d 626, 634-35 (D.C. 1979) aff'd on appeal after remand, 455 A.2d 893 (D.C. 1983).

Several different evidentiary issues are raised.

Relevancy

The first issue concerns the relevancy of BWS evidence. Typically, the evidence is offered in support of a self-defense claim in a homicide prosecution. A few courts have declared that BWS evidence is simply irrelevant to a self-defense claim. See *People v. White*, 90 Ill. App. 3d 1067, 1072-73, 414 N.E.2d 196, 200-01 (1980); *State v. Necaise*, 466 So. 2d 660, 663-65 (La. App. 1984); *State v. Thomas*, 66 Ohio St. 2d 518, 521, 423 N.E.2d 1140 (1981), overruled by *State v. Koss*, 49 Ohio St. 3d 2551 N.E.2d 970, 974 (1990).

This seems wrong. While being a battered woman by itself is no defense to homicide, the syndrome may explain two elements of a self-defense claim: (1) the defendant's subjective fear of serious injury or death and (2) the reasonableness of that belief. See generally *W. LaFave & A. Scott, Criminal Law* § 5.7 (2d ed. 1984); 2 *Robinson, Criminal Law Defenses* § 132 (1984).

Numerous courts have recognized the relevancy of BWS evidence for this purpose. *E.g.*, *People v. Aris*, 21 Cal. App. 3d 1178, 1196-99, 264 Cal. Rptr. 167, 179-81 (1989); *Terry v. State*, 467 So. 2d 761, 763-64 (Fla. App. 1985); *Hawthorne v. State*, 408 So. 2d 801, 806-07 (Fla. App. 1982); *State v. Hundley*, 236 Kan. 461, 467-69, 69 P.2d 475, 479-80 (1985); *State v. Anaya*, 438 A.2d 892, 894 (Me. 1981); *State v. Kelly*, 97 N.J. 178, 202-05, 478 A.2d 364, 375-77 (1984); *People v. Torres*, 128 Misc.2d 129, 133-34, 488 N.Y.S.2d 358, 362 (N.Y. Sup. 1985); *St. v. Leidholm*, 334 N.W.2d 811, 820 (N.D. 1983). See also *May v. State*, 460 So. 2d 778, 785 (Miss. 1984) ("[T]he battered wife syndrome has important informational and explanatory power . . .").

For example, the evidence explains why a battered woman has not left her mate. According to the New Jersey Supreme Court, "[o]nly by understanding these unique pressures that force battered women to remain with their mates, despite their long-standing and reasonable fear of severe bodily harm and the isolation that being a battered woman creates, can a battered woman's state of mind be accurately and fairly understood." *State v. Kelly*, 97 N.J. 178, 196, 478 A.2d 364, 3 (1984). See also *Fielder v. State*, 756 S.W.2d 309, 319 (Tex. Crim. App. 1988).

Another court admitted BWS evidence to help explain a battered woman's conduct after killing her mate. *Pe*

v. Minnis, 118 Ill. App. 3d 345, 356-57, 455 N.E.2d 209, 218 (1983) (BWS "might extend to [explain] dismemberment" of husband after killing, a point which the prosecution legitimately exploited.)

Similarly, this evidence also would be admissible on the subjective fear element in a jurisdiction that recognized "imperfect self-defense," which reduces murder to voluntary manslaughter. See *People v. Aris*, 215 Cal. App. 3d 1178, 1199, 264 Cal. Rptr. 167, 181 (1989) (BWS evidence is relevant "to prove the honest belief requirement for both perfect and imperfect self-defense"); Note, "Partially Determined Imperfect Self-Defense: The Battered Wife Kills and Tells Why," 34 *Stan. L. Rev.* 615 (1982).

Battered Child Defense

In *State v. Janes*, 64 Wash. App. 134, 822 P.2d 1238 (1992), rev. granted, 119 Wash. 2d 1001, 832 P.2d 488 (1992), these arguments were applied to a "battered child." The court reasoned that "[n]either law nor logic suggests any reason to limit to women recognition of the impact a battering relationship may have on the victim's actions or perceptions. . . . [C]hildren are both objectively and subjectively more vulnerable to . . . violence than are adults." *Id.* at 142, 822 P.2d at 1243.

Other courts have rejected this view, at least in nonconfrontational situations. See *Whipple v. Duckworth*, 957 F.2d 418, 421-24 (7th Cir. 1992) (exclusion of syndrome evidence did not violate constitution because accused offered no evidence that he was in immediate danger), cert. denied, 113 S.Ct. 218 (1992); *Jahnke v. State*, 682 P.2d 991, 1008 (Wyo. 1984) ("battered son" testimony rejected because the defendant was not under attack at the time of the killing).

See generally P. Mones, *When a Child Kills: Abused Children Who Kill Their Parents* (1991); Van Sambeek, "Parricide as Self-defense," 7 *Law & Inequality* 87 (1988-89); Comment, "Killing Daddy: Developing a Self-Defense Strategy for the Abused Child," 137 *U. Pa. L. Rev.* 1281 (1989).

Beyond Jurors Knowledge

A second issue is whether BWS evidence is a proper subject for expert testimony. In 1981, the Ohio Supreme Court held that this subject is "within the understanding of the jury" and thus inappropriate for expert testimony. *State v. Thomas*, 66 Ohio St. 2d 518, 521, 423 N.E.2d 137, 140 (1981), overruled by *State v. Koss*, 49 Ohio St.3d 213, 551 N.E.2d 970 (1990).

Most courts disagree, finding that "a battering relationship embodies psychological and societal features that are not well understood by lay observers." *State v. Kelly*, 97 N.J. 178, 209, 478 A.2d 364, 379 (1984). *Accord* *Ibn-Tamas v. United States*, 407 A.2d 626, 634-35 (D.C. 1979), appeal after remand, 455 A.2d 893 (D.C. 1983); *Hawthorne v. State*, 408 So. 2d 801, 806 (Fla. App.), appeal dismissed, 415 So. 2d 1361 (Fla. 1982); *Smith v. State*, 247 Ga. 612, 618-19, 277 S.E.2d 678, 683 (1981); *People v. Torres*, 128 Misc. 2d 129, 134, 488 N.Y.S.2d 358, 362 (Sup. Ct. 1985); *State v. Hill*, 287 S.C. 398, 399, 339 S.E.2d 121, 122 (1986); *State v. Allery*, 101 Wash. 2d 591, 597, 682 P.2d 312, 316 (1984).

The research appears to support this conclusion; it "suggests that jurors are misinformed on some aspects

of wife abuse and that some jurors are likely to be more misinformed than others. Nevertheless, the surveys have not found overwhelming endorsement of the 'myths' about abuse." Schuller & Vidmar, "Battered Woman Syndrome Evidence in the Courtroom: A Review of the Literature," 16 *Law & Hum. Behav.* 273, 283 (1992).

Scientific Basis

A final issue relates to the scientific basis for BWS evidence. Some courts excluded expert testimony on this subject because its scientific validity had not been sufficiently established. *Ibn-Tamas v. United States*, 455 A.2d 893, 983-94 (D.C. 1983); *State v. Thomas*, 66 Ohio St. 2d 518, 521-22, 423 N.E.2d 137, 140 (1981) (BWS not sufficiently developed as scientific knowledge), overruled by *State v. Koss*, 49 Ohio St. 3d 213, 551 N.E.2d 970, 974 (1990); *Buhrle v. State*, 627 P.2d 1374, 1378 (Wyo. 1981) (record did not establish scientific basis).

Rejecting this argument, other courts have concluded that a "sufficient scientific basis" has been established. *State v. Kelly*, 97 N.J. 178, 211, 478 A.2d 364, 380 (1984). According to a federal district court, "[t]he general acceptance of expert testimony on the battered woman syndrome has been acknowledged by legal authorities as well as the scientific community." *Fennell v. Goolsby*, 630 F. Supp. 451, 459 (E.D. Pa. 1985). *Accord* *State v. Hennem*, 441 N.W.2d 793, 797-99 (Minn. 1989); *State v. Gallegos*, 104 N.M. 247, 253, 719 P.2d 1268, 1274 (N.M. App. 1986).

As noted earlier, the research now supports the latter cases.

Recent Trend

The trend in the cases is to admit BWS evidence. See Note, "A Trend Emerges: A State Survey on the Admissibility of Expert Testimony Concerning the Battered Woman Syndrome," 25 *J. Fam. L.* 373, 396 (1986-87) ("The trend . . . appears to be in the direction of admissibility. . ."); Annot., "Admissibility of Expert or Opinion Testimony on Battered Wife or Battered Woman Syndrome," 18 *A.L.R.4th* 1153 (1982).

For example, the Ohio Supreme Court has reversed its earlier position and admitted BWS evidence. *State v. Koss*, 49 Ohio St. 3d 213, 217, 551 N.E.2d 970, 974 (1990). Two states, including Ohio, have enacted statutes admitting BWS evidence. See *Mo. Ann. Stat. § 563.033* (1992 Supp.); *Ohio Rev. Code Ann. §§ 2901.06, 2945.39, 2945.392* (Baldwin 1992). See also *State v. Williams*, 787 S.W.2d 308, 311-12 (Mo. App. 1990) (statute applies to unmarried as well as married victims).

Nevertheless, one court has held that the refusal to admit BWS evidence is not unconstitutional. *Tourlakis v. Morris*, 738 F. Supp. 1128, 1140 (S.D. Ohio 1990).

Limitations on Admissibility

Several limitations on admissibility should be noted. First, some courts permit experts to explain the syndrome only in general terms, describing the salient characteristics of BWS. Accordingly, the expert "should not be allowed to testify as to the ultimate fact that the particular defendant actually suffers from battered woman syndrome." *State v. Hennem*, 441 N.W.2d 793, 799 (Minn. 1989).

Second, the substantive law of self-defense may limit admissibility. Traditional self-defense law requires "imminent" danger of death or serious bodily injury. Typically, a killing in the absence of a confrontation falls outside this rule. Accordingly, several courts have held that a battered wife who kills a sleeping spouse cannot claim self-defense. *E.g.*, *State v. Stewart*, 243 Kan. 639, 647-48, 763 P.2d 572, 577-78 (1988); *State v. Norman*, 324 N.C. 253, 261-68, 378 S.E.2d 8, 13-16 (1989). See generally Comment, "Rendering Each Woman Her Due: Can a Battered Woman Claim Self-Defense When She Kills Her Sleeping Batterer?" 38 U. Kan. L. Rev. 169 (1989).

Similarly, some courts refuse to recognize the use of BWS evidence in "murder-for-hire" cases. *E.g.*, *People v. Yaklich*, 833 P.2d 758, 760 (Colo. App. 1991); *State v. Martin*, 666 S.W.2d 895, 899-900 (Mo. App. 1984). The opposing view is that the battered woman may justifiably believe she is in "imminent" danger even though she is not being beaten or threatened at the time of the killing.

Because of this problem, one commentator has argued that the legal definition of self-defense is too restrictive and should be modified to recognize "psychological self-defense." Ewing, "Psychological Self-Defense: A Proposed Justification for Battered Women Who Kill," 14 Law & Hum. Behav. 579 (1990). Others, however, have criticized this proposal: "The psychological justification for the defense employs unacceptably soft science, and its legal support is confused and regressive." Morse, "The Misbegotten Marriage of Soft Psychology and Bad Law: Psychological Self-Defense as a Justification for Homicide," 14 Law & Hum. Behav. 595, 595-96 (1990).

See also Greenwald, Tomkins, Kenning & Zavodny, "Psychological Self-Defense Jury Instructions: Influence on Verdicts for Battered Women Defendants," 8 Behav. Sci. & Law 171 (1990).

ADMISSIBILITY: OTHER CASES

BWS evidence has been offered for purposes other than self-defense. In most of these cases the syndrome is used by the prosecution rather than the defense.

In *Arcoren v. United States*, 929 F.2d 1235 (8th Cir. 1991), cert. denied, 112 S.Ct. 312 (1991), the defendant was charged with aggravated sexual abuse. His estranged wife reported the assault but then recanted her grand jury testimony at trial. The prosecution introduced BWS evidence to explain the wife's conduct. On appeal the Eighth Circuit affirmed, finding "no persuasive reason" to limit BWS testimony "to cases in which it is offered to bolster a claim of self-defense." *Id.* at 1241.

Other cases have reached a similar result. In *State v. Baker*, 120 N.H. 773, 775-76, 424 A.2d 171, 172-73 (1980), the court upheld the introduction of BWS evidence to rebut an insanity defense in the trial of a husband for the attempted murder of his wife.

In *State v. Ciskie*, 110 Wash. 2d 263, 281, 751 P.2d 1165, 1170-71 (1988), BWS evidence was admitted in a rape prosecution to explain why the victim had not left the defendant or reported the abuse.

As one court has noted: "It would seem anomalous to allow a battered woman, where she is a criminal defendant, to offer this type of expert testimony in order to help the jury understand the actions she took, yet deny her

that same opportunity when she is the complaining witness and/or victim and her abuser is the criminal defendant." *State v. Frost*, 242 N.J. Super. 601, 612, 577 A.2d 1282, 1287 (A.D.), cert. denied, 127 N.J. 321, 604 A.2d 596 (1990). See generally Note, "Using Battered Woman Syndrome Evidence in the Prosecution of a Batterer," 76 Iowa L. Rev. 553 (1991) (offering prosecutors guidelines for the introduction of BWS evidence).

BWS evidence has also been introduced in sentencing proceedings. *E.g.*, *United States v. Johnson*, 956 F.2d 894, 901-02 (9th Cir. 1992); *United States v. Whitetail*, 956 F.2d 857, 864 (8th Cir. 1992) (Sentencing guidelines "permit consideration of battered-woman syndrome as a basis for departure from the guidelines.")

RELATED ISSUES

Several other issues concerning the battered wife syndrome have arisen. One court has ruled it error for the prosecution to rebut BWS evidence with evidence of the defendant's prior aggressive acts toward the victim. *State v. Kelly*, 102 Wash. 2d 188, 193-99, 685 P.2d 564, 569-71 (1984). This type of rebuttal evidence is inadmissible because it is character evidence.

Ineffective Assistance of Counsel

Several cases raise claims of ineffective assistance of counsel. In one case the Sixth Circuit ruled that a defense counsel's failure to introduce expert testimony on the battered woman syndrome did not constitute ineffective assistance. *Meeks v. Bergen*, 749 F.2d 322, 328-29 (6th Cir. 1984).

In another case, however, the Pennsylvania Supreme Court reached the opposite result. *Commonwealth v. Stonehouse*, 521 Pa. 41, 57-58, 555 A.2d 772, 781 (1989) (failure to introduce BWS evidence constituted ineffective assistance of counsel).

A California appellate court concurred in a case where defense counsel admitted that he had "never heard" of such a defense, and BWS evidence would have helped dispel "many of the commonly held misconceptions about battered woman. As the record reflect[ed], the prosecutor exploited several of these misconceptions in urging the jury to reject appellant's self-defense claim." *People v. Day*, 2 Cal. App. 4th 405, 416, 2 Cal. Rptr. 2d 916, 922 (1992).

Victim Examinations

The courts are split on whether a defendant who intends to introduce BWS evidence is required to submit to an examination by prosecution experts.

In *United States v. Vega-Penarete*, 137 F.R.D. 233 (E.D.N.C. 1991), the court ruled that the prosecution "should have the opportunity to respond to the defendant's expert testimony on the Battered Wife Syndrome with testimony of its expert who has also examined the defendant." *Id.* at 235. See also *State v. Briand*, 130 N.H. 650, 657-58, 547 A.2d 235, 240 (1988) (independent evaluation required); *State v. Myers*, 239 N.J. Super. 158, 169-70, 570 A.2d 1260, 1266 (same), cert. denied, 127 N.J. 323, 604 A.2d 598 (1990).

In *Hickson v. State*, 589 So. 2d 1366, 1369 (Fla. App. 1991), however, a Florida appellate court held that offering BWS evidence did not waive the Fifth Amendment

privilege against self-incrimination, and thus an examination by a prosecution expert was impermissible.

The Minnesota Supreme Court in *State v. Hennem*, 441 N.W.2d 793, 799-800 (Minn. 1989), resolved the issue on different grounds. The court ruled that only generalized information about BWS is admissible, and thus a defense expert is not permitted to express an opinion about the particular defendant. This rule of limited admissibility obviates the need for an adverse examination by prosecution experts because defense experts will not be allowed to testify based upon a defense examination of the defendant.

See generally Comment, "A Critique and Proposed Solution to the Adverse Examination Problem Raised by Battered Woman Syndrome Testimony in *State v. Hennem*," 74 Minn. L. Rev. 1023 (1990).

Right to Expert Assistance

Finally, an indigent defendant may have the right to expert assistance in introducing BWS evidence. In *Dunn v. Roberts*, 963 F.2d 308 (10th Cir. 1992), the 10th Circuit ruled that the accused had such a right in support of a duress defense.

REFERENCES

Books and articles on BWS include:

- Representing Battered Women Who Kill (S. Johann & I. Osanka eds. 1989);
- C. Ewing, *Battered Woman Who Kill* (1987);
- C. Gillespie, *Justifiable Homicide: Battered Women, Self-Defense, and the Law* (1989);
- Crocker, "The Meaning of Equality For Battered Women Who Kill Men in Self-Defense," 8 *Harv. Women's L.J.* 121 (1985);
- Kinports, "Defending Battered Women's Self-Defense Claims," 67 *Ore. L. Rev.* 393 (1988);
- Mather, "The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony," 39 *Mercer L. Rev.* 545 (1988);
- Rosen, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill," 36 *Am. U. L. Rev.* 11 (1986);
- Schneider, "Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense," 15 *Harv. C.R.-C.L. L. Rev.* 623 (1980);
- Tinsley, "Criminal Law: The Battered Woman Defense," 34 *Am. Jur. Proof of Facts* 2d 1 (1983);
- Vidmar & Schuller, "Juries and Expert Evidence: Social Framework Testimony," 52 *Law & Contemp. Probs.* 133, 148-55 (Autumn 1989);
- Comment, "The Defense of Battered Women Who Kill," 135 *U. Pa. L. Rev.* 427 (1987).