Battered Woman Syndrome Evidence in Arizona

Law and Practice

by Larry J. Cohen

***B**attered Woman Syndrome is a theory based on principles of psychology and sociology offered to explain why some women attack and even kill husbands or other significant males in their lives who have been abusing them. The central issue addressed by this theory is why these women respond with violence to the abuse they suffer rather than simply leave the environment where the abuse is occurring or seek help from others to stop the abuse. This issue is drawn into sharpest focus when the abused woman reacts violently at a time when there is no obvious immediate threat to her safety.*

The explanation provided by Battered Woman Syndrome theory, including especially the concepts of a battering cycle and of "learned helplessness," is controversial.[1] Nonetheless, expert testimony drawing on Battered Woman Syndrome theory and concepts has been permitted in most jurisdictions

in the United States, though courts differ as to the circumstances under which they will permit such testimony.[2]

In this brief discussion about the use of Battered Woman Syndrome evidence in Arizona, we will first review Arizona law on the admissibility of this evidence.[3] Assuming Arizona's courts will continue to permit the presentation of such evidence under some circumstances, we will then turn to the more practical question of how jurors are likely to respond to expert testimony based on Battered Woman Syndrome theory and concepts.

Current State of the Law in Arizona

In its most recent pronouncement on the issue, in 1997, the Arizona Supreme Court held that testimony concerning Battered Woman Syndrome was inadmissible when offered to demonstrate that a defendant's mental incapacity negated specific intent. *State v. Mott*, 187 Ariz. 536, 544, 931 P.2d 1046 (1997). The Court did not reject the possibility of admitting evidence of Battered Woman Syndrome for other purposes, though, as in self-defense cases to aid the jury in assessing the "reasonableness of the defendant's apprehension and the imminency [sic] of death or serious harm," *Id.* at 540, footnote 3. However, as Justice Thomas Zlaket observed in his concurring opinion, the majority's decision reads like a "broad attack on the use of psychological evidence," at least in criminal cases. *Id.* at 548. Justice Stanley Feldman's lengthy dissent focused on whether excluding this kind of evidence when offered to negate the elements of the criminal charge violates the due process clauses of the Arizona and United States constitutions. *Id.*

The earliest reference to Battered Woman Syndrome in a reported Arizona case is Justice Zlaket's majority opinion in *State v. Schackart*, 175 Ariz. 494, 858 P.2d 639 (1993). The Court held that ordering a defendant to submit to a psychiatric examination does not violate the defendant's right against self-incrimination where the defendant "places his or her mental condition in issue and gives notice of an intention to rely on psychiatric testimony." 175 Ariz. at 500. In support of that conclusion the Court cited a New Hampshire Supreme Court decision, *State v. Briand*, 130 N.H. 650, 547 A.2d 235, 240 (1988), which permitted a court-ordered examination of a defendant who was going to offer psychiatric testimony that she suffered from Battered Woman Syndrome. 175 Ariz. at 500. The Court in *Schackart* did not otherwise comment on the admissibility of Battered Woman Syndrome testimony in Arizona.

Next, in *In re Jett*, 180 Ariz. 103, 882 P.2d 414 (1994), a city magistrate challenged allegations of willful misconduct surrounding her issuance of an order releasing her boyfriend from jail by arguing she did not have the requisite state of mind at the time to conclude she acted in "bad faith." Justice Robert Corcoran, writing for the majority, conceded she was suffering from Battered Woman Syndrome and sleep deprivation. However, the Court concluded that the nature of a judge's misconduct did not change merely because the misconduct was the result of a mental condition. 180 Ariz. at 106. Again, the Court did not directly address the admissibility of this kind of evidence, but the opinion can be read to suggest tacit acknowledgment of Battered Woman Syndrome as a recognized mental condition.

The Ninth Circuit, in *United States v. Greyes*, 988 F.2d 123, 1993 WL 51296 (9th Cir. 1993), likewise seemed to acknowledge Battered Woman Syndrome as a recognized mental condition. The defendant in that case struck and killed her husband with a pick-up truck she was driving. She said in her defense that she was trying to leave her home in a hurry because she was afraid of her husband, and then struck him by accident. On appeal she argued that the trial court improperly excluded evidence of her husband's alleged prior assaults against her and her children. She maintained that such evidence would have helped establish her state of mind at the time of the accident. The Court of Appeals disagreed, noting that evidence about her fear might have been relevant if she claimed self-defense or a Battered Woman Syndrome defense. However, the evidence was properly excluded in this case because she did not assert such defenses. While this decision cannot be cited as a authority, because it was published as a "memorandum" decision, it is noteworthy because of the panel's (Judges Choy, Schroeder and Brunetti) apparent recognition of "Battered Woman Syndrome" as a viable defense.

As previously noted, the Arizona Supreme Court's 1997 decision in *Mott* limits the use of the Battered Woman Syndrome defense in this state. That decision may also reflect a rather skeptical view of psychological testimony generally that will limit still further the availability of psychological

defenses, including Battered Woman Syndrome. For the present, however, it appears the Court acknowledges Battered Woman Syndrome as a recognized mental condition. It may be significant in that regard that the majority opinion in *Mott* did not reject or even comment negatively on the Court of Appeals' observation in *State v. Mott*, 183 Ariz. 191, 901 P.2d 1221 (App. 1995), about the status of Battered Woman syndrome in the fields of psychology and psychiatry:

"We have found no Arizona case addressing the admissibility of evidence regarding the Battered Woman Syndrome; however, we note that it has been recognized in numerous other jurisdictions, and is included in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders IV. 183 Ariz. at 191, citing *Bechtel v. State*, 840 P.2d 1 (Okla. 1992)(listing 31 states and the District of Columbia which have accepted Battered Woman Syndrome or have recognized the scientific validity of Battered Woman Syndrome)."

In summary, while the Arizona Supreme Court will not permit evidence of Battered Woman Syndrome on the issue of specific intent in a criminal case, the Court has not ruled out its use either, at least in self-defense cases. Whether the Court will continue to permit its use in that context or will permit its use in other contexts remains to be seen in future decisions.

Presenting Battered Woman Syndrome Evidence at Trial

Assuming the attorney survives a challenge to the admissibility of Battered Woman Syndrome evidence,[4] there remains the problem of persuading the jury to adopt the theory and apply it favorably to the attorney's case. Attorneys must overcome the lack of sympathy, and perhaps even disdain, some jurors may feel toward a woman who remained in an abusive relationship. Attorneys must also deal with the common-sense expectation jurors probably have that a victim of abuse would simply leave the relationship and otherwise try to avoid the abuser. Stated more affirmatively, in order to be successful as a practical matter the attorney must persuade jurors, among other things, that the victim was justified in her belief that she faced imminent peril and that her attack on the abuser was a reasonable means of protecting herself under the circumstances.

The lack of direct access to jury deliberations, limitations on the availability of jurors after trial to discuss those deliberations, and concerns about the candor of jurors willing to discuss jury-room deliberations have led researchers to use mock trials to study the efficacy of courtroom testimony. There are obvious problems with this kind of research, including especially the contrived nature of the research setting. Still, using this method researchers can explore to some extent, in a systematic and controlled way, how jurors respond to the presentation of evidence.

One such study reported in 1992 compared the verdicts in three kinds of simulated murder trials where there was no expert testimony, where experts offered general comments about Battered Woman Syndrome, and where experts expressed specific opinions that the victim/defendant herself fit the syndrome profile of a battered woman.[5] Researchers looked first for differences in the reactions of individual jurors in the three different trial settings. They found little differences among jurors who heard no expert testimony or heard experts' general comments, with their verdicts distributed evenly among the murder, manslaughter and not guilty alternatives with which they were presented. However, jurors who heard experts express specific opinions that the defendant fit the battered woman profile predominately returned verdicts of manslaughter and not guilty, and very few murder verdicts.

The researchers also looked for the effects of expert testimony on deliberations of groups of jurors. They found a modest trend toward more manslaughter verdicts by groups that heard either kind of expert testimony, as compared with groups that heard no expert testimony. They also found a tendency for more favorable interpretations of the defendants' action in groups that heard expert testimony as compared with groups that did not hear expert testimony.[6]

A study reported in 1993 similarly used college students as jurors in mock trials involving battered women to look at the effects of expert testimony.[7] Researchers compared verdicts (not guilty, hung jury, guilty) of juries which heard experts' opinions with verdicts of juries that did not hear those opinions.[8]

These researchers did not find any effect expert witness testimony on jury verdicts where women kill their husbands. However, expert testimony did seem to influence the thinking of individual jurors:

"Prior to deliberation, participants in the present study differed in their verdicts as a function of gender, but not as function of expert testimony. Females more frequently believed the defendant was not guilty, whereas males believed more frequently that the defendant was guilty. However, following deliberation males in the expert condition changed their verdicts from guilty to not guilty, whereas females in the expert condition changed their verdicts from not guilty to guilty. A comparable change in verdicts did not occur in the no expert condition.[9]"

The researchers speculated that the expert may have served as a "third party" during jury deliberations, providing jurors with arguments to garner support for their own positions to challenge the positions taken by others on the jury.

"Females may have used testimony to support a not guilty verdict, thus convincing some males to change a guilty verdict to a not guilty verdict. Alternatively, males may have focused on inconsistencies in the expert's testimony to convince some females to change a not guilty verdict to a guilty verdict."[10]

Where this "third party" resource was missing in the no-expert mock trials, "verdicts remained constant across deliberations."[11]

A more recent study reported in 1998 focused on the impact of the gender of the expert and the timing of expert testimony on jury verdicts.[12] These researchers found that jury verdicts were more lenient when the expert was female and her testimony was presented early in the trial, and in any event before the defendant testified. Further, male jurors seemed more influenced by female experts than were female jurors. Moreover, when the researchers compared juries that heard expert testimony with juries that did not hear expert testimony, they observed little differences in the verdicts of female jurors but some differences in the verdicts of male jurors. The researchers speculated that women may have or believe they have more knowledge than men on issues relating to battered women and thus are less influenced by expert testimony.

The authors in all of these studies were appropriately cautious about the practical applications of their findings. More research is needed, preferably involving less-contrived settings and working with jurors more similar in their backgrounds and experiences to the kinds of people attorneys see on their juries in actual cases.[13]

At the same time, attorneys in practice must make decisions about whether to use expert witnesses, whom to use, what opinions to seek from them, and when during the trial to have them provide their explanations and offer their opinions. Historically attorneys draw on their own experience, information they get from other attorneys and their "gut feelings" in making these decisions. While the results of social science studies like these should not be overstated or given too much weight, they offer another piece of information for attorneys to use in making tactical decisions about their cases.

The conclusion to be drawn from these studies, and others,[14] is that expert testimony appears to be useful in cases involving battered women in helping jurors overcome preconceptions about the personalities and conduct of victims of abuse. Such experts are likely to be most effective when used to establish a frame of reference, or lens, through which other testimony can then be viewed and understood. Finally, jurors probably have preconceived notions about the kinds of background and experiences most likely to qualify an expert to comment on domestic violence situations. Such preconceptions probably defer in the long run to demonstrated evidence of competence and expertise in an area, but may give an edge to some experts over others.[15]

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ENDNOTES:

1. Compare L. Walker, *The Battered Woman Syndrome* (1984) and L. Walker, *Terrifying Love: Why Battered Women Kill and How Society Responds* (1989) with D.L. Faigman, "The Battered Women Syndrome and Self-Defense: A Legal and Empirical Dissent," 72 *Virginia Law Review* 619 (1986) and D.L. Faigman, "The Battered Woman Syndrome in the Age of Science," 39 *Arizona Law Review* 67 (1997).
2. J.O. Pearson, Jr., "Admissibility of Expert Testimony on Battered Wife or Battered Woman Syndrome," 18 American Law Reports (4th ed.) 1153 (1997).
3. For a more general discussion about strategies for seeking the admissibility of this kind of evidence see L.J. Cohen, "Meeting the Challenge of the Junk Science Defense in Domestic Violence Litigation," 34 *Psychotherapy* 397

(1998). For a more general discussion about the admissibility of "novel" scientific evidence in Arizona see P.F. Eckstein and S.A. Thomma, "Novel Scientific Expert Evidence in Arizona State Courts," 34 *Arizona Attorney* 16 (June, 1998).

4. The attorney may face other challenges to the admissibility of Battered Woman Syndrome evidence, including an argument pursuant to Rule 403, Arizona Rules of Evidence, that the prejudicial effect of the testimony outweighs its probative value, or an argument pursuant to Rule 702, Arizona Rules of Evidence, that the testimony will not assist the trier of fact to understand the evidence of determine an issue of fact.

5 R.A. Schuller, "The Impact of Battered Woman Syndrome Evidence on Jury Decision Processes," 16 *Law and Human Behavior* 597 (1992).

6. The researchers appropriately caution practitioners about limits on projecting their research, which was based on simulations using university students as subjects, to real-world settings.

7. M. Kasian, N.P. Spanos, C.A. Terrance and S. Peebles, "Battered Women Who Kill: Jury Simulation and Legal Defenses," 17 *Law and Human Behavior 289* (1993).

8. The expert was a psychiatrist who discussed some misconceptions about battering, batterers and battered women, discussed the cycle theory of violence, and then commented on the defendant's plea.

9. Kasian, et al at 299.

10. *Id.*

11. *Id.*

12. R.A. Schuller and J. Cripps, "Expert Evidence Pertaining to Battered Women: The Impact of Gender of Expert and Timing of Testimony," 2 *Law and Human Behavior* 17 (1998).

13. The subjects in the studies were college students.

14. See further N.J. Finkel, K.H. Meister, and D.M. Lightfoot, "The Self-Defense Defense and Community Sentiment," 15 *Law and Human Behavior* 585 (1991); D.R. Follingstad, et. al., "Factors Predicting Verdicts in Cases Where Battered Women Kill Their Husbands," 13 *Law and Human Behavior* 253 (1989); and R.A. Schuller, V.L.. Smith and J.M. Olson, "Juror's Decisions in Trials of Battered Women Who Kill: The Role of Prior Beliefs and Expert Testimony," 24 *Journal of Applied Social Psychology* 316 (1994).

15. Many, if not all, of these observations apply to expert testimony generally. Further, they may seem either self-evident or are the kinds of things one learns after trying cases. Their validation through social science research should further encourage both experienced and inexperienced lawyers to think about them as they plan their cases.