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## Battered Woman's Syndrome: A Defense to Child Abuse?

by Dawn Doran Wilsey<sup>1</sup>

**I**ntroduction  
Expert testimony concerning domestic violence can be offered by either the state or the defense in criminal cases for various purposes: (1) to show that a defendant is a battered woman, (2) to explain a battered woman's state of mind, (3) to generally support a claim (e.g., when a battered victim is suing a batterer for damages) or the validity of a particular defense (i.e., when a battered woman is the defendant), (4) to explain a battered woman's conduct, (5) to explain a battered woman's recantation or resistance to prosecution (i.e., when a battered victim is the state's witness in a prosecution), (6) to bolster a battered woman's credibility, or (7) to explain the existence of mitigating factors (i.e., for purposes of sentencing when a battered woman has been found guilty in a criminal trial).<sup>2</sup>

Prosecutors may find themselves in the unique position of introducing Battered Woman's Syndrome testimony in their case in chief in certain cases and then attacking Battered Woman's Syndrome testimony when it is introduced as a defense in others. It is imperative that prosecutors thoroughly understand both the proper and improper uses of the syndrome in order to prepare an effective cross examination on the syndrome as a defense without destroying its appropriate use in criminal trials.

### Battered Woman's Syndrome Defined

The parameters and definition of Battered Woman's Syndrome (BWS) have evolved from its initial inception in the late 1970s.<sup>3</sup> Lenore Walker, the pioneer in this field, initially defined Battered Woman's Syndrome as a state of "learned helplessness," a condition used to explain a victim's inability to protect herself against the batterer's violence that developed following repeated, but failed, efforts to do so.<sup>4</sup> Another early formulation referred to the cycle of violence, a theory that describes the dynamics of the batterer's behavior,<sup>5</sup> which can also be used to explain how battered victims are drawn back into the relationship when the abuser is contrite and attentive following violent episodes. Originally Walker's work required at least two separate incidents of battering in order to rise to the level of BWS. However, it is now accepted that not all women experience BWS in the same way.<sup>6</sup> More recently, BWS has been defined as post-traumatic stress disorder (PTSD),<sup>7</sup> a psychological condition that results from exposure to severe trauma.<sup>8</sup>

It is important to note that the Diagnostic and Statistical Manual of Disorders IV TR (DSM-IV-TR) does not list BWS as a subcategory of PTSD.<sup>9</sup> Nevertheless, since some battered women suffer from PTSD, evidence of a diagnosis of PTSD, in addition to specific evidence regarding the defendant's victimization, may be introduced to support a claim of self-defense or duress. This is offered in an attempt to show why a battered woman may perceive a non-dangerous situation as

imminently dangerous due to flashbacks and other intrusive experiences resulting from her prior victimization.<sup>10</sup>

### Application to the Duress Defense

Traditionally defendants have introduced evidence of BWS in support of self-defense claims. More recently defendants have begun to introduce BWS evidence to demonstrate that they committed crimes against third parties under duress.<sup>11</sup> For example, in one case involving the scalding death of a young boy by his father, the victim's mother pled no contest to the murder charge, but argued that she did not report or attempt to get help for her son because his father, her husband, beat and threatened her into silence.<sup>12</sup> APRI's advanced trial advocacy course, *Childproof*, is modeled after a similar case in Virginia where the victim's mother stood by as her boyfriend repeatedly raped, tortured, bound and eventually killed her 12-year-old daughter.<sup>13</sup>

BWS evidence, when introduced as part of a duress defense,<sup>14</sup> must satisfy the general elements of duress: reasonableness, imminence and lack of opportunity to escape. To prove her fear was reasonable, the defense will attempt to introduce evidence of the defendant's victimization, particularly increased frequency or severity in the batterer's assaults, as well as threats by the batterer. Past instances where the batterer acted on threats may be introduced to buttress her claim that her fear was reasonable and well-grounded.

BWS may be introduced to establish that the defendant faced "imminent" danger where a gap of time existed between the threat of death or serious bodily injury and the act of child abuse, or failure to act or protect. It can be used to explain the defendant's perception of her batterer's ability to cause her imminent harm, even where there was a gap between the batterer's threat and her commission of a crime. In addition, where the batterer's behavior seemed benign or if he was absent for the defendant's criminal act, BWS evidence may be introduced in an attempt to persuade jurors that the defendant's perception of imminent harm was reasonable.<sup>15</sup>

Finally, where the defendant must prove there was no alternative to the commission of the crime, evidence of the cyclical nature of the relationship and the defendant's state of "learned helplessness" establish either the defendant's actual inability to escape or the reasonableness of her perception that she could not escape.<sup>16</sup> This BWS evidence will focus on the defendant's past inability to escape her batterer's assaults leading her to believe that there was no way to avoid committing the criminal act without inflicting graver damage to herself or others. This evidence can be bolstered with testimony that the batterer previously threatened to kill the defendant, or harm other members of her family, if she attempted to leave him.

### Failure to Protect/Third Party Crimes

While courts have generally been accepting of the use of

BWS as an element of a self-defense or duress claim between two parties, the issue becomes complicated when BWS is used as a defense to actions against a third party. This defense is often raised in failure to protect cases, when mothers stand by as a child is abused without attempting to halt the abuse or to aid the child. Courts have been reluctant to accept BWS as a defense to child abuse, as it is universally accepted that parents have a clear duty to protect their children.

For example, in New Jersey, for more than two decades, courts have allowed BWS testimony as part of a duress defense. The New Jersey Supreme Court recently unanimously ruled that defendants who claim their abusers forced them to hurt innocent third parties are limited in their use of BWS testimony and must be held to a standard of a "person of reasonable firmness," not a BWS standard.<sup>17</sup> Courts are not the only entity refusing to accept BWS as a defense to child abuse. Recently, California Governor Arnold Schwarzenegger denied parole to a woman who did not stop her boyfriend from fatally beating her two year old daughter, stating that being a victim of domestic violence was no defense to the failure to protect a child.<sup>18</sup>

Prosecutors should also be aware that BWS evidence in support of the duress defense has not been limited to child abuse cases. In New Jersey, a defendant charged with embezzling over \$250,000 from the state was permitted to introduce evidence that her abusive and drug-dependent son coerced her to steal the money.<sup>19</sup> In *United States v. Johnson*,<sup>20</sup> a defendant was also permitted to introduce BWS in an attempt to mitigate her sentence for a drug offense. As BWS becomes more accepted as part of a general duress defense, prosecutors are likely to encounter it in many cases.

### Charging/Trial Considerations

Prosecutors should strenuously object to any improper introduction of BWS testimony, particularly when it is used as a defense to child abuse. Prosecutors should seek to introduce testimony, when appropriate, to show that the defendant's fear was not reasonable, nor imminent, and there was opportunity for escape. Attacking BWS as a defense may place child abuse prosecutors at odds with domestic violence advocates and prosecutors, who may strenuously object to the prosecution of any battered woman for her actions while she is in an abusive relationship.<sup>21</sup> Each case should be considered on its own merits, but child abuse prosecutors have the responsibility to hold all those accountable for the abuse of, or failure to protect, our most vulnerable of victims.

Prosecutors should consider the following factors: Was the defendant's fear reasonable? If the defendant provided protection for the child, or called for help, would she have faced immediate harm? Did the defendant have opportunities for outside assistance for the children? Did the defendant ever seek resources for the children from family members, friends or child protective services? Did the defendant work outside the home or attend church or any other activities outside the home? Did she have a relationship with any family members outside the home who could have provided a safe home for the child? Has the batterer attacked the children before, or was the defendant merely avoiding danger or harm to herself? Is there any history of reporting abuse against herself, but no reports of child abuse? Did the defendant ever seek information on battered woman shelters? Prosecutors should seek to introduce any and all testimony regarding the reasonable alternatives to harming, or failing to protect, a helpless child.

If BWS testimony is allowed to be introduced as a defense to neglect, prosecutors should consider the following factors: Did the defendant have proper food or clothing, access to services or medical help for herself, but fail to provide the same for her child? Was the defendant ever contacted by child protective services, teachers, or other agencies or individuals to inquire about the welfare of the child where the defendant actively denied any need to protect or aid the child? Finally, did the defendant choose her own welfare and protection at the expense of her child?

### Conclusion

Prosecutors should examine each case where BWS is raised on its own merits. Prosecutors must understand the correct application of the use of BWS as part of a duress defense, and object to testimony that is not appropriately introduced. Finally, BWS should be critically evaluated and attacked when introduced in cases of child abuse or failure to protect. It is the prosecutor's job to ensure that children do not suffer in silence and that all parties responsible for their abuse and neglect are brought to justice.

- <sup>1</sup> Ms. Wilsey is the Deputy Director of APRI's Child Abuse Programs. Ms. Wilsey would like to thank Danica Szarvas-Kidd, Staff Attorney and Monica Wright, Law Clerk, with APRI's National Center for Prosecution of Child Abuse, for their editorial assistance with this article.
- <sup>2</sup> J. Parish, *Trend Analysis: Expert Testimony on Battering and its Effects in Criminal Cases*, 1996.
- <sup>3</sup> See Mary Ann Dutton, *Impact of Evidence Concerning Battering and Its Effects in Criminal Trials Involving Battered Women*, U.S. Department of Justice, Office of Justice Programs (May 1996), at <http://www.ojp.usdoj.gov/ocom/94Guides/Trials/Valid/> (discussing the use of BWS in criminal prosecutions since the 1970s).
- <sup>4</sup> Lenore E. Walker, *Battered Women and Learned Helplessness*, 2 VICTIMOLOGY: AN INT'L J., 525, 525-534 (1977-78).
- <sup>5</sup> Lenore E. Walker, *THE BATTERED WOMAN SYNDROME* (Springer Publishing Co. 1984).
- <sup>6</sup> Dutton, *supra* note 3 at 6 (stating "the 'cycle of violence' is not the only pattern of abusive behavior found in battering relationships").
- <sup>7</sup> Lenore E. Walker, *Battered Woman Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUBLIC POL'Y 321, 321-334 (1992).
- <sup>8</sup> Am. Psychiatric Ass'n, *Diagnostic and Stat. Manual of Mental Disorders* (4th ed. Text Revision 2000).
- <sup>9</sup> This fact alone, however, should not be relied upon as evidence of the American Psychological Association's (APA) disapproval of BWS. The APA has filed amicus briefs in support of BWS in at least two cases: *Hawthorne v. State*, 470 So. 2d 770 (Fla. Dist. Ct. App. 1985) and *State v. Kelly*, 478 A.2d 364 (N.J. 1984). In addition, many argue that such a categorization further and unfairly pathologizes battered women, who are simply and rationally responding to their difficult and traumatic circumstances.
- <sup>10</sup> Mary Ann Dutton, *Critique of the "Battered Woman Syndrome" Model*, VAWnet, September 1996, [http://www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR\\_bws.php](http://www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR_bws.php).
- <sup>11</sup> See Jennifer Gentile Long and Dawn Doran Wilsey, *Understanding Battered Woman Syndrome and Its Application to the Duress Defense*, 40/2 THE PROSECUTOR, March/April 2006, at 36.
- <sup>12</sup> Laurie Kratky Dore, *Downward Adjustment and the Slippery Slope: The Use of Duress in Defense of Battered Offenders*, 56 OHIO ST. L.J. 665, 698-99 (citing other case examples where BWS was introduced in support of a duress defense).
- <sup>13</sup> See *Hovertter v. Commonwealth*, 477 S.E.2d 771 (Va. Ct. App. 1996, life sentence); see also *Smelser v. Commonwealth*, (pled guilty, received 35 years with 23 suspended. She was paroled in 2005).
- <sup>14</sup> See *Dixon v. U.S.*, No. 05-7053 (S. Ct. June 22, 2006) (affirming that the burden of proving duress stays with the defendant and does not shift to the government, even when BWS is raised).
- <sup>15</sup> See Meredith Blake, *Coerced Into Crime: The Application of Battered Woman Syndrome to the Defense of Duress*, 9 WIS. WOMEN'S L.J. 67, 78-79 (1994) (noting that some jurisdictions do not require "imminence" to mean "immediate.") Prosecutors should check the applicable statute and case law in their jurisdictions.
- <sup>16</sup> See *id.* at 80-84 (discussing the varying definitions of reasonableness among the jurisdictions).
- <sup>17</sup> *State v. B.H.*, 870 A.2d 273, (N. J. 2005).
- <sup>18</sup> Linda Lee Smith was convicted of second degree murder in 1980 in San Luis Obispo County. She has been up for parole six times. Succeeding California Governors have exercised veto power each time. See <http://releases.usnewswire.com/GetRelease.asp?id=65254>.
- <sup>19</sup> Michael Capanzzi, *Battered Woman's Defense Refined*, THE STAR-LEDGER, April 14, 2005.
- <sup>20</sup> Alafair Burke, *Rational Actors, Self-Defense and Duress, Making Sense Not Syndromes out of the Battered Woman*, 81 N.C. L. REV. 211, 222 (2002) (citing 956 F.2d 894, 899-900).
- <sup>21</sup> See Victor Vieth, Comment, *How Child Protective Service Investigators Decide to Substantiate Mothers for Failure-to-Protect in Sexual Abuse Cases*, J. OF CHILD SEXUAL ABUSE (forthcoming 2006).

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