1-1-1998

Prosecutorial Use of Expert Testimony in Domestic Violence Cases: From Recantation to Refusal to Testify

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PROSECUTORIAL USE OF EXPERT TESTIMONY IN DOMESTIC VIOLENCE CASES: FROM RECANTATION TO REFUSAL TO TESTIFY

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The Warren Moon case in 1996 generated considerable media and legal commentary on the issue of compelling a witness to testify against her spouse. Moon, a professional football player, was prosecuted for battering his wife even though she had refused to press charges. Pursuant to a 1995 Texas law that abolished spousal immunity, the prosecution called Moon's wife, over her objection, to testify. In her testimony, she recanted her earlier statements that her husband had beaten her. Moon's subsequent acquittal led to enormous publicity on the issue of whether his wife should have been compelled to testify.[1]

*The Moon prosecutor made no attempt to call an expert witness to explain Mrs. Moon's recantation of her earlier statement that Moon "beat the s**t out of me."*[2]

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[1] *See, e.g.*, Domestic Violence, Should Victims Be Forced to Testify Against Their Will?, 82 ABA Journal 26 (May 1996); Colleen O'Connor, The Moons: A Case of Spousal Immunity on Trial, Buffalo News, Mar. 18, 1996, at A7. The issue of the spousal immunity doctrine, which prevents spouses from being forced to testify against each other, is beyond this article's scope; for discussion of the doctrine, *see* Cheryl Hanna, No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions, 109 Harv. L. Rev. 1849 (1996); Malinda L. Seymore, Isn't It a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence, 90 Nw. U. L. Rev. 1032 (1996); Debbie S. Holmes, Marital Privileges in the Criminal Context: The Need for a Victim Spouse Exception in Texas Rule of Criminal Evidence 504, 28 Hous. L. Rev. 1095 (1991).

[2] The prosecution had presented considerable independent evidence to support the charges against Moon. Given this evidence, at least one commentator has questioned whether it was even necessary for the prosecutor to call Mrs. Moon. *See* Hanna, *supra* note 1, at 1906-07.

Mandatory arrest laws and no-drop policies have greatly increased the number of batterers being prosecuted.[3] Unlike conventional cases, however, where prosecutors rely on the cooperation and participation of complaining witnesses to obtain convictions, in domestic violence cases prosecutors are often faced with exceptional challenges. Such challenges include victims who refuse to testify, who recant previous statements, or whose credibility is attacked by defense questions on why they remained in a battering relationship. To explain the behavior of such victims, prosecutors rely increasingly on expert testimony on battering and its effects.[4] While the use of expert testimony on battering and its effects has been widely used by women claiming that they have killed their abusers in self-defense,[5] it is only in the last few years that prosecutors have made significant efforts to use experts when prosecuting batterers.[6]

Until 1990, appellate courts in only a handful of jurisdictions had considered whether prosecutors may use expert testimony on battering and its

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[3] *See* notes 23-24 and accompanying text *infra*. *See generally* Hanna, *supra* note 1, at 1863.

[4] I prefer the phrase "battering and its effects" rather than "battered woman's syndrome." *See* Janet Parrish, Trend Analysis: Expert Testimony on Battering and its Effects in Criminal Cases, 11 Wis. Women's L.J. 75, 82 (1996). The latter term has been the subject of criticism by a number of scholars as evocative of stereotypes of women who have been abused as maladjusted or disturbed. *See* note 11 *infra*; *see generally* Alana Bowman, A Matter of Justice: Overcoming Juror Bias in Prosecutions of Batterers Through Expert Witness Testimony of the Common Experiences of Battered Women, 2 S. Cal. Rev. L. & Women's Stud. 219, 226 n.31 (1992). Other commentators criticize the phrase "battered woman's syndrome" as inadequate to encompass the broad range of reactions to battering. *See* Malcolm Gordon, Validity of "Battered Woman Syndrome" in Criminal Cases Involving Battered Women (visited March 7, 1997) <http://www.ojp.usdoj.gov/OCPA/94Guides/Trials/Valid/>. The great majority of the cases and commentators, however, use the terminology "battered woman's syndrome"; therefore, this article uses both phrases.

[5] *See generally* Holly Maguigan, Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Legislation, 140 U. Pa. L. Rev. 379 (1991); David L. Faigman & Amy J. Wright, The Battered Woman Syndrome in the Age of Science, 39 Ariz. L. Rev. 67 (1997).

[6] *See generally* Parrish, *supra* note 4; Myrna S. Raeder, Proving the Case: Battered Woman and Batterer Syndrome: The Double-Edged Sword: Admissibility of Battered Woman Syndrome By and Against Batterers in Cases Implicating Domestic Violence, 67 U. Colo. L. Rev. 789 (1996); Joan M. Schroeder, Using Battered Woman Syndrome Evidence in the Prosecution of a Batterer, 76 Iowa L. Rev. 553 (1991).

effects in a domestic violence prosecution.[7] Between 1991 and 1997, however, appellate courts in at least thirteen more jurisdictions ruled on the admissibility of expert testimony to explain a battering victim's puzzling behavior at or before trial.[8] All of those jurisdictions, except Ohio, approved of prosecutorial use of expert testimony.[9]

Prosecutors have called experts to educate the jury on a victim's unusual behavior such as delay in reporting the violence, or why she would remain in the abusive relationship. Judicial acceptance of a prosecutor's use of expert testimony in the above settings raises the question of whether a prosecutor may use an expert to explain the victim's outright refusal to testify.[10] To date, only one reported case has addressed this issue;[11] however,

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[7] *See* Brandon v. State, 839 P.2d 400 (Alaska Ct. App. 1992) (dicta only); Pruitt v. State, 296 S.E.2d 795 (Ga. Ct. App. 1982); State v. Baker, 424 A.2d 171 (N.H. 1980); State v. Frost, 577 A.2d 1282 (N.J. Super. Ct. App. Div. 1990); State v. Ciskie, 751 P.2d 1165 (Wash. 1988). The precedential value of some of the earliest cases is doubtful. For a discussion of Pruitt, *see* note 82 and accompanying text *infra*. Baker's relevancy is also doubtful because there the prosecution offered the testimony to explain the defendant's behavior, not the victim's conduct.

[8] *See* Arcoren v. United States, 929 F.2d 1235 (8th Cir. 1991); People v. Humphrey, 921 P.2d 1 (Cal. 1996); People v. Morgan, 68 Cal. Rptr. 2d 772 (Cal. Ct. App. 1997); State v. Borelli, 629 A.2d 1105 (Conn. 1993); State v. Clark, 926 P.2d 194 (Haw. 1996), *approving* State v. Cababag, 850 P.2d 716 (Haw. Ct. App. 1993); Isaacs v. State, 659 N.E.2d 1036 (Ind. 1995); Carnahan v. State, 681 N.E.2d 1164 (Ind. Ct. App. 1997); State v. Griffin, 564 N.W.2d 370 (Iowa 1997); Commonwealth v. Goetzendanner, 679 N.E.2d 240 (Mass. App. Ct. 1997); People v. Christel, 537 N.W.2d 194 (Mich. 1995); State v. Searles, 680 A.2d 612 (N.H. 1996); People v. Hryckewicz, 634 N.Y.S.2d 297 (N.Y. App. Div. 1995); State v. Pargeon, 582 N.E.2d 665 (Ohio Ct. App. 1991) (ruling that expert testimony is only admissible for self-defense purposes); State v. Bednarz, 507 N.W.2d 168 (Wis. Ct. App. 1993); Barnes v. State, 858 P.2d 522 (Wyo. 1993).

Lower courts in some jurisdictions have also allowed expert testimony in the prosecution of batterers. *See, e.g.*, People v. Ellis, 650 N.Y.S.2d 503 (N.Y.Sup. Ct. 1996).

[9] *See id. But see* State v. Pargeon, 582 N.E.2d at 667.

[10] Ideally, a complainant will cooperate with prosecutors and participate in a batterer's trial. Accordingly, a number of jurisdictions have devised special domestic violence units within the prosecutor's office to encourage voluntary participation. *See* Kathleen Waits, The Criminal Justice System's Response to Battering: Understanding The Problem, Forging The Solutions, 60 Wash. L. Rev. 267 (1985); Elena Saltzman, The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention, 74 B.U. L. Rev. 329 (1994). Additionally, some jurisdictions have policies to compel a reluctant complainant to appear through subpoena and risk of contempt charges and possible incarceration. *See, e.g.*, Hanna, *supra* note 1, at 1865-66; Waits, *supra* at 323. Much

the explosive growth in the number of batterers being prosecuted mandates that courts and commentators explore whether expert testimony is appropriate to explain the complainant's absence. The issue of prosecutorial use of expert testimony has received limited scholarly attention. Commentators who have addressed the question "tend to be fairly cautious" in their approach.[12] Most would allow generalized information about abuse, but only following a defense attack on credibility.[13] However, the authors of one article have suggested that any prosecutorial use of expert testimony on battering and its effects is too prejudicial.[14]

This article discusses the use of expert testimony in prosecuting those charged with domestic abuse. Part I provides a background on the need and nature of expert testimony in domestic violence cases and the requirements for the admission of such expert testimony. It traces the development of the role of expert testimony in domestic violence cases from its initial exclusive use as a defense tool to support self-defense claims to its present use by prosecutors to explain a complainant's recantation or other puzzling behavior. Part II discusses the appellate cases that have addressed the admissibility and scope of expert testimony offered by the prosecution in domestic abuse cases. It then analyzes the proper uses of the expert testimony, including when the State may introduce the testimony and what guidelines courts should follow to ensure that its probative value outweighs any prejudicial effect on the defendant.

Part III applies the existing case law to the uncharted issue of whether the courts should allow expert testimony to explain a complainant's outright

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controversy surrounds the issue of compelled appearance, which is beyond the scope of this article. Instead, this article operates from the assumption that regardless of the means prosecutors have employed to gain the complainant's presence, she is absent from trial.

[11] *See* Pruitt v. State, 296 S.E.2d 795 (Ga. Ct. App. 1982); *see* note 82 and accompanying text *infra*.

[12] *See* Raeder, *supra* note 6, at 801; *see generally* Schroeder, *supra* note 6; Faigman & Wright, *supra* note 5; Bowman, *supra* note 4; Hanna, *supra* note 1.

[13] *See* Raeder, *supra* note 6, at 801; Schroeder, *supra* note 6; Bowman, *supra* note 4.

[14] *See* Faigman & Wright, *supra* note 5, at 96-98. Faigman and Wright argue that no research exists to support the conclusion that a manifestation of battering is an increased chance of recantation. Anecdotal evidence does, however, support this claim. *See* Raeder, *supra* note 6, at 807; Mary Ann Dutton, Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman's Syndrome, 21 Hofstra L. Rev. 1191, 1202 (1993).

refusal to testify. It explains that law enforcement needs to change the prototype of a domestic abuse prosecution from being victim-propelled to one where sufficient independent evidence of the crime is gathered to enable prosecutors to proceed without the victim's cooperation or participation. Concomitant with this shift in focus, prosecutors, such as those in the Moon case, should view expert testimony as an integral component of a victimless prosecution. Part III explains that courts should allow expert testimony to explain the characteristics of battered women to help the jury properly assess the state's evidence in light of the complainant's absence. By limiting the expert to explaining general aspects of battering and its effects, rather than addressing the particular victim or specific acts of violence, the courts will safeguard the defendant against undue prejudice.

Over time, the propriety of defense use of expert testimony has been unanimously accepted by the courts. The same judicial acceptance is developing for prosecutorial use of expert testimony on battering. The relevance of the expert testimony is identical in both situations: It aids the jury in assessing the evidence by explaining the effect of battering on the witness. This article concludes that the developing trend of prosecutorial use of expert testimony is an appropriate and necessary tool in successfully prosecuting domestic violence cases.

PART I—BACKGROUND ON THE ADMISSIBILITY OF EXPERT TESTIMONY ON THE EFFECTS OF BATTERING

A. Psychological Effects of Battering and Its Impact on Prosecutions

A brief description of the psychological manifestations of battering and its effects is necessary to highlight the importance of expert testimony as a prosecution tool. Dr. Lenore Walker, widely recognized as the first person to identify the battered woman's syndrome, describes it as "the cluster of psychological sequela from living in a violent relationship" that women develop.[15] As promulgated by Dr. Walker, the syndrome is caused by a three-phase cycle of violence—tension building, confrontation, and contrition.[16] The cycle of violence may leave its victims with feelings of learned

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[15] Lenore E. Walker, The Battered Woman Syndrome, xi, 1 (1984).

[16] *See id.* at 95; Lenore E. Walker, Battered Woman 55-70 (1979).

helplessness,[17] low self-esteem, depression, minimization techniques,[18] self-isolation, and passivity.

These psychological reactions may manifest themselves in behavior that might appear baffling and even frustrating to the average person. The refusal to leave the relationship, the unwillingness to pursue legal action against the batterer, or the inability to protect one's children from abuse may each stem from the psychological effects of being battered. Many women also stay with their batterers because of legitimate fears of retaliation and lack of viable alternatives.[19]

A state's attempt to prosecute a batterer may be undermined by the victim's delay in seeking police intervention, her refusal to cooperate with prosecutors, her recantation of statements implicating the battered for her injuries, or her remaining in the abusive relationship.[20] Many prosecutors

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[17] "Learned helplessness" is the cornerstone of the syndrome. It is derived from animal studies in which dogs were subjected to electric shocks and later were unable to take advantage of readily available escape opportunities. Walker, Battered Woman, *supra* note 16, at 47-49. According to Dr. Walker, the victim, after repeated beatings, begins to believe that she has no control over the violence, and she loses the ability to escape, even when viable means to escape exist. *Id.* Learned helplessness may help to explain why a battered woman remains with the batterer. *See* Waits, *supra* note 10, at 282-83; Dutton, *supra* note 14, at 1197 & n.33.

Walker's theory has not been free from criticism. *See* Raeder, *supra* note 6, at 796. Some commentators prefer to remove the stigma of the label, preferring to refer to the woman's reaction as one of survival. *See* Raeder, *supra* note 6, at 796 n.31. Others have questioned the validity of Walker's findings on a number of grounds. Commentators have criticized the nature of the sample, the lack of a control group, the methodology of the interviews, and the lack of support in the data for the conclusions Walker drew. *See* Robert F. Schoop *et al.*, Battered Woman Syndrome, Expert Testimony, and the Distinction between Justification and Excuse, 1994 U. Ill. L. Rev. 45, 54-56 (1994). Notwithstanding such criticism, Walker's theory has been vitally instrumental in changing judicial and public perceptions about domestic violence. At least one commentator has noted that "there is massive anecdotal evidence generally confirming the syndrome." Raeder, *supra* note 6, at 797.

[18] Typically, a battering victim minimizes the severity of the attack and her injuries. Walker, Battered Woman, *supra* note 16, at 63; *see also* Waits, *supra* note 10, at 293.

[19] *See* James Martin Truss, The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence, 26 St. Mary's L.J. 1149, 1172-73 (1995); Diane Patton, "He Never Hit Me"—The Need for Expert Testimony in Domestic Violence Cases, 30 Ariz. Att'y 10 (Jan. 1994).

[20] *See generally* Chief Judge A.M. "Sandy" Keith, Domestic Violence and the Court System, Remarks at the Jurist-in Residence Program at Hamline University School of Law (Apr. 11, 1991), *in* 15 Hamline L. Rev. 105 (1991).

have commented about a victim's lack of cooperation.[21] Indeed, historically, law enforcement officials have used the lack of victim cooperation as an excuse for their lax response to domestic violence.[22] The official response to domestic violence cases has been dramatically altered by mandatory arrest laws that limit law enforcement's discretion in making arrests[23] and no-drop policies that mandate prosecution of domestic violence cases regardless of the victim's cooperation.[24] However, the same misapprehension that previously had colored law enforcement's ability to respond to a victim's plight most likely exists in the minds of the jurors assessing charges brought against an alleged batterer. Expert testimony on battering and its effects is necessary to educate the jurors. The admissibility and scope of the expert testimony is discussed in the following sub-section.

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[21] *See* Waits, *supra* note 10, at 311-12.

[22] *See* Waits, *supra* note 10, at 311-12.

[23] Mandatory arrest policies evolved as a response to decades, perhaps centuries, of non-intervention by law enforcement toward domestic disputes. *See generally*, Waits, *supra* note 10, at 310-16 (detailing the historically inadequate police response to domestic violence). In the 1960s, mediation of domestic violence disputes became the police norm. *See generally* Developments in the Law—Legal Responses to Domestic Violence, 106 Harv. L. Rev. 1498 (1993). Mediation proved to be ineffective in addressing domestic violence because the police viewed both the abuser and the victim as similarly situated, and treated the incident as a family dispute rather than a criminal offense. *See generally* Marion Wanless, Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But Is It Enough?, 1996 U. Ill. L. Rev. 533. By the mid-1980s, following the urging of domestic violence advocacy groups and the imposition of large civil damage awards against police departments for failing to intervene, *see* Thurman v. City of Torrington, 595 F. Supp. 1521 (D. Conn. 1984), the United States Attorney General recommended arrest as the appropriate response to domestic incidents. *See* Hanna, *supra* note 1, at 1859. Since then, every state has adopted some form of mandatory arrest rules. Typically, such rules require an arrest when the officer has probable cause to believe a misdemeanor has been committed. *See generally*, Hanna, *supra* note 1, at 1859-60; Wanless, *supra*.

[24] The development of no-drop policies were a natural outgrowth of mandatory arrest laws. Parallel to the historical police reluctance to intervene in a domestic disputes, prosecutors also were mired in a hands-off approach. *See* Hanna, *supra* note 1, at 1859-60; Waits, *supra* note 10, at 299-302. As more arrests were made, attention was shifted to the prosecutor's role in stemming domestic violence. Many offices have adopted no-drop policies which range from checking a prosecutor's discretion to dismiss a domestic violence case, to providing guidelines on prosecuting such cases with or without the victim's cooperation. *See generally* Angela Corsilles, No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?, 63 Fordham L. Rev. 853 (1994); Hanna, *supra* note 1 (describing the various types of no-drop policies).

B. General Admissibility Requirements of Expert Testimony

Domestic violence crimes are predominantly governed by state law.[25] However, since all jurisdictions have requirements for the admissibility of expert testimony identical with or similar to the Federal Rules of Evidence, this Article uses the Federal Rules as a prototype. The first consideration for the admission of any evidence is whether it is relevant.[26] Additionally, Federal Rule of Evidence 702 sets forth the basic rule of admissibility of expert testimony:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.[27]

The generally accepted understanding of Rule 702's requirements is that expert's testimony should aid the jury's understanding of the evidence but that the topic need not be completely outside the general understanding of the

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[25] *But see* Violence Against Women Act of 1994, 42 U.S.C. § 10410 (1997) (federalizes acts of domestic violence under certain circumstances, such as traveling across state lines with the intent to inflict bodily harm).

[26] Fed. R. Evid. 401. The rule defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* Thus, evidence is relevant if it is material and probative to the issues in dispute. According to McCormick, materiality examines the relationship between the propositions for which the evidence is offered an the issues in the case. Probative value is the tendency for of the evidence to establish the proposition for which it is offered. *See* 1 McCormick on Evidence § 185 (John W. Strong ed., 4th ed. 1992).

[27] Fed. R. Evid. 702. Rule 702's language has been adopted in whole or in substantial part by at least forty states. *See* Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 702[06] (Joseph M. McLaughlin ed., 2d ed. 1998).

jury,[28] that the testimony be based on scientifically valid methodology,[29] and that the expert be qualified.[30] Additionally, the trial court must decide whether the evidence's probative value outweighs any prejudicial impact.[31]

C. Defense Use of Expert Testimony on Battering and Its Effects

Defendants initiated the use of expert testimony on battering and its effects. The typical case involved a woman who was charged with killing her abusive mate and who raised a claim of self-defense. Courts have ruled that because a battered woman's behavior and perceptions are beyond the ken of a typical juror's understanding, expert testimony is needed to assist the jury in determining whether the defendant acted in self-defense.[32]

Notwithstanding the courts' present acceptance of testimony on battered woman's syndrome, initial court reaction to a defense attempt to

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[28] Rule 702 does not require that the subject of the expert testimony be completely outside the comprehension of the average juror. The federal rule is based on a "helpful" standard. *See* Weinstein & Berger, *supra* note 27, § 702[02].

[29] *See* Daubert v. Merrell Dow Pharmaceutical, Inc., 509 U.S. 579 (1993). Daubert rejected the seventy-year-old Frye test of admissibility of expert testimony. *See* Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). Under Frye, expert testimony was admissible only if based on scientific technique that was "generally accepted" as reliable in the scientific community. *Id.* at 1014. The Daubert Court removed the requirement of "general acceptance." According to the Daubert Court, the test for admissibility is whether there is a "valid scientific connection to the pertinent inquiry." 509 U.S. 579, 580. Courts and commentators have generally regarded Daubert as liberalizing the admissibility of expert testimony. *See, e.g.*, United States v. Chischilly, 30 F.3d 1144 (9th Cir. 1994); Michael H. Gottesman, Should Federal Evidence Rules Trump State Tort Policy? The Federalism Values Daubert Ignored, 15 Cardozo L. Rev. 1837 (1994).

[30] *See* Weinstein & Berger, *supra* note 27, § 702[04].

[31] Fed. R. Evid. 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *See generally* Weinstein & Berger, *supra* note 27, § 403.

[32] Typically, the expert will testify as to the battered woman's heightened perception of danger that may make her reasonably fearful of an imminent threat of great bodily harm in situations where an average juror may not perceive the threat. *See, e.g.*, State v. Leidholm, 334 N.W.2d 811 (N.D. 1983); State v. Kelly, 478 A.2d 364 (N.J. 1984).

introduce expert testimony on the battered woman's syndrome was mixed.[33] Since defense attacks on a prosecutor's use of experts parallel the earlier efforts to introduce battered woman's syndrome testimony by the defense, a review of the history of the syndrome's role in criminal cases is helpful.

One of the earliest attempts to use battered woman's syndrome as a defense arose in State v. Kelly.[34] There, a woman was indicted for murder after she killed her husband during an altercation. The defendant claimed that she acted in self-defense, although the State strongly disputed this contention.[35] The trial court denied her attempt to introduce expert testimony on the battered woman's syndrome to explain her state of mind and to bolster her self-defense claim. The defendant was convicted of reckless manslaughter.

The Supreme Court of New Jersey reversed and remanded for a new trial based on the refusal to allow the expert testimony. Noting first that the initial question in deciding the admissibility of expert testimony is its relevance, the court reasoned that the defendant's credibility was the "critical issue" in the case. Therefore, the expert testimony was relevant in assessing the honesty of her belief that she was in imminent danger of death at the time she killed her spouse.[36] The court stated that the expert could have explained to the jury why the defendant had remained with her spouse even though he had repeatedly abused her in the past. As the court noted, "Whether raised by the prosecutor as a factual issue or not, our own common knowledge tells us that most of us, including the ordinary juror, would ask himself or herself just such a question."[37]

The Kelly court also explained that the expert testimony, in educating the jury about the battered woman's syndrome, would help the jury assess the

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[33] *Compare* State v. Thomas, 423 N.E.2d 137 (Ohio 1981) (inadmissible) *with* State v. Kelly, 478 A.2d 364 (N.J. 1984); Ibn-Tamas v. United States, 407 A.2d 626 (D.C. Cir. 1979) (admissible). Some courts found that the syndrome was not based on scientifically recognized data. *See generally* Laurie Kratky Dore, Downward Adjustment and the Slippery Slope: The Use of Duress in Defense of Battered Offenders, 56 Ohio St. L.J. 665, 684 n.77 (1995). Other courts ruled against its admissibility, reasoning that the expert invaded the jury's province on judging credibility issues. *See* Raeder, *supra* note 6, at 805.

[34] 478 A.2d 364 (N.J. 1984).

[35] *See id.* at 368.

[36] *See id.* at 375.

[37] *Id.* at 377.

reasonableness of the defendant's fear of imminent danger, a crucial element of her self-defense claim.[38]

Following Kelly, courts in every jurisdiction have approved of the admissibility of expert testimony on battered woman's syndrome when raised to support a self-defense claim.[39] The crucial factor in the admissibility of the expert testimony was the courts' findings that the battering relationship and its effects on the victim of abuse were outside the understanding of the average juror.[40] Following the original use of expert testimony to support a classic self-defense claim where the defendant has killed an abusive mate in the course of a confrontation, defendants have sought to admit expert testimony on battered woman's syndrome in a variety of less traditional cases. To date, courts have allowed the expert testimony in cases where a defendant claims self-defense for a non-confrontational killing—the "sleeping spouse" scenario,[41] where a defendant claims duress based on battered woman's syndrome as a defense to robbery,[42] and where a woman is a respondent in a civil proceeding seeking to terminate her parental rights based on her failure to protect her children from an abusive mate.[43]

As this section has demonstrated, the behavior manifested by many victims of domestic violence has generated the need for expert testimony to educate jurors on battering and its effects. The expert can explain that a victim of abuse may remain in an abusive relationship, recant charges against an abuser, or refuse to assist in the prosecution of a batterer because of a variety of reasons including psychological manifestations of abuse, fear of retaliation, or lack of viable housing and financial alternatives. Although the need for expert testimony was first recognized in cases where a battered

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[38] On remand, both sides presented experts; the prosecution experts testified that Mrs. Kelly did not meet the criteria of a battered woman. She was convicted of murder. *See* Elizabeth Schneider, Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering, 9 Women's Rts. L. Rep. 195, 211-12 (1986).

[39] *See generally* Parrish, *supra* note 4.

[40] *See, e.g.*, Ibn-Tamas v. United States, 407 A.2d 626 (D.C. Cir. 1979); Smith v. State, 277 S.E.2d 678 (Ga. 1981); State v. Hennum, 441 N.W.2d 793 (Minn. 1989).

[41] *See, e.g.*, State v. Stewart, 763 P.2d 572 (Kan. 1988); State v. Leidholm, 334 N.W. 2d 811 (N.D. 1983); *cf.* State v. Allery, 682 P.2d 312 (Wash. 1984) (spouse lying on couch with back turned to defendant when she killed him).

[42] *See, e.g.*, People v. Romero, 13 Cal. Rptr. 2d 332 (Cal. Ct. App. 1992), *vacated on other grounds*, 883 P.2d 388 (Cal. 1994).

[43] *See, e.g.*, In re Matter of Glenn G., 587 N.Y.S.2d 464 (N.Y. Fam. Ct. 1992).

woman killed her attacker in self-defense, its use by prosecutors is predicated on identical goals—that the jury accurately assess the evidence before it.

PART II—PROSECUTORIAL USE OF EXPERT TESTIMONY

A. Development of the Case Law

Pivotal in the early cases to evoke the battered woman's syndrome was the defense use of the expert testimony. In recent years, however, with the tremendous increase in the number of domestic violence arrests and prosecutions, the prosecution has sought to use expert testimony on battering and its effects. With its holding in State v. Ciskie,[44] the Supreme Court of Washington became the first state appellate court to affirm the prosecutorial use of battered woman's syndrome to explain a battering victim's behavior.

In Ciskie, the defendant was charged with four counts of rape over a 23-month period of a woman with whom he had an abusive relationship. The defense claimed that the sexual encounters were consensual, as evidenced by the victim's failure to report them, or to break off the relationship. To rebut this attack on the victim's credibility, the prosecution offered expert testimony on battered woman's syndrome as part of its case-in-chief. In upholding the admission of the testimony, the Washington Supreme Court relied heavily on its earlier decisions upholding the admission of expert testimony on battered woman's syndrome when offered by the defendant as part of a self-defense claim. The court reasoned that the key to the admissibility of expert testimony under Washington's evidence rule[45] was whether it would be helpful to the trier of facts. The court noted that without the help of expert testimony, an average juror would not understand why the victim would stay in an abusive relationship. It further reasoned that the testimony was not unduly prejudicial to the defendant because the expert gave her opinion only to a hypothetical situation, and because the trial court correctly refused to allow the expert to opine as to whether the victim was in fact raped.

Following Ciskie, courts have further ruled on appropriate prosecutorial use of expert testimony.[46] The courts are most receptive to allowing expert testimony when the victim recants at trial earlier statements

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[44] 751 P.2d 1165 (Wash. 1988).

[45] Wash. R. Evid. 702.

[46] *See* note 8 *supra.*

implicating the defendant.[47] For example, in State v. Stringer,[48] the Supreme Court of Montana generally endorsed prosecutorial use of expert testimony. There, the defendant was convicted of assault and aggravating kidnapping after he broke into a home in which his ex-wife was visiting, forced her to leave at gunpoint, and assaulted her.[49] At trial, the defendant's ex-wife recanted her earlier statements to the police implicating the defendant. Over the defendant's objection that it was improper bolstering,[50] the trial court allowed the State to call an expert on battered woman's syndrome to explain the syndrome and why a complaining witness may recant earlier statements against her abuser.

On appeal, the Supreme Court of Montana ruled that prosecution may use expert testimony on battered woman's syndrome to explain

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[47] *See, e.g.*, Arcoren v. United States, 929 F.2d. 1235 (8th Cir. 1990); State v. Borelli, 629 A.2d 1105 (Conn. 1993); State v. Cababag, 850 P.2d 716 (Haw. Ct. App. 1993); State v. Bednarz, 507 N.W. 2d 168 (Wis. Ct. App. 1993). The courts in at least one jurisdiction have refused to allow expert testimony on battered woman's syndrome to be used for any purpose other than as part of a self-defense claim. *See* State v. Pargeon, 582 N.E.2d 665 (Ohio Ct. App. 1991) (interpreting its evidence rule as limiting battered woman's syndrome to self-defense claims).

[48] 897 P.2d 1063 (Mont. 1995).

[49] *See id.* at 1065.

[50] The term "bolstering" generally means an impermissible attempt to enhance the credibility of a witness. *See* Bennett Gershman, Trial Error and Misconduct § 5-1(a), at 301 (1997). Accordingly, courts customarily stress that since the jury has the exclusive role of assessing credibility, it is improper for a witness to comment on the credibility of other witnesses. *See, e.g.*, United States v. Shay, 57 F.3d 126 (1st Cir. 1995); United States v. Richter, 826 F.2d 206 (2d Cir. 1987); State v. Lindsay, 720 P.2d 620 (Ariz. 1986); State v. Friedrich, 398 N.W.2d 763 (Wis. 1987).

The scope of expert testimony is circumscribed by these limitations. The expert may not invade the jury's province by opining on a witness's truthfulness or whether he or she believes the witness. *See, e.g.*, State v. Oliver, 372 S.E.2d 256 (Ga. Ct. App. 1988); State v. J.Q., 617 A.2d 1196 (N.J. 1993); State v. Raymond, 540 N.W. 2d 407 (S.D. 1995). Additionally, the expert may not give an opinion that the witness has been victimized by the defendant. *See, e.g.*, State v. Griffin, 564 N.W.2d 370 (Iowa 1997); Commonwealth v. Goetzendanner, 679 N.E.2d 240 (Mass. App. Ct. 1997); State v. Ellis, 656 A.2d 25 (N.J. Super. Ct. App. Div. 1995).

Courts have held that it is not improper bolstering for an expert to explain behavior patterns of persons in the complainant's class so as to aid the jury in assessing the evidence before it. *See* Commonwealth v. Goetzendanner, 679 N.E.2d at 244; State v. Griffin, 564 N.W.2d at 374-75. *See generally* Gershman, *supra* § 5-4(i), at 334-36.

inconsistencies in a witness's testimony. The court stressed that this was not impermissible bolstering of the victim's testimony since the witness had recanted. Moreover, the court explained that the expert could testify only generally on battered woman's syndrome to explain why a battered woman might recant, not on whether the particular witness was truthful.[51]

In addition to using experts to explain a recantation, the State commonly seeks to use expert testimony to rehabilitate a witness after the defense has attacked her credibility by pointing out behavior inconsistent with being abused, such as remaining with the attacker or failing to report the abuse.[52] In a case of first impression for its jurisdiction, the Appeals Court of Massachusetts in Commonwealth v. Goetzendanner[53] ruled that expert testimony on battering was appropriate to help explain a victim's conduct. The defendant in Goetzendanner was charged with kidnapping, raping, and assaulting a woman with whom he had had a four-month relationship. According to the complainant, their relationship was marked with violence that culminated in the charged acts. On cross-examination, defense counsel attacked the witness's credibility by pointing to her "vacillating behavior toward the defendant."[54] The prosecution then called an expert witness to educate the jury about the dynamics of domestic violence. In upholding the admission of such testimony, the court noted that evidence of battered woman's syndrome was admissible to enlighten the jury about behavioral and emotional characteristics common to battering victims.[55] It cautioned, however, that the expert could not offer an opinion as to whether the complainant was an abused woman.[56]

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[51] The Stringer court approved of prosecutorial use of expert testimony on battering and its effects as a general concept. *See* 897 P.2d at 1068-69. It ruled, however, that the State failed to lay an appropriate foundation for its admissibility because there was no evidence that the ex-wife was a battered woman. *See id.* at 1069-70.

[52] *See, e.g.*, State v. Griffin, 564 N.W.2d 370 (Iowa 1997); Commonwealth v. Goetzendanner, 679 N.E.2d 240 (Mass. App. Ct. 1997); State v. Ciskie, 751 P.2d 1165 (Wash. 1988); Arcoren v. United States, 929 F.2d 1235 (8th Cir. 1991); In the Matter of Victoria C., 630 N.Y.S.2d 470 (N.Y. Fam. Ct. 1995).

[53] 679 N.E.2d 240 (Mass. App. Ct. 1997).

[54] *Id.* at 243.

[55] *See id.* at 244.

[56] *See id.* at 245.

Consistent with the reasoning employed by the Goetzendanner court, the Supreme Court of Michigan in People v. Christel[57] ruled that the lower court erred in admitting expert testimony on battering and its effect because the victim did not exhibit any puzzling or inconsistent behavior.[58] According to the court, the lack of incongruous behavior obviated the need for expert testimony to aid the jury in assessing the evidence before it.

Some courts have allowed the prosecution to offer expert opinion evidence on battering and its effects without a recantation or a specific defense attack on credibility if the complainant exhibits anomalous behavior at trial.[59] In State v. Searles,[60] the defendant appealed his conviction on assault charges on the ground that the trial court improperly permitted expert testimony on the dynamics of domestic violence when he never attacked the witness's credibility. In rejecting the defendant's argument, the Supreme Court of New Hampshire ruled that the need for expert testimony was triggered by a victim's puzzling actions, regardless of any defense attack on her credibility. Relying on its earlier ruling in a child sexual abuse syndrome case, the court noted that "expert testimony may be offered to preempt negative inferences based upon the victim's actions."[61]

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[57] 537 N.W.2d 194 (Mich. 1995).

[58] Although the court ruled that the lower court erred in admitting the expert testimony, it ruled that the error was harmless because of the extensive independent evidence of sexual assault. *See id.* at 197.

Whether the court ruled correctly that there was no need for the expert testimony is questionable. The crux of the defense was that the sexual acts were consensual. Accordingly, the defense vigorously attacked the complainant's credibility by pointing to her continued relationship with the defendant following the alleged attack. *See id.* at 198. Other courts have held that such seemingly anomalous behavior is sufficient to warrant the introduction of expert testimony. *See, e.g.*, State v. Ciskie, 751 P.2d 1165 (Wash. 1988).

[59] *See* State v. Frost, 577 A.2d 1282 (N.J. Super. Ct. App. Div. 1990); State v. Searles, 680 A.2d 612 (N.H. 1996); State v. Barnes, 858 P.2d 522 (Wyo. 1993).

[60] 680 A.2d 612 (N.H. 1996).

[61] *Id.* at 614 (*citing* State v. Cressey, 628 A.2d 696 (N.H. 1993)). In addition, the court rejected the defendant's claim that the testimony was unduly prejudicial because it implied that he was the batterer. The court noted that the trial court limited the expert to testifying about general characteristics of domestic violence victims and not about the particular individuals. *See id.*

Other courts have ruled that the prosecution may offer testimony that supports a witness's credibility regardless of any defense attack. In State v. Frost, 577 A.2d at 1287, the court allowed expert testimony on battered woman's syndrome as part of the State's case-in-

In some cases, the prosecution has sought to offer the expert testimony to prove the victim was, in fact, battered.[62] Most courts have refused to allow this use of expert testimony, finding that its probative value is outweighed by

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chief in the trial of a batterer charged with sexual assault. The court relied on New Jersey Rule of Evidence 20, which specifies that "for the purpose of impairing or supporting the credibility of a witness, any party . . . may . . . introduce extrinsic evidence relevant upon the issue of credibility . . . ." 577 A.2d at 1287 (emphasis added). The Frost court further allowed the expert to opine that the complainant was in fact a battered woman. *See id.* at 1286-88.

One commentator has suggested that Frost had limited applicability to other cases because of the unique evidentiary rule upon which its reasoning was based. *See* Schroeder, *supra* note 6, at 575-76. However, at least one court has adopted Frost's reasoning even though the evidence statute in that court's jurisdiction paralleled the less inclusive language in Federal Rule of Evidence 607, which states that "the credibility of a witness may be attacked by any party including the party calling him." *See* Barnes v. State, 858 P.2d 522 (Wyo. 1993). The Barnes defendant was charged with the brutal murder of his girlfriend's five-year-old daughter. The defendant tried to implicate his girlfriend in the child's death. The State called a police officer to testify as to the mother's behavior, and the defendant objected on the grounds that it improperly bolstered her credibility. The defendant also objected to the admission of the mother's testimony as a victim's impact statement. The Wyoming Supreme Court analogized to cases where it permitted expert testimony to educate the jury on why a rape victim may delay in reporting the assault, and upheld the testimony in the case before it. The court reasoned that "[a] corollary to the rule allowing a party to attack the credibility of a witness is to permit the opposing party to bolster that credibility." 858 P.2d at 533. The court ruled that a party need not wait for the opposing party to attack a witness's credibility before it can be bolstered, and it allowed the mother to testify as to the impact of her child's death. *See id.* at 534-35.

The Barnes court appears to hold that a party may bolster the testimony of its witnesses, in contravention of the generally prevailing rule regarding such impermissible bolstering. *See* note 50 and accompanying text *supra*. However, the proper scope of Barnes's ruling may be explained by examining the facts of the case.

Although the Barnes court spoke broadly about allowing a party to support its witness's credibility even if the opposing counsel has not attacked it, in fact, the defense "repeatedly and vigorously" attacked the mother's credibility on cross-examination. 858 P.2d at 534. Thus, Barnes is consistent with prevailing authority that allows expert testimony to rehabilitate a witness or to explain puzzling behavior.

[62] *See* State v. Ciskie, 751 P.2d 1165 (Wash. 1988) (trial court specifically prohibited such testimony).

its prejudicial impact.[63] Instead, the courts permit the expert to testify generally about battering and its effects.[64]

B. Guidelines for Prosecutorial Use of Expert Testimony

As the cases described above illustrate, the courts have been most receptive to the State's use of expert testimony when it is introduced to rebut a defense attack on the victim's credibility or to explain a recantation.[65] The courts have pointedly rejected defense efforts to limit expert testimony on battering and its effects to cases where a woman uses it to support a self-defense claim, acknowledging that 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."[66]

A synthesis of the courts' reasoning in the cases that have allowed expert testimony reveals that the key consideration is whether such testimony can help explain seemingly bizarre or puzzling behavior by a witness without undue prejudice to the defendant. With this principle as a guide, we can articulate certain guidelines for prosecutorial use of expert testimony on battering and its effects.

First, since it is a witness's puzzling behavior that triggers the need for expert testimony to help the jury assess the evidence before it, its introduction should not be dependent on a defense attack on the witness's credibility. A number of courts have upheld trial court rulings that allowed the prosecution to call an expert witness without requiring any defense attack on the witness's credibility.[67] These courts have ruled correctly that expert testimony that

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[63] *See, e.g.*, State v. Borelli, 629 A.2d 1105, 1115 (Conn. 1993); State v. Griffin, 564 N.W.2d 370 (Iowa 1997); State v. Ciskie, 751 P.2d 1165 (Wash. 1988).

[64] *See, e.g.*, State v. Borelli, 629 A.2d at 1115; State v. Griffin, 564 N.W.2d at 374-75; State v. Ciskie, 751 P.2d at 1166-74.

[65] *See* notes 47-53 and accompanying text *supra*.

[66] State v. Frost, 577 A.2d at 1287.

[67] *See* Barnes v. State, 858 P.2d 522 (Wyo. 1993); State v. Frost, 577 A.2d at 1287-88; State v. Searles, 680 A.2d at 615; People v. Christel, 537 N..W.2d 194 (Mich. 1995). *See also* notes 59-61 and accompanying text *supra*.

explains general characteristics to offset common misconceptions is permissible.[68]

Concomitantly, the timing of the introduction of the expert testimony is not, by itself, critical. In many instances, it will be the defense that points to puzzling behavior, such as the failure to report an abuse incident, or the failure to leave the relationship.[69] The State will then seek to admit the expert as a rebuttal witness, or as part of its case-in-chief following the defendant's cross-examination of the complainant. In other instances, however, the defense may not attack the witness's testimony. The State still should be allowed to present expert testimony as part of its case-in-chief if it aids the jury in its understanding of the evidence.

Some courts and commentators have insisted, however, that courts admit expert testimony only for rebuttal or rehabilitation after a defense attack and not as part of the State's case-in-chief.[70] They reason that to allow it in other circumstances would be improper bolstering.[71] This position is unnecessarily narrow and its shortcomings are most apparent when applied to a complainant who recants earlier charges against the defendant. In such an instance, the defendant would not want to attack the complainant's testimony. This should not bar the prosecution from offering expert testimony to explain the incongruous behavior. The rules of evidence governing expert testimony are grounded in the usefulness of the expert testimony,[72] not on an inquiry on the evidentiary vehicle used for its admission. A jury will necessarily be perplexed by a victim's recantation unless it is educated on battering and its effects.

The genesis of the rebuttal or rehabilitation requirement appears to be court rulings on the use of expert testimony in the related areas of child sexual abuse cases and rape trauma syndrome cases. In many of these cases, the courts have limited the introduction of expert testimony to rebuttal or

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[68] *See generally* Gershman, *supra* note 50.

[69] *See* note 52 and accompanying text *supra.*

[70] *See* People v. Christel, 537 N.W.2d at 205 (Cavanagh, J., dissenting) (expert testimony should be limited "to the narrow purpose" of rebuttal); Schroeder, *supra* note 6, at 573.

[71] *See, e.g.*, Schroeder, *supra* note 6, at 573.

[72] *See* notes 26-28 and accompanying text *supra.*

rehabilitation.[73] Their reasoning is that unless the expert testimony is limited to rehabilitating the witness or rebutting a defense attack on the victim's credibility, the expert testimony would constitute improper bolstering.[74]

Courts and commentators have pointed to the similarities between cases involving rape victims, child sexual abuse victims, and battered women.[75] However, some crucial differences may exist. Typically, in a rape trauma case the defense attacks the victim's credibility by arguing that the intercourse was consensual. Defense counsel may point to a victim's failure to report the rape as a means of impeaching the victim's trial testimony that she was raped. Similarly, in a child sexual abuse case, the defense may highlight the child's delay in reporting an attack or earlier inconsistent statements to discredit the victim's testimony that the defendant abused him or her. In both cases, the victim testifies against the defendant at trial.[76] The

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[73] *See, e.g.*, People v. Bowker, 249 Cal. Rptr. 886 (Cal. Ct. App. 1988) (expert testimony on child sexual abuse syndrome limited to rebuttal following defense attack); People v. Bledsoe, 681 P.2d 291 (Cal. 1984) (expert testimony permissible for limited purpose of rebutting a defense suggestion that the victim's behavior was inconsistent with being raped); People v. Beckley, 456 N.W.2d 391 (Mich. 1990) (expert testimony on child sexual abuse syndrome admissible only for rebuttal or rehabilitation). *See generally* John E.B. Myers *et al.*, Expert Testimony in Child Sexual Abuse Litigation, 68 Neb. L. Rev. 1, 86-92 (1989); John E.B. Myers, The Child Witness: Techniques for Direct Examination, Cross-Examination and Impeachment, 18 Pac. L.J. 801, 848 (1987).

The controversy as to the timing of the admission of expert testimony on battering and its effects also stems from early defense attacks on its admissibility in general. Courts faced defense claims that expert testimony on battering and its effects was appropriate only when offered by a defendant to support a self-defense claim, and not as part of a prosecutor's case-in-chief against a batterer. *See, e.g.*, State v. Frost, 577 A.2d at 1286-87. While most courts have rejected this position, *see* note 47 and accompanying text *supra*, some have retained the limitation that the prosecution may only use the expert to rebut or rehabilitate a defense attack. *See generally* Raeder, *supra* note 6, at 801-02.

[74] *See generally* Myers, Expert Testimony in Child Sexual Abuse Litigation, *supra* note 73, at 90-92.

[75] *See, e.g.*, State v. Freeney, 637 A.2d 1088 (Conn. 1994); State v. Cababag, 850 P.2d 716 (Haw. Ct. App. 1993); State v. Griffin, 564 N.W.2d 370 (Iowa 1997); Commonwealth v. Goetzendanner, 679 N.E. 2d 240 (Mass. App. Ct. 1997); People v. Christel, 537 N.W.2d 194 (Mich. 1995); State v. Searles, 680 A.2d 612 (N.H. 1996); State v. Ellis, 656 A.2d 25 (N.J. Super. Ct. App. Div. 1995); State v. Bednarz, 507 N.W.2d 168 (Wis. Ct. App. 1993).

[76] Experts on child sexual abuse accommodation syndrome widely cite recantation as common behavior in abused children. *See generally* Roland C. Summit, The Child Sexual Abuse Accommodation Syndrome, 7 Child Abuse & Neglect 177 (1983); Andrew Cohen, Note,

expert testimony is admitted to educate the jury that the victim's behavior in failing to report the abuse is consistent with the behavior of rape trauma or child sexual abuse victims. It is therefore helpful in assessing the victim's credibility. Courts have limited the expert testimony to rehabilitation or rebuttal because the victim's testimony is consistent with the prosecution's case against the defendant.

In contrast, when battered women recant at trial, their testimony supports the defendant. No opportunity to rehabilitate arises; however, this should not prevent the admission of expert testimony, since the jury still needs to be educated on why the victim may have recanted to properly assess the evidence.

A second guideline for proper prosecutorial use of expert testimony is that the expert should not be asked to testify that the witness was in fact battered or to give any opinion as to the complainant's truthfulness. To avoid undue prejudice to the defendant, the expert should testify only to general characteristics of battering and its effects, and not whether the complainant exhibits these traits. Prosecutors should also refrain from using hypotheticals that mirror too closely the particular facts of the case at bar, because courts have deemed this technique as merely a tactic to circumvent the prohibition against offering expert testimony on whether the complainant was, in fact, battered.[77] Judges should specifically instruct the jury on the limitations of the expert testimony and that it may not make any inferences from the expert testimony about the specific charges at issue.[78]

With these directives in place, we can turn to the issue of whether expert testimony is appropriate when the complainant refuses to testify.

The Unreliability of Expert Testimony on the Typical Characteristics of Sexual Abuse Victims, 74 Geo. L.J. 429, 443-48 (1985). A sampling of the cases reveals that in many instances where recantation is the basis for the admission of expert testimony, the child has testified against the defendant at trial, but has previously made inconsistent statements. *See, e.g.*, Wheat v. State, 527 A.2d 269 (Del. 1987); State v. Batangan, 799 P.2d 48 (Haw. 1990); State v. Middleton, 657 P.2d 1215 (Or. 1982).

[77] *See* Gershman, *supra* note 50, § 5-10(f), at 64.

[78] *See, e.g.*, State v. Griffin, 564 N.W.2d 370 (Iowa 1997); State v. Searles, 680 A.2d 612 (N.H. 1996).

PART III—EXPERT TESTIMONY TO EXPLAIN THE VICTIM'S ABSENCE

As prosecutors litigate more and more domestic violence cases, the likelihood increases that they will face situations where complainants refuse to testify. This section examines the propriety and parameters of using expert testimony to explain the victim's absence.[79]

While there exists anecdotal evidence that some courts have allowed expert testimony on battering and its effects to explain a complainant's refusal,[80] only one reported case has addressed the issue. In 1982 in Pruitt v. State,[81] a Georgia appellate court ruled that such testimony was inadmissible for two reasons. First, it ruled that testimony on battered woman's syndrome was relevant only to support a defendant's self-defense claim. Second, the court held that the prosecution did not establish that the missing witness was a battered woman. Pruitt's precedential value is questionable since in the years following the decision, a vast majority of courts have made it clear that expert testimony on battering should not be limited solely to self-defense claims.[82] Thus, the issue is essentially one of first impression.

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[79] The use of expert testimony to explain the refusal differs from situations where a party seeks to introduce a complainant's out-of-court statements by having her declared unavailable. *See* Weinstein & Berger, *supra* note 27, § 804. In this instance, the State may call an expert to give testimony on the witness's unavailability. *See, e.g.*, State v. Allen, 755 P.2d 1153 (Ariz. 1988). Thus, a physician could testify that the witness is unavailable because of a medical condition.

This section addresses the separate issue of whether the expert may testify as to characteristics of battered women generally so that the jury may properly assess the evidence before it. The court should not allow the expert to testify specifically that the reason the witness has refused to testify is because she is a battered woman, since such testimony would be highly prejudicial to the defendant. *See* note 77 and accompanying text *supra*.

[80] *See* Parrish, *supra* note 6, at 108 n.59.

[81] 296 S.E.2d 795 (Ga. Ct. App. 1982).

[82] *See generally* Parrish, *supra* note 4, at 106-08. *But see* State v. Pargeon, 582 N.E.2d 665 (Ohio Ct. App. 1991). Since Pruitt, Georgia courts have strongly endorsed the use of expert testimony to support self-defense claims, even in non-traditional situations, such as sleeping spouse cases. *See* Chapman v. State, 386 S.E.2d 129 (Ga. 1989). Concomitantly, the Georgia legislature has specified that defendants may introduce expert testimony to support a justification defense. Ga. Code Ann. 16-3-21(d) (Michie 1994). Finally, Georgia courts have allowed expert testimony to explain that sexual assault victim's behavior was consistent with the battered woman's syndrome. *See* Thompson v. State, 416 S.E.2d 755 (Ga. Ct. App. 1992). Given this trend, Pruitt's continued validity is questionable.

The first consideration for the admission of expert testimony in domestic violence cases is whether such testimony is relevant. Expert testimony is relevant if it is material and probative to the issues in dispute and if it "assist[s] the trier of fact to understand the evidence."[83] Implicit in this requirement is that the prosecutor establish a prima facie case against the defendant. If the only evidence that the prosecutor has is the victim's testimony and the victim refuses to testify, the State is left without evidence, and the court should grant a defense motion for dismissal.

To ensure the prosecution of domestic violence cases without the victim's cooperation, battered women's advocates have long urged that law enforcement officers and prosecutors be trained in so-called "victimless" prosecutions to shift the paradigm of prosecuting domestic violence cases away from being victim-driven.[84] Practitioners and commentators have suggested a number of steps that police officers and prosecutors can take to prosecute a domestic violence case without the victim's cooperation. Most of these guidelines are equally applicable to prosecuting a case without the victim's presence at trial. These steps include pragmatic recommendations for law enforcement in the gathering of physical evidence, including the recording of statements the victim makes at the scene; obtaining emergency 911 tapes and medical records of treatment the victim obtained following a violent incident.[85] Concomitantly, prosecutors have been successful in developing trial strategies that have gradually gained judicial acceptance.[86] They include

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The Pruitt court's finding that the prosecutors did not establish a sufficient factual foundation for the admission of expert testimony should be limited to the facts of the case.

[83] Fed. R. Evid. 702. *See* notes 26-28 and accompanying text *supra*.

[84] *See* Mary E. Asmus *et al.*, Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies From Understanding the Dynamics of Abusive Relationships, 15 Hamline L. Rev. 115 (1991); Developments in the Law—Legal Responses to Domestic Violence, 106 Harv. L. Rev. 1498 (1993); Casey G. Gwinn & Anne O'Dell, Stopping the Violence: The Role of the Police Officer and the Prosecutor, 20 W. St. U. L. Rev. 297 (1993).

[85] *See* Hanna, *supra* note 1, at 1901-03; Casey & O'Dell, *supra* note 84. One small town purchased eleven Polaroid cameras for its police force to allow immediate close-up photographs of a victim's injuries. *See* John Pope, Petersburg Arrests Mandatory in Cases of Domestic Violence, Richmond Times Dispatch, May 1, 1997, at B8.

[86] *See generally* Keith, *supra* note 20. *See also* Hanna, *supra* note 1, at 1905-06; Waits, *supra* note 10, at 327-28 (noting the prosecutor's role in educating judges to alter antiquated notions of domestic violence).

introducing out-of-court statements under excited utterance, unavailability, or admission hearsay exceptions.[87] Commentators have suggested other methods of obtaining evidence against the defendant, including using propensity evidence[88] and hearsay exceptions that to date have only applied to children.[89]

It is against this backdrop that we can examine the propriety of allowing a prosecutor to offer expert testimony as part of a victimless prosecution. Since courts consistently have allowed expert testimony to rebut a defense attack on a witness's behavior, the easiest scenario for the introduction of expert testimony is where the defense uses the complainant's absence to attack the prosecution's case. If the defense requests a missing witness charge[90] or if it attacks the prosecution's case based on the victim's absence, the court should allow the expert testimony to rebut the defense attack. Additionally, if the defendant suggests that he was not in a battering relationship, expert testimony on its dynamics would be relevant to explain the complainant's absence.

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[87] *See* Asmus, *supra* note 84, at 19-144; Hanna, *supra* note 1, at 1903-04. Other hearsay exceptions may require the presence of the declarant at trial, thus precluding their applicability when the complainant refuses to testify. *See, e.g.*, Asmus, *supra* note 84, at 139 (discussing the present sense impression exception).

[88] *See* Hanna, *supra* note 1, at 1905.

[89] Several states have created so-called "prompt complaint" hearsay exceptions for statements made by sexual assault and child abuse victims. *See, e.g.*, Tex. Crim. P. Code Ann. § 38.072 (1998). *See generally* Domestic Violence, 15 Wm. Mitchell L. Rev. 871, 887-88 (1989). The impetus for creating special hearsay exception in sex and child abuse cases was the unique nature of these types of cases, in that the victims are often reluctant or unwilling to testify, third party witnesses to the assault are rare, and the physical evidence may be inconclusive. Courts and commentators have noted the similarities between rape trauma syndrome and child abuse syndrome cases and domestic violence cases. *See* note 76 and accompanying text *supra*. Accordingly, the "prompt complaint" exception may very well apply to domestic violence cases. *See* Domestic Violence, *supra*, at 887-88.

[90] A "missing witness" charge allows a jury to draw an adverse inference from a party's failure to call a witness when the testimony would be material and the witness is within the control of that party. *See* United States v. Torres, 845 F.2d 1165, 1169 (2d Cir. 1988). *See generally* 1 Moore's Federal Practice § 630.30[5] (3d ed. 1997). Whether a complainant in a domestic violence case is under the State's control is questionable. *See generally* Pace University School of Law Battered Women's Justice Center, Memorandum of Law, In Domestic Violence Cases Where the Victim Refuses to Testify for the Prosecution, Can the Defendant Obtain a Missing Witness Charge? (last modified June 10, 1998) <http://www.law.pace.edu/bwjc/misswit.htm>.

At least one court has permitted the State to offer expert testimony on battered woman's syndrome in a homicide case where the defendant pointed to the victim's continued relationship with him to attack the prosecutor's charge that he intentionally murdered her. In Isaacs v. State,[91] the trial court permitted the expert testimony to "refute, rebut, or at least to explain why a woman who has been allegedly battered would continue to go back to, and have an affair with the individual who was doing the battering."[92] In affirming the defendant's conviction, the Supreme Court of Indiana reasoned that the expert testimony was properly admitted to refute the notion that the defendant and the victim had a good relationship prior to her death.

While Isaacs is a homicide case where the victim is obviously unavailable, its import is applicable to domestic violence prosecutions when the complainant refuses to testify. Where a domestic violence defendant denies the charges against him, and instead attempts to portray a good relationship between himself and the missing complainant, the court should permit the prosecutor to offer expert testimony on battering and its effects to explain a missing witness's seemingly inconsistent behavior toward the defendant, such as remaining with him despite claims of abuse.

Even without a direct defense attack on the complainant's absence, the prosecution should still be able to introduce expert testimony if there is sufficient independent evidence to support the charges against the defendant. As the previous sections demonstrated, courts have ruled that it is a witness's puzzling or incongruous behavior which the average juror may not understand, creating the need for expert testimony. To a juror unschooled in the dynamics of domestic violence, the refusal of a complainant to testify against the defendant is the quintessence of puzzling behavior. The jury might easily interpret the refusal to appear as evidence that the complainant was not injured, thus undermining the independent evidence offered by the prosecution. Expert testimony would therefore be helpful to neutralize any negative implications the jury may draw from the complainant's refusal to testify.

The refusal to testify in such a situation is analogous to a complainant's recantation at trial of earlier statements implicating the defendant. Thus, the same rules that govern the admissibility of expert testimony to explain a recantation should govern in this situation.[93] The

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[91] 659 N.E.2d 1036 (Ind. 1995).

[92] *Id.* at 1041.

[93] *See* note 47 and accompanying text *supra*.

prosecution would not be using the expert to impermissibly bolster its case, but rather to explain general characteristics of the dynamics of domestic violence to the jurors who may naturally be confused by the complainant's absence, and who may thus improperly draw negative conclusions from her absence.

Defendants will object to the prosecutorial use of expert testimony when a witness refuses to testify by claiming that the expert testimony is too speculative or without proper foundation. To forestall such an objection, in addition to the independent evidence of the charges and a foundation that the victim was a battered woman,[94] the prosecution should be prepared to offer testimony that explains its office's efforts to get the complainant to testify and to explain that she is aware that the trial is taking place.[95] In addition, prosecutors should be prepared to stress that the expert testimony is not offered as positive evidence of the charges against the defendant, but only as a means of negating the negative inferences the jury might derive from the complainant's absence.

As in the case of a recantation, the courts must carefully delineate the proper scope of the expert testimony to avoid undue prejudice to the defendant. The expert should not be permitted to opine as to the reason for the particular complainant's absence. The expert should also be prohibited from testifying as to whether the complainant was in fact a battered woman. The expert should only be allowed to describe common characteristics of battering and its effects on women, including why a person may refuse to testify.

CONCLUSION

Much progress has been made in the past two decades to educate the general public about the breadth and depth of domestic violence in this country. Law enforcement has begun to take an aggressive stance against

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[94] *See, e.g.*, Carnahan v. State, 681 N.E.2d 1164 (Ind. Ct. App. 1997).

[95] Additionally, the defense may claim that Sixth Amendment Confrontation Clause rights are violated by the complainant's absence. U.S. Const. amend VI. The court should reject this contention because the prosecution is proceeding with independent evidence of the charges, including hearsay statements that do not required the complainant's presence at trial. *See* Idaho v. Wright, 497 U.S. 805 (1990). *See generally* Jacqueline Miller Beckett, The True Value of the Confrontation Clause: A Study of Child Sex Abuse Trials, 82 Geo. L.J. 1605 (1994); Diana Younts, Note, Evaluating and Admitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions, 1991 Duke L.J. 691 (1991).

domestic violence through mandatory arrest and no-drop policies. However, unless jurors fully comprehend the enormous emotional, physical, financial, and sociological effects of battering, they will be unable to adequately assess the cases before them.

The propriety of expert testimony on battering and its effects in support of self-defense claims has become a settled principle of law because the courts have recognized that jurors may be clouded by misconceptions about domestic violence. The admissibility of expert testimony is grounded on its ability to assist the finders of fact. The same rationale that has led to judicial acceptance of defensive use of expert testimony applies to prosecutorial use of expert testimony. The expert can provide the jurors with an understanding of why a victim of domestic violence would remain in an abusive relationship, why she may recant charges against her abuser, or why she may refuse to appear at trial. The courts have reacted favorably to prosecutorial use of expert testimony, particularly when it is used to rehabilitate a witness. Accordingly, prosecutors should include expert testimony as an integral part of their trial strategy. In so doing, prosecutors will be able to lessen the undue reliance they have placed historically on a victim's testimony. Developing independent evidence to support the charges against a defendant, together with expert testimony to explain the effects of battering and demystify a victim's puzzling behavior, will help prosecutors in vigorously prosecuting domestic violence incidents.