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Battered Woman Syndrome: Admissibility of Expert Testimony for the Defense--Smith v. State

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NOTES

BATTERED WOMAN SYNDROME: ADMISSIBILITY OF EXPERT TESTIMONY FOR THE DEFENSE

Smith v. State[1]

In recent years there has been increasing public awareness of violence against women, particularly women involved in violent relationships with their mates. There is increased protection today for women, both from their battering spouses and from their inability to extricate themselves from the violent relationships.

This movement toward greater protection has traditionally been seen in the areas of law enforcement and social work. In a handful of cases, however, protection has been extended through the judicial system to women who have assaulted or killed those who allegedly battered them. The availability of the "battered woman syndrome"[2] as a defense in these cases raises issues that are difficult but important.

Josephine Smith killed her live-in boyfriend.[3] At trial, Smith's testimony showed that she met the victim when she was 17 years old and later bore his child, but she never married him. The deceased first struck her less than a month after they met and continued to beat her periodically during the following six years until his death. Following the beatings, the deceased always apologized, said he would not strike her again, and told her he loved her. In view of these promises, Smith never called the police or told her friends about the beatings.[4]

On the night of the shooting, the deceased made advances toward Smith, but she told him she was not interested. A scuffle ensued, and the deceased hit Smith in the head with his fist, choked her, and threw her against a door. When Smith got loose, she grabbed a gun and ran downstairs to phone for help; however, she was unsuccessful. Smith attempted to flee the apartment, but the victim slammed the door on her foot. She then fired the gun three times with her eyes closed, fled to a neighbor's house, and called the police.[5]

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1. 247 Ga. 612, 277 S.E.2d 678 (1981).
2. "Battered woman syndrome" is defined in the text accompanying notes 24-32 *infra*.
3. 247 Ga. at 612, 277 S.E.2d at 678.
4. *Id.* at 613, 277 S.E.2d at 679.
5. *Id.*

Other testimony showed that when the police arrived, they found the victim with gunshot wounds in the head, neck, and abdomen.[6] No officer noticed any bruises on the defendant. Although Smith refused shoes because, she said, her foot was swollen, no one noticed her limping.[7]

At trial, Smith claimed she shot her boyfriend in self-defense.[8] Her attorney attempted to introduce expert testimony to show that Smith honestly believed she was in danger when she shot the victim because she suffered from the battered woman syndrome, i.e., that due to a special psychological condition caused by the prolonged period of beatings, Smith truly believed she was in a life-threatening situation.[9] The syndrome is defined as a combination of the stages of a battering relationship and the resultant psychological condition.[10] The condition is predominantly a combination of a learned helplessness and a low self-image.[11]

The trial court, however, ruled that the testimony was inadmissible because the jurors were able to decide, without the aid of an expert, whether Smith acted in fear.[12] The jury ultimately rejected Smith's assertions of self-defense, and she was convicted of voluntary manslaughter.[13]

Smith appealed her conviction on the ground that it was error to exclude the expert's testimony concerning the battered woman syndrome. The Georgia Court of Appeals[14] upheld the trial court's exclusion, basing its decision on the rule that a witness cannot express an opinion concerning an ultimate issue of fact because such testimony invades the province of the jury.[15] The Georgia Supreme Court, in *Smith v. State*,[16] reversed and held

6. *Id.* The medical examiner testified that any one of the three wounds could have been fatal.

7. *Id.*

8. *Id.* at 612, 277 S.E.2d at 678.

9. *Id.* at 614, 277 S.E.2d at 680. The expert testified out of hearing of the jury that typically the battered woman fears for her friends and herself, lacks self-respect, and believes that her batterer will reform. *See* notes 38-41 and accompanying text *infra*. The expert further testified that a study of the defendant revealed that she possessed many of these characteristics. Smith's case history demonstrated the existence of a six-year relationship between herself and the victim, highlighted by frequent periods of abuse. The defendant continued the relationship because she loved the victim, believed him each time he promised to end the abuse, and was afraid that if she tried to leave, her life would be endangered. The expert concluded that, in her opinion, Smith was a victim of the battered woman syndrome. 247 Ga. at 614, 277 S.E.2d at 680.

10. *See* text accompanying notes 24-32 *infra*.

11. *See* notes 28-32 and accompanying text *infra*.

12. 247 Ga. at 613, 277 S.E.2d at 679. *See* notes 59-60 and accompanying text *infra*.

13. 247 Ga. at 613-14, 277 S.E.2d at 679.

14. Smith v. State, 156 Ga. App. 419, 274 S.E.2d 703 (1980), *reversed*, 247 Ga. 612, 277 S.E.2d 678 (1981).

15. *Id.* at 419, 274 S.E.2d at 704.

16. 247 Ga. 612, 277 S.E.2d 678 (1981).

that the expert testimony regarding the battered woman syndrome was improperly excluded from the jury's consideration.[17] The *Smith* court said that an expert's opinion on an ultimate issue is admissible when the expert's conclusion is one that jurors ordinarily cannot draw for themselves.[18] The court determined that conclusions concerning a defendant's fear in a battering situation are conclusions beyond the ordinary experience of the jury and, therefore, are admissible.[19] In support of its decision, the court relied on the fact that other courts consistently have admitted expert testimony concerning the battered child syndrome.[20]

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17. *Id.* at 619-20, 277 S.E.2d at 683.

18. *Id.* at 615-17, 277 S.E.2d at 680-82. The court emphasized the modern trend to abandon the rule that an expert may not state his opinion on an ultimate issue. *See* C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 12 (2d ed. 1972). The court pointed out that the Federal Rules of Evidence allow opinion testimony to be admitted on the ultimate issue if it will assist the trier of fact to understand the evidence or to determine a fact in issue. FED. R. EVID. 702, 704. The *Smith* court then pointed out that as early as 1939, Georgia recognized that if the same elements that guide the expert can be comprehended by the jury, the jury alone should form an opinion on ultimate issues. 247 Ga. at 616, 277 S.E.2d at 681. If the knowledge of the expert exceeds that of the average person, however, Georgia courts have held that the expert's opinion on an ultimate issue should be admitted. *Id. See also* Metropolitan Life Ins. Co. v. Saul, 189 Ga. 1, 9, 5 S.E.2d 214, 221 (1939).

19. 247 Ga. at 619, 277 S.E.2d at 683.

20. *Id.* at 617, 277 S.E.2d at 682. The battered child syndrome is a sociomedical term used to characterize a clinical condition in children who have been physically abused by a parent or guardian. Kempe, Silverman, Steel, Droegemueller & Silver, *The Battered Child Syndrome*, 181 A.M.A.J. 17, 17 (1962). Typically, expert testimony concerning the battered child syndrome is presented by the prosecution in an assault or homicide case where the parent is on trial for beating or killing his child. The state calls a forensic pathologist or, in some cases, a pediatrician who first testifies that he examined the victim's body. He then describes the various fractures, bruises, ruptures, or internal injuries allegedly resulting from the beating in question. He also describes any evidence of partially healed wounds or scars that may have resulted from past beatings. Finally, he testifies that, in his opinion, the child's injuries were not the result of a careless child's play or an accident in the home but were most likely the result of an overzealous display of discipline. *See* People v. Jackson, 18 Cal. App. 3d 504, 505-07, 95 Cal. Rptr. 919, 920-21 (1971); State v. Wilkerson, 295 N.C. 559, 563-66, 247 S.E.2d 905, 908-09 (1978); State v. Best, 89 S.D. 220, 245-46, 232 N.E.2d 447, 458 (1975). For a discussion of the use of a pathologist in child abuse cases, see Wecht & Larkin, *The Battered Child Syndrome—A Forensic Pathologist's Viewpoint*, 1981 MED. TR. T. Q. 1, 18.

Expert testimony regarding the battered child syndrome differs drastically from expert testimony concerning the battered woman syndrome. The expert in a battered child case is a physician who testifies that a child found with the described injuries has not suffered those injuries by accidental means. The conclusion simply relates to the source of injury and has nothing to do with the defendant's

The *Smith* decision is significant because the Georgia court is one of only a handful to hold that expert testimony concerning the battered woman syndrome is admissible. Of the few appellate courts that have addressed the issue, only two have unconditionally admitted such expert testimony.[21] A small number of courts have stated that the testimony was admissible if a proper foundation was laid concerning the expert's method of analysis, his qualifications, and the theory's acceptance within the relevant scientific community.[22] The remaining appellate courts, however, have unconditionally denied admission of the testimony.[23] Thus, the *Smith* court has contributed to a growing

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psychological makeup or state of mind. On the other hand, the expert in a battered woman case is a psychologist who testifies regarding the circumstances surrounding a battering relationship and the defendant's reactions to that relationship. The expert's conclusion concerns psychological differences between battered women and normal women. Battered child syndrome testimony concerns the corpus delecti of an assault, i.e., the evidence tending to show that the defendant committed the act. Battered woman syndrome testimony relates to the mens rea of an assault, i.e., the evidence tending to show whether the defendant had the requisite state of mind. The difference between these theories raises a serious question as to whether the admissibility of battered child syndrome evidence supports the admission of battered woman syndrome evidence.

The *Smith* court used more reliable precedent when it cited two cases holding that battered woman syndrome testimony is generally admissible. *See* State v. Baker, 120 N.H. 773, 775, 424 A.2d 171, 173 (1980) (admissible to rebut defendant batterer's evidence of insanity); Ibn-Tamas v. United States, 407 A.2d 626, 639 (D.C. 1979) (admissible if proper foundation presented regarding acceptance of expert's methodology in relevant scientific community).

21. Smith v. State, 247 Ga. 612, 619, 277 S.E.2d 678, 683 (1981); State v. Baker, 120 N.H. 773, 775, 424 A.2d 171, 173 (1980). In *Baker*, the court allowed the prosecution to call a psychologist to rebut the defendant batterer's evidence of insanity. The psychologist, called as an expert witness on the battered woman syndrome, testified regarding the mental condition of a batterer involved in a battering relationship. The defendant had beaten his wife on numerous occasions before he killed her, and the psychologist testified that wife-beaters are not necessarily mentally ill. 120 N.H. at 775, 424 A.2d at 173.

22. In Ibn-Tamas v. United States, 407 A.2d 626 (D.C. 1979), the court held that expert testimony relating to the battered woman syndrome was conditionally admissible. The court remanded the case, however, because the record was insufficient to show that the expert witness was qualified or that her research methods were accepted by the relevant scientific community. *Id.* at 637-39. *See* note 64 and accompanying text *infra*.

In Buhrle v. State, 627 P.2d 1374 (Wyo. 1981), the court excluded expert testimony concerning the battered woman syndrome because the defense did not demonstrate adequately that the state of the art would permit a reasonable expert opinion. *Id.* at 1377. The court specifically stated that it was not holding that expert testimony regarding the syndrome was always inadmissible. *Id.* at 1378. *See also* People v. White, 90 Ill. App. 3d 1067, 1072, 414 N.E.2d 196, 200 (1980).

23. Morrison v. Bradley, ___ Colo. App. ___, ___, 622 P.2d 81, 82 (1980) (court disallowed expert testimony on battered woman syndrome as defense in

split of authority on the question of whether expert testimony concerning the battered woman syndrome is admissible.

As mentioned before, the "battered woman syndrome" is a term used to describe the stages of a battering relationship and the effects of each stage on an abused woman.[24] Dr. Lenore E. Walker, a pioneer psychologist in the study of battered women, has identified the three stages of a battering relationship as: (1) a tension building stage in which minor incidents of verbal and physical abuse occur;[25] (2) a violent battering stage in which the woman is often seriously injured;[26] and (3) a compassionate stage in which the man begs forgiveness, swears his love, and promises never to strike the woman again.[27] Dr. Walker has found that the repetition of this pattern causes the woman to develop certain learned reactions.[28] The first stage becomes a red flag, warning a woman that a severe beating will soon follow.[29] The suppressed fear experienced by the woman in the first stage may be so disconcerting that she may subconsciously welcome the second stage in order to return to the peaceful third stage.[30] The repeated disappointments resulting from the batterer's false promises of reform in the third stage cause the woman to develop a "learned helplessness,"[31] i.e., the woman believes hers is an inevitable fate and she can do nothing to alter her situation.[32]

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wrongful death action, but declined to accept or reject validity of general theory); State v. Thomas, 66 Ohio St. 2d 518, 521, 423 N.E.2d 137, 139-40 (1981) (court excluded battered woman syndrome testimony on grounds that self-defense is within understanding of average layman, expert's research methodology was not accepted by relevant scientific community, and evidence's prejudicial impact outweighed probative value).

24. L. WALKER, THE BATTERED WOMAN 56 (1979).

25. *Id.* at 56-59.

26. *Id.* at 59-65.

27. *Id.* at 65-70.

28. *Id.* at 55.

29. *Id.* at 57. Dr. Walker points out that many battered women are adept at keeping the relationship in the first stage for years. *Id.* at 58. Women who have been battered over a period of time, however, know that the first stage's minor battering incidents will escalate. *Id.* at 57. When the tension rises to a certain point, it triggers the more serious incidents of the second stage. *Id.* at 59. Because the cycle is repeated, the battered woman learns to recognize this pattern of escalation and the point at which her mate loses control. For a description of a situation involving the first and second stages of the cycle, see Comment, *Defense Strategies for Battered Women Who Assault Their Mates:* State v. Curry, 4 HARV. WOMEN'S L.J. 161, 171-72 (1981).

30. L. WALKER, *supra* note 24, at 70.

31. *Id.* at 55.

32. *Id.* at 49-50. Dr. Walker states that repeated cycles of battering diminish the woman's motivation to respond. Learned helplessness is concerned with "early response reinforcement and subsequent passive behavior." *Id.* at 45. Once the woman begins acting out of a belief of helplessness, her perception becomes reality and she loses her motivation to control her destiny—she truly becomes helpless. *Id.* at 47.

Expert testimony related to the battered woman syndrome is useful to the defendant because it helps dispel the average juror's misconceptions concerning a battering relationship. Three prevalent myths exist concerning battering relationships. First, no matter how sympathetic people might be, they frequently believe that the reason a woman remains with her batterer is because she is masochistic.[33] Second, much of the public believes that battered women are mentally ill. This is similar to the first myth in that it attributes the existence of the battering relationship to the woman's negative personality characteristics.[34] Third, it is widely presumed that the law enforcement system protects battered women.[35] In fact, the system often fails to protect women from abuse.[36]

Some writers believe that social myths and prejudices concerning battered women cause the average layman to fault the female defendant for not ending the relationship before it reached the point of no return.[37] Expert

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33. *Id.* at 20. A source of this myth is explained in Comment, *Does Wife Abuse Justify Homicide?*, 24 WAYNE L. REV. 1705, 1708-09 (1978). The writer states that some psychiatrists, including Freud, have asserted that battered wives are masochistic and have characterized battered women as "aggressive, efficient, masculine, and sexually frigid." *Id.* at 1708-09 (quoting Snell, Rosenwald & Robey, *The Wifebeater's Wife*, 11 ARCH. GEN. PSYCH. 107, 111 (1964)). Some psychiatrists believe that the beatings give these women masochistic satisfaction. Comment, *supra*, at 1708-09. Dr. Walker asserts that these women are not masochistic but endure the beatings because of a diminished motivation to respond. L. WALKER, *supra* note 24, at 47.

34. *See* L. WALKER, *supra* note 24, at 20-21. Often, a beaten spouse's behavioral patterns earn her the label of crazy. Several women that Dr. Walker interviewed reported being hospitalized for schizophrenia, paranoia, and severe depression. *Id.*

35. *Id.* at 26.

36. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 626 (1980). The legal system is hesitant to become involved in domestic disputes largely out of respect for privacy rights. Comment, *The Battered Spouse Syndrome as a Defense to a Homicide Charge Under the Pennsylvania Crimes Code*, 26 VILL. L. REV. 105, 106 (1980). The courts traditionally have given deference to the sanctity of the home and to the family relationship. *Id.* In addition to family privacy, practical considerations have caused police departments to assign wife abuse calls a low priority. First, more police are injured or killed answering domestic calls than any other type of call. *Id. See also* Eisenberg & Seymour, *The Self-Defense Plea and Battered Women*, 14 TRIAL 34, 36 (1978). Second, vague standards for arrests and low conviction percentages have caused police who do respond to assume the role of social worker rather than law enforcement officer. Comment, *supra*, at 106 n.12.

37. *See* W. RYAN, BLAMING THE VICTIM 1-11 (rev. ed. 1976); Schneider, *supra* note 36, at 629. For examples of methods used by defense lawyers to demonstrate public misconceptions and prejudices, see Lewin, *Battered Women and the Doctrine of Self-Defense: A Reevaluation of the Meaning of Deadly Force*, 8 STUDENT LAW. 10, 11 (1980) (affidavits from local experts pointing out community's ignorance concerning battering obtained to persuade judge to allow voir dire of jurors concerning

testimony can show the various reasons why the battered woman remained with her mate.[38] These reasons may include economic dependence on the victim,[39] low self-esteem that made the woman feel she deserved abuse or that no one would help her,[40] or constant fear that the male victim would find her if she left and would punish her or her children for the attempt.[41]

Expert testimony concerning the syndrome also is valuable because it can help the jury understand the reasons why the defendant believed she needed to act in self-defense.[42] In order for the defendant to assert self-defense successfully, she must show that she believed that she was in imminent physical danger, used only that amount of force necessary to defend herself, and acted reasonably in light of all known surrounding facts and circumstances.[43] Expert testimony related to the battered woman syndrome can explain why the degree of force the defendant used to prevent injury was reasonable.[44] The testimony can show that a battered woman becomes familiar with behavioral cues from her batterer.[45] Thus, what may seem to have been an unreasonable degree of force to the average juror may have seemed reasonable to an abused woman who recognized that her batterer

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their beliefs about battering relationships); Comment, *supra* note 29, at 167-68 (defense counsel filed pretrial motion for appointment of expert on battered woman syndrome and attached affidavits containing statements from doctors and social workers recognizing community's lack of understanding of wife battering).

38. *See* Comment, *supra* note 29, at 172. Often, the question of why the defendant stayed with her mate is presented by the prosecution when cross-examining the defendant. *See, e.g.*, Ibn-Tamas v. United States, 407 A.2d 626, 633-34 (D.C. 1979).

39. Comment, *The Battered Wife's Dilemma: To Kill or To Be Killed*, 32 HASTINGS L.J. 895, 902 (1981).

40. *Id.* at 901. *See* L. WALKER, *supra* note 24, at 31.

41. *See* Comment, *supra* note 39, at 901.

42. *See* Comment, *The Use of Expert Testimony in the Defense of Battered Women*, 52 COLO. L. REV. 587, 587-93 (1981); Comment, *supra* note 29, at 169-75; Comment, *supra* note 39, at 917-31. *But see* Rittenmeyer, *Of Battered Wives, Self-Defense and Double Standards of Justice*, 9 J. CRIM. JUST. 389, 391-93 (1981) (claims by battered wives of excused homicide because of psychological factors have no legal foundation).

43. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 53 (1972). There is a split of authority concerning the definition of "surrounding facts and circumstances." One view is that an act of self-defense must be reasonable in light of circumstances existing at the time of the killing. The modern view is that the act must be reasonable in light of *all* the facts and circumstances known to the defendant. For a discussion of this split of authority, see note 49 *infra*.

44. L. WALKER, *supra* note 24, at 62-63. Dr. Walker explains that battered women do not overestimate the potential danger when their mates threaten violence. If anything, they underestimate the danger that could face them if they did not strike first. *See also* Comment, *supra* note 29, at 172.

45. *See* Comment, *supra* note 29, at 171 (relying on L. WALKER, *supra* note 24, at 59).

had passed the point of control.[46] Such testimony also can help resolve issues of fact concerning the imminence of physical danger.[47] The expert testimony can show that the battered woman's special familiarity with behavioral cues alerted her to the imminence of harm before the moment her attacker actually moved to strike.[48]

While expert testimony concerning the syndrome can prove valuable to an assertion of self-defense, there are problems with its admissibility. The first objection raised is that syndrome testimony is irrelevant to the issue of self-defense. As previously noted, the defendant must have acted reasonably in light of all known facts and circumstances to assert self-defense successfully.[49] There is a split of authority on whether the reasonableness

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46. *See* Ibn-Tamas v. United States, 407 A.2d 626, 634 (D.C. 1979) (expert testified that batterer's actions caused wife's state of fear, which led her to believe she was in danger even though victim was standing in next room when she shot him); Buhrle v. State, 627 P.2d 1374, 1378 (Wyo. 1981) (excluded testimony offered to show defendant's fear was reasonable even though she shot victim through locked door after talking with him for over an hour).

47. *See* Comment, *supra* note 29, at 171. *See also* cases cited note 46 *supra*.

48. For a general discussion of the battered woman syndrome and the imminent danger element of self-defense, see Comment, *supra* note 39, at 926-30.

49. Some courts have held that in order to assert self-defense, the defendant's belief of imminent harm must be reasonable under the circumstances existing at the time of the killing. *See, e.g.*, People v. Williams, 240 Ill. 633, 640, 88 N.E. 1053, 1056 (1909); State v. Potter, 295 N.C. 126, 143, 244 S.E.2d 397, 408 (1978). The modern and more prevalent view, however, is that in order to assert self-defense, the defendant's belief of imminent harm must be reasonable under all circumstances, whether past or present, known to him at the time of the killing. *See* People v. Bush, 84 Cal. App. 3d 294, 303, 148 Cal. Rptr. 430, 436 (1978).

An important example of the modern view is State v. Wanrow, 88 Wash. 2d 221, 559 P.2d 548 (1977). In *Wanrow*, the court reversed Ms. Wanrow's conviction for second degree murder because, in part, of trial court error with regard to a self-defense instruction that read:

> To justify killing in self-defense . . . there must . . . reasonably appear to be, at or immediately before the killing, some overt act, or some circumstances which would reasonably indicate to the party killing that the person slain is, at the time, endeavoring to kill him or inflict upon him great bodily harm.

Id. at 234 n.7, 559 P.2d at 555 n.7. The *Wanrow* court emphasized the phrase "at or immediately before the killing" and found that the phrase erroneously narrowed the scope of the jury's inquiry into the surrounding circumstances. *Id.* at 236, 559 P.2d at 556. The court stated that Washington's law of self-defense called for the jury's evaluation of the defendant's belief in light of all the facts and circumstances known to him, including those known substantially before the killing. *Id.* at 234, 559 P.2d at 555. The court emphasized that it was important that the jury be able to consider Wanrow's knowledge of the victim's past violent acts and reputation for violence. *Id.* at 237-38, 559 P.2d at 557.

Writers discussing the use of battered woman syndrome testimony in self-defense cases have suggested that *Wanrow* is precedent for introducing the battered woman's circumstances into evidence. *See* Comment, *supra* note 42, at 591-93; Comment,

of the defendant's actions should be measured by an objective or subjective standard.[50] Under the objective standard, the jury must determine whether the facts and circumstances would have induced a reasonable person to act in self-defense.[51] The relevancy objection to the admission of syndrome testimony is supported by the argument that the special beliefs and reactions of a battered woman are not those of a reasonable person.[52] The counter-argument is that the battered woman's special beliefs and reactions are the direct result of the surrounding facts and circumstances[53] and, therefore, that a reasonable person put in the same situation also would have those beliefs and reactions.[54] Under the subjective standard, the jury need not

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supra note 39, at 920-26. These commentators suggest that the circumstances surrounding the battered woman, including past beatings by the victim, her frustration due to unsuccessful efforts to solicit help from the police, and her general feeling of worthlessness, influence her perception of the need to use self-defense—just as past acts by the victim influenced Ms. Wanrow's perception of the need to defend herself. *See* Comment, *supra* note 39, at 923.

50. The minority view and probably the common law rule is the subjective standard as set forth in 40 AM. JUR. 2D *Homicide* § 154 (1968). It holds that a person claiming self-defense must have honestly believed he was in imminent danger under all the circumstances as he honestly perceived them. The Model Penal Code has adopted the subjective standard. "The use of force . . . toward another person is justified when the actor believes that such force is . . . necessary for the purpose of protecting himself . . . ." MODEL PENAL CODE § 3.04(1) (1962).

The majority view is that the apprehension of danger and belief of necessity must be a reasonable belief. 40 AM. JUR. 2D *Homicide* § 154 (1968). The prevalent view is that an honest but unreasonable belief concerning the necessity of self-defense merely negates malice aforethought and reduces the offense to voluntary manslaughter. *See, e.g.*, People v. Flannel, 25 Cal. 3d 668, 680, 603 P.2d 1, 7, 160 Cal. Rptr. 84, 90 (1979). For some examples of the objective standard, see People v. Rickman, 73 Ill. App. 3d 755, 761, 391 N.E.2d 1114, 1119 (1979); People v. Moore, 43 Ill. App. 3d 521, 527, 357 N.E.2d 566, 570 (1976).

51. *See, e.g.*, Anderson v. State, 245 Ga. 619, 623, 266 S.E.2d 221, 223-24 (1980).

52. Arguably, a reasonable person who has experienced physical abuse exercises an instinct for survival and leaves the relationship before the abuse is repeated. *See generally* notes 38-41 and accompanying text *supra*. *See also* notes 31 & 32 and accompanying text *supra*. In Rittenmeyer, *supra* note 42, at 393, the author suggests that proponents of the battered woman syndrome as a defense in essence are promoting a different standard of reasonableness for battered women than the standard imposed on the rest of society. Rittenmeyer criticizes this as giving a battered woman a unique license to destroy her tormentor and creating a sex-based classification violative of the due process and equal protection rights of male homicide defendants and victims. *Id.* at 390.

53. *See* Ibn-Tamas v. United States, 407 A.2d 626, 639 (D.C. 1979); Smith v. State, 247 Ga. 612, 614, 277 S.E.2d 678, 680 (1981); Buhrle v. State, 627 P.2d 1374, 1377 (Wyo. 1981).

54. *See generally* Schneider & Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4 NAT'L J. CRIM. DEF. 141, 153 (1978).

decide what a reasonable person would believe, but rather what the defendant truly believed. If a court uses the subjective standard, the argument for admissibility is strengthened because the jury necessarily would have to consider the defendant's special beliefs and reactions to decide whether she truly anticipated danger.[55]

A second objection to admitting syndrome testimony is that it allows the expert to state his opinion on an ultimate issue of fact and, therefore, to invade the province of the jury.[56] The objection is supported by the fact that expert testimony often presents an aura of special reliability and trustworthiness to jurors.[57] Thus, the expert's opinion, in fact, could decide the ultimate issue for the jury. The majority rule for admissibility of expert testimony, however, is whether the expert's opinion may help the jury in its search for the truth. If so, it is irrelevant whether the opinion touches on an ultimate issue.[58]

A third objection to syndrome testimony is that it relates to a subject within the experience of the average layman.[59] Arguably, fear and belief of imminent danger are elements within the average juror's experience and need not be explained by expert testimony.[60] Based on that premise, courts

55. *See* Comment, *supra* note 39, at 919.

56. *See* State v. Nelson, 306 So. 2d 745, 750 (La. 1975); Daniels v. State, 554 P.2d 88, 94-95 (Okla. Crim. App. 1976); Cartera v. Commonwealth, 219 Va. 516, 519, 248 S.E.2d 784, 786 (1978).

57. *See, e.g.*, State v. Amaral, 488 F.2d 1148, 1152 (9th Cir. 1973); Buhrle v. State, 627 P.2d 1374, 1377 (Wyo. 1981).

58. *See, e.g.*, Diecidue v. State, 119 So. 2d 803, 806 (Fla. Dist. Ct. App. 1960); State v. Cunningham, 23 Wash. App. 826, 854, 598 P.2d 756, 772-73 (1979). *See also* note 18 and accompanying text *supra*.

59. Expert testimony is appropriate when the subject of inquiry is outside the normal experience and understanding of the jury. Dyas v. United States, 376 A.2d 827, 832 (D.C. 1977); Johnson v. State, 314 So. 2d 248, 252 (Fla. Dist. Ct. App. 1979); Compton v. Commonwealth, 219 Va. 716, 728-30, 250 S.E.2d 749, 756-58 (1979); Smith v. State, 564 P.2d 1194, 1199 (Wyo. 1977).

60. Mullis v. State, ____ Ga. ____, ____, 282 S.E.2d 334, 337 (1981). In *Mullis*, expert testimony on the battered woman syndrome was inadmissible because the testimony related to the defendant's reasonable fears, which could be comprehended by average jurors. This is a Georgia Supreme Court decision dated merely two months after *Smith*. Although the issue is the same, the court said that this case was distinguishable from *Smith* simply because the fear of the defendant in this case was within the comprehension of the jurors. The court did not elaborate on its finding but specifically held that this decision did not overrule *Smith*. *Id.* It is not clear from the opinion whether or not this is an attempt by the Georgia Supreme Court to narrow its earlier decision. *See also* State v. Griffiths, 101 Idaho 163, 166, 610 P.2d 522, 524 (1980) (fear is a human emotion within understanding of jury and jurors are as capable as psychiatrist to determine whether defendant acted in fear); State v. Jenkins, 260 N.W.2d 509, 513 (S.D. 1977) (expert testimony concerning validity of defendant's assertion of duress excluded). *Contra* State v. Ellis, 89 N.M. 194, 197, 548 P.2d 1212, 1215 (Ct. App. 1976) (expert testimony that

traditionally have excluded expert testimony concerning the defendant's state of mind[61] unless he has pleaded insanity.[62] The argument for admission of syndrome testimony, however, is that in order to understand a defendant's state of mind, the jury must understand the reasons why a defendant suffering from the battered woman syndrome would not leave her mate, would not inform police or friends of the abuse, and would fear imminent danger in situations where a non-sufferer would not. These reasons are not within the experience of the average layman.[63]

Another argument for exclusion of syndrome testimony concerns the reliability of the battered woman syndrome theory. Under the majority rule regarding the admissibility of expert testimony, an expert cannot give an opinion based on a theory unless it is generally accepted as reliable in the relevant scientific community.[64] Dr. Lenore Walker, one of the leading

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defendant was in state of fear and shot in response to basic instinct for survival improperly excluded). *Cf.* State v. Dickey, 125 Ariz. 163, 169, 608 P.2d 302, 308 (1980) (determination of whether defendant actually was fearful was within common experience of jury; however, expert testimony on character traits, such as being overly protective and easily fearful, was admissible).

61. The courts find expert testimony on the defendant's state of mind irrelevant because it is an issue within the understanding of the jury. *See, e.g.*, State v. Briggs, 112 Ariz. 379, 382, 542 P.2d 804, 807 (1975); State v. Williams, 34 N.C. App. 408, 415, 238 S.E.2d 668, 672 (1977); Smith v. State, 564 P.2d 1194, 1198-99 (Wyo. 1977). *But see, e.g.*, State v. Fish, ____ Mont. ____, ____, 621 P.2d 1072, 1079 (1980); State v. Ellis, 89 N.M. 194, 197, 548 P.2d 1212, 1215 (Ct. App. 1976). The essence of the rule is that predictive issues such as intent and motive can be decided on the basis of common experience and that the mental health professional has so little knowledge beyond the ordinary experience regarding intent that his testimony is highly misleading. *See* Bonnie & Slogobin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427, 429 (1980). Perhaps a secondary reason for the courts' reluctance to allow expert testimony on the defendant's state of mind is criticism of the clinical methodology practiced by many mental health professionals. *Id.* at 429. *See* note 66 and accompanying text *infra*.

62. *E.g.*, Bradshaw v. State, 353 So. 2d 188, 190 (Fla. Dist. Ct. App. 1978); Jones v. State, 232 Ga. 762, 765, 208 S.E.2d 850, 853 (1974). *Contra* State v. Ellis, 89 N.M. 194, 198, 548 P.2d 1212, 1214-15 (Ct. App. 1976).

63. *See* Ibn-Tamas v. United States, 407 A.2d 626, 634-35 (D.C. 1979); Smith v. State, 247 Ga. 612, 619, 277 S.E.2d 678, 683; notes 38-41 and accompanying text *supra*. *But see* State v. Thomas, 66 Ohio St. 2d 518, 521, 423 N.E.2d 137, 139 (1981).

64. The general three-pronged test for admissibility of expert testimony is illustrated by Dyas v. United States, 376 A.2d 827 (D.C. App. 1977), in which the court stated the requirements for admissibility: (1) the subject matter "must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman;" (2) "the witness must have sufficient skill or experience in that field to make it appear that his opinion or inference will probably aid the trier in the search for the truth;" and (3) the state of the pertinent art

authorities on the battered woman syndrome, has admitted that many of her research conclusions are tentative and that further research may be necessary to confirm her contentions.[65] Additionally, the reliability of the theory has been questioned because the method used by Dr. Walker and many others to study battered women has been criticized as an unreliable basis for analysis.[66] Although these reliability problems might indicate that

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or scientific knowledge must permit a reasonable opinion to be asserted by an expert. *Id.* at 832.

The third prong, which requires that the theory be generally accepted as reliable in the relevant scientific community, was explained in Frye v. United States, 293 F. 1013 (1910). In *Frye*, the court stated that expert testimony deduced from a well recognized scientific principle must be "sufficiently established to have gained general acceptance in the particular field in which it belongs." *Id.* at 1014. In applying the *Frye* rule, the courts hold that the underlying scientific method used by the expert in forming his opinion must be generally accepted. *See* People v. Kelly, 17 Cal. 3d 24, 30, 549 P.2d 1240, 1244, 130 Cal. Rptr. 144, 148 (1976) (voice print analysis); State v. Washington, 229 Kan. 47, 54, 622 P.2d 986, 991 (1981) (blood test analysis); State v. Canaday, 90 Wash. 2d 808, 812, 585 P.2d 1185, 1188 (1978) (breathalizer test analysis).

In Ibn-Tamas v. United States, 407 A.2d 626 (D.C. 1979), the court applied this interpretation of the *Frye* rule to the admissibility of expert testimony regarding the battered woman syndrome. *Id.* at 637. The court stated that the third criterion of the *Dyas* test dealt with the admissibility of expert testimony based on new techniques of scientific measurement, citing United States v. Addison, 498 F.2d 741, 743 (D.C. Cir. 1974) as authority. 407 A.2d at 638. The court found that the *Dyas* criterion, as applied to the battered woman syndrome, was intended to test whether the methodology used by the clinical psychologist to identify and study the battered woman syndrome had reached the requisite point of acceptance in the relevant field of inquiry. *Id.* at 638.

65. L. WALKER, *supra* note 24, at x-xi.

66. *See* note 64 *supra*. Dr. Walker used a case study method and compiled her information concerning battered women from a "self-volunteered sample." The women, therefore, were not randomly selected and, as Dr. Walker admits, cannot be considered a legitimate data base from which to make specific generalizations. L. WALKER, *supra* note 24, at xiii. Dr. Jay Ziskin, an attorney, clinical psychologist, and the author of J. ZISKIN, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY (2nd ed. 1975), has elaborated on two possible problems with the case study method. First, Ziskin notes the need for a base rate when attempting to determine the significance of a particular behavioral pattern. Base rates refer to the extent to which a behavioral pattern exists in the general population. In order to assert that a behavioral pattern is unique to a certain group of people, a psychologist must have a base rate of that behavioral pattern with which to compare his data. *Id.* at 48. Failure to use a base rate can be damaging to an expert's credibility because there is little to show he is dealing in an area concerning abnormal responses. Second, Ziskin notes that there are variables in the clinical examination setting that influence the outcome of each interview, including the examiner's personal influence, i.e., the particular questions he chooses to ask and the manner in which he asks them, and the examiner's ability to observe, recall, and avoid repetition

syndrome testimony should be excluded, many courts have held that the trial court, in its discretion, should determine the reasonable reliability of proffered expert testimony and that any refutation evidence should bear on the weight of the testimony, not on its admissibility.[67]

The final objection to the admission of syndrome testimony is that the testimony's prejudicial effect outweighs its probative value.[68] The testimony tends to stereotype the victim as a wifebeater and the defendant as his helpless mate.[69] As a result, the jury could punish the victim for his past acts instead of deciding the issues of the case at hand. The counter-argument is that evidence of the victim's past abusive acts toward the defendant is admissible on the issue of self-defense and that any additional impact of an expert's opinion relating to the effect of that abuse is at most minimal.[70]

Any of the objections considered above could persuade a court to exclude expert testimony concerning the battered woman syndrome. The objection that the testimony is irrelevant because the special beliefs and reactions of a woman suffering from the syndrome are not those of a reasonable person, however, may lack merit; there is a good argument that a reasonable person surrounded by the same facts and circumstances as a battered woman would develop the special beliefs and reactions explained by an expert's syndrome-related testimony. The objection that syndrome testimony invades the province of the jury is overcome by the majority rule that an expert may testify to an ultimate issue of fact if the testimony will aid the jury in its fact finding mission. Arguably, the objection that the defendant's state of mind is within the understanding of the average layman lacks merit because the battered woman's special beliefs, which the jury must evaluate in order to understand her state of mind, are beyond a layman's everyday experience. In addition, the undue prejudice argument lacks merit because, in the majority of jurisdictions, evidence of a victim's past abusive acts toward a defendant already is admissible on the issue of self-defense, and any additional impact of an expert's description of the results of that abuse is minimal. On

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of data. *Id.* at 129-30. These variables can be damaging to an expert's credibility because they emphasize the possibility of manipulation of data inherent in the case study.

67. Chafin v. State, 333 So. 2d 559, 608 (Ala. Crim. App. 1976); Gottardi v. State, 615 P.2d 626, 630 n.9 (Alaska 1980); State v. Kersting, 50 Or. App. 461, 469, 623 P.2d 1095, 1101 (1981). *See also* State v. Hall, 297 N.W.2d 80, 85 (Iowa 1980) ("general scientific acceptance" not a prerequisite to admission of expert evidence if reliability of evidence is established otherwise).

68. State v. Thomas, 66 Ohio St. 2d 518, 522, 423 N.E.2d 137, 140 (1981). In all cases, this criteria must be met for expert testimony to be admissible. *See, e.g.*, Lewis v. State, 469 P.2d 689, 696 (Alaska 1970); State v. Williams, 388 A.2d 500, 504 (Me. 1978). Some courts have found that the special aura of trustworthiness associated with expert testimony heightens its prejudicial value. *See, e.g.*, United States v. Amaral, 488 F.2d 1148, 1152 (9th Cir. 1973).

69. State v. Thomas, 66 Ohio St. 2d 518, 522, 423 N.E.2d 137, 140 (1981).

70. Ibn-Tamas v. United States, 407 A.2d 626, 639 (D.C. 1979).

the other hand, reliability problems may present a valid objection to the admission of syndrome testimony.

The reliability of an expert's testimony should be the most crucial test for admissibility. This is true because laymen give great weight to an expert's opinion. Although many courts hold that reliability should determine the weight of the testimony and not the admissibility, it is questionable whether this is the actual effect on the jury. It is doubtful that a layman would have the judgment to weigh the testimony according to its reliability instead of giving it absolute credence.

In her study of battered women, Dr. Walker, the leading authority, has indicated that the science is in its infancy. The methods used in the study have been criticized in the scientific community. Until the theory and its underlying basis are generally accepted as reliable, courts should exclude syndrome testimony. Expert opinion is given too much weight by jurors to admit it before it has been proven to be accepted. This is especially true in a case where the whole issue of self-defense, and therefore absence of guilt, could be determined by the credibility of an expert on the battered woman syndrome.

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