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Removing the Roadblocks to Successful Domestic Violence Prosecutions: Prosecutorial Use of Expert Testimony on the Battered Woman Syndrome in Ohio

Matthew P. Hawes

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REMOVING THE ROADBLOCKS TO SUCCESSFUL DOMESTIC
VIOLENCE PROSECUTIONS: PROSECUTORIAL USE OF
EXPERT TESTIMONY ON THE BATTERED WOMAN
SYNDROME IN OHIO

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I. INTRODUCTION

On April 8, 1993, Amanda Demich gave a taped statement to the Lorain, Ohio police department that her boyfriend, Joseph Dowd, had beaten her.¹ A police detective took photographs of Demich's injuries, which included bruises on her face and thighs.² Demich later testified before a grand jury that Dowd caused the injuries shown in the photographs by hitting her.³ On April 13, 1993, Dowd was indicted on

¹State v. Dowd, No. 93CA005638, 1994 WL 18645, at *1 (Ohio App. 9 Dist. 1994).

²*Id.*

³*Id.*

counts of felonious assault, kidnapping, and assault.⁴ Three weeks later, though, Demich recanted her previous statements to the police and grand jury by stating that Dowd was not the person who assaulted her.⁵ Demich's recantation essentially left the prosecution without a case against Dowd.

The situation in *Dowd* illustrates a common challenge that prosecutors face in domestic violence cases. In a conventional criminal case the prosecution can expect to rely on the cooperation and participation of the victim to obtain a conviction.⁶ In a domestic violence case, however, the prosecution will often encounter victims who refuse to testify, recant previous statements, or whose credibility is attacked with questions on why they remained in a battering relationship.⁷ In an attempt to explain this behavior by the victims of domestic violence, prosecutors in many jurisdictions now rely on expert testimony relating to the battered woman syndrome.⁸ In Ohio, however, a prosecutor in a domestic violence case like *Dowd* cannot introduce any expert testimony to explain the behavior of the victim.

Since the mid-1980's, expert testimony on the battered woman syndrome has been widely used by female murder defendants who claim that they have killed their batterers in self-defense.⁹ The Ohio Supreme Court first permitted such use of the syndrome in 1990.¹⁰ More recently, courts in several jurisdictions have accepted expert testimony on the battered woman syndrome introduced by prosecutors in domestic violence cases.¹¹ Despite this growing trend, Ohio courts have prohibited it.¹²

⁴*Id.*

⁵*Id.*

⁶Audrey Rogers, *Prosecutorial Use of Expert Testimony in Domestic Violence Cases: From Recantation to Refusal to Testify*, 8 COLUM. J. GENDER & L. 67, 68 (1998).

⁷*Id.*

⁸*Id.*; see also David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67, 96 (1997).

⁹Rogers, *supra* note 6, at 68; see also *State v. Koss*, 551 N.E.2d 970 (Ohio 1990); *State v. Daws*, 662 N.E.2d 805 (Ohio Ct. App. 1994).

¹⁰*Koss*, 551 N.E.2d at 974-75.

¹¹Rogers, *supra* note 6, at 68-69; see *Arcoren v. United States*, 929 F.2d 1235 (8th Cir. 1991); *People v. Morgan*, 68 Cal. Rptr.2d 772 (Cal. Ct. App. 1997); *People v. Gadlin*, 92 Cal. Rptr.2d 890 (Cal. Ct. App. 2000); *People v. Lafferty*, 9 P.3d 1132 (Colo. Ct. App. 1999); *State v. Borelli*, 629 A.2d 1105 (Conn. 1993); *State v. Clark*, 926 P.2d 194 (Haw. 1996); *State v. Cababag*, 850 P.2d 716 (Haw. Ct. App. 1993); *Carnahan v. State* 81 N.E.2d 1164 (Ind. Ct. App. 1997); *State v. Giffin*, 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. Frost*, 577 A.2d 1282 (N.J. Super. Ct. App. Div. 1990); *People v. Hryckewicz*, 634 N.Y.S.2d 297 (N.Y. App. Div. 1995); *State v. Ciskie*, 751 P.2d 1165 (Wash. 1988); *State v. Bednarz*, 507 N.W.2d 168 (Wis. Ct. App. 1993); see also *Isaacs v. State*, 659 N.E.2d 1036 (Ind. 1995) (allowing expert testimony on the syndrome in prosecution of husband for murder to show that couple did not have friendly relationship).

¹²See *Dowd*, No. 93CA005638, 1994 WL 18645; see also *State v. Pargeon*, 582 N.E.2d 665 (Ohio Ct. App. 1991).

It is only a matter of time before the Ohio courts will again face a situation where a prosecutor wants to admit expert testimony on the battered woman syndrome to explain the seemingly abnormal behavior of a victim of domestic violence. The growing modern trend towards allowance of the testimony,¹³ and the arguments of several commentators supporting allowance,¹⁴ will no doubt have an impact on how the court reacts to this issue in the future. Before any change can take place, however, prosecutors in Ohio must develop an appropriate approach for introducing testimony on the syndrome under the Rules of Evidence.

This note contends that Ohio should join the modern trend and allow expert testimony on the battered woman syndrome in a limited form in domestic violence prosecutions. Part II of this note explores the syndrome and its origins. Part III provides background on the evidentiary uses of the syndrome in Ohio. It discusses the emergence of the battered woman syndrome in Ohio courts, and then examines the unsuccessful initial attempts by prosecutors in Ohio to use expert testimony on the syndrome.

Part IV looks at how several jurisdictions outside of Ohio have addressed this issue. Part V presents the argument that prosecutors in Ohio should be allowed to introduce battered woman evidence in domestic violence cases. To provide a basis for this argument, it begins by setting forth the applicable Ohio Rules of Evidence. Next, it examines each of the arguments currently cited in Ohio against prosecutorial use of battered woman evidence, and attempts to rebut each one in turn. Finally, it proposes a framework for the prosecutorial introduction of testimony on the syndrome that will enhance the likelihood of overturning the precedent in Ohio. Part VI provides concluding remarks.

II. DOMESTIC VIOLENCE AND THE BATTERED WOMAN SYNDROME

A. *The Problem of Domestic Violence*

According to the American Institute on Domestic Violence, between three and four million women are battered each year in the United States.¹⁵ Each year nearly 1,500 of these women are killed by their batterer.¹⁶ Battering is the single most common cause of injury to American women, more common than car accidents, muggings, and rape combined.¹⁷

¹³See note 11, *supra*; see also Part IV, *infra*.

¹⁴See Rogers, *supra* note 6; Diana Patton, "He Never Hit Me" – *The Need for Expert Testimony in Domestic Violence Cases*, 1994 ARIZONA ATTORNEY 10; 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 (1995).

¹⁵American Institute on Domestic Violence, *Domestic Violence Statistics; Crime Statistics; Workplace Violence Statistics*, available at <http://www.aidv-usa.com/Statistics.htm>. (last visited January 26, 2004).

¹⁶Myrna S. Raeder, *The Double-Edged Sword: Admissibility of Battered Woman Syndrome By and Against Batterers in Cases Implicating Domestic Violence*, 67 U. COLO. L. REV. 789, 792 (1996).

¹⁷A.M. Keith, *Domestic Violence and the Court System*, 15 HAMLINE L. REV. 105, 106 (1991) (reprinting of speech by Minnesota Chief Justice Keith at Hamline University, 1991).

Scholars trace the roots of domestic violence against women back for thousands of years. The violent punishment of wives is known to have been allowed, approved and expected in many cultures from the time of ancient Egypt until as recently as the early American common law.¹⁸ The common law “rule of thumb” permitted men to beat their wives “with a rod or stick no larger than a man’s thumb or small enough to pass through a wedding band.”¹⁹ Commentators suggest that the rule was viewed as a “natural and necessary right of control” that was incident to the man’s role as head of the family.²⁰

The problem surrounding domestic violence has been described as “a conspiracy of silence.”²¹ Sociologist Del Martin offered the following vivid description of this silence: “We can picture a very thick door locked shut. On the inner side is a woman trying hard not to cry out for help. On the other side are those who could and should be helping but instead are going about their business as if she weren’t there.”²² Dr. Lenore Walker, with her book *The Battered Woman*, took one of the largest steps towards opening this proverbial “thick door.”

B. *The Battered Woman Syndrome*

Dr. Walker is widely recognized as the first person to identify the battered woman syndrome.²³ From 1978 through June 1981, Dr. Walker conducted a study of over 400-battered women to learn about the effects of domestic violence.²⁴ Her research led her to define the syndrome as “a cluster of psychological symptoms” that women develop from living in a violent relationship.²⁵

¹⁸See Patton, *supra* note 14, at 10.

¹⁹Truss, *supra* note 14, at 1157; *see also* State v. Oliver, 70 N.C. 60 (1874).

²⁰Truss, *supra* note 14, at 1157. Truss also states that the rule was justified because the husband was often civilly or criminally liable for the actions of his wife.

²¹Keith, *supra* note 17, at 106.

²²*Id.*

²³Rogers, *supra* note 6, at 71.

²⁴LENORE E. A. WALKER, *THE BATTERED WOMAN SYNDROME*, 2d ed., ix (2000). Dr. Walker originally published the first edition of the *BATTERED WOMAN SYNDROME* in 1984. The first edition was, “written to present an integration of the final analysis from [her] research project into the body of literature specializing in understanding spouse abuse that was available at the time.” The second edition attempts, “to analyze the original study results in light of the new clinical and empirical research and determine if the original conclusions still hold true today.” Dr. Walker ultimately decided that the original conclusions still hold true. *Id.* at ix-x.

²⁵*Id.* at ix. Dr. Walker stated that, “[t]he goals of the research project were to identify key psychological and sociological factors that compose the battered woman syndrome, test specific theories about battered woman, and collect comprehensive data on battered woman.” *Id.* Dr. Walker tested the “learned helplessness theory” and the “cycle theory of battering.” The first test relied on the hypothesis that “learned helplessness” is responsible for the apparent emotional, cognitive and behavioral deficits observed in the battered woman that negatively influence her from leaving a relationship after the battering occurs. The second test relies on the hypothesis that further victimization occurs by the nature of the “cycle of violence.” *Id.*

The battering relationship itself is often described as cyclical in nature, with three distinct phases: tension building, confrontation, and contrition.²⁶ During the “tension building” phase, the woman is generally compliant, often feeling as though she deserves the abuse.²⁷ Once the tension reaches a boiling point, the batterer will erupt uncontrollably, committing a violent act.²⁸ Next, in an abrupt about-face, the abuser will exhibit seemingly intense love and affection towards his victim.²⁹ The victimized women are then led to believe that the violence was an isolated incident and that it will not continue.³⁰ This cycle of violence may leave the victim with feelings of learned helplessness, low self-esteem, depression, minimization techniques, self-isolation, and passivity.³¹ It is this collection of resulting symptoms that has come to be known as the “battered woman syndrome.”

The psychological reactions exhibited by victims of domestic violence can prove to be troublesome for a prosecutor in a domestic violence case. This is because the prosecutor’s case is normally built around the testimony of the victim. A battering victim’s behavior can often appear baffling and even frustrating to the average juror.³² Many victims, as a result of the contrition of their abuser, remain in abusive relationships or refuse to pursue legal action against the batterer.³³ The defense will attack the legitimacy of an alleged victim’s claim because of her delay in leaving the relationship and seeking police intervention. Additionally, victims frequently recant previously made statements to the police or prosecutors that implicate their significant other as an abuser.³⁴

Historically, if the victim recanted her story or was not cooperative with the investigation, the prosecutor would be forced to drop the case. The advent of “no drop” policies within many prosecutors’ offices, however, has forced prosecutors to face these issues within the context of litigation.³⁵ In an attempt to explain the sometimes seemingly abnormal behavior by the victims, prosecutors have begun to look towards expert testimony on the battered woman syndrome.

III. OHIO COURTS AND THE BATTERED WOMAN SYNDROME

A. Emergence of Battered Woman Evidence in Ohio

Ohio courts have approached the battered woman syndrome very cautiously. The Ohio Supreme Court initially addressed the battered woman syndrome in 1981, in

²⁶Rogers, *supra* note 6, at 71; *see also* Truss, *supra* note 14, at 1170-1172.

²⁷Truss, *supra* note 14, at 1170.

²⁸*Id.* at 1170-71.

²⁹*Id.* at 1171.

³⁰*Id.*

³¹Rogers, *supra* note 6, at 71-72.

³²*Id.* at 72.

³³*See id.*; *see also* Truss, *supra* note 14, at 1171-72.

³⁴Rogers, *supra* note 6, at 72.

³⁵*See id.* at 73. A “no-drop” policy essentially requires a prosecutor, once informed of a domestic violence situation, to pursue prosecution regardless of the victim’s cooperation. *Id.*

State v. Thomas.³⁶ In *Thomas*, the defendant, Kathy Thomas, was indicted and found guilty of murdering Reuben Daniels, her common law husband.³⁷ Thomas and Daniels had lived together in a “stormy relationship” for about three years before the killing,³⁸ during which Thomas was repeatedly beaten.³⁹ Thomas admitted to the murder, but claimed self-defense because she feared for her life.⁴⁰

At trial, Thomas’ counsel attempted to call an expert witness to testify on the battered woman syndrome to aid the jury in weighing the evidence concerning Thomas’ subjective state of mind at the time of the killing.⁴¹ The trial court refused to admit the testimony and Thomas was convicted.⁴² In upholding the trial court’s decision, the Ohio Supreme Court cited four reasons for finding the proffered expert testimony inadmissible.⁴³ First, the court stated that the testimony was, “irrelevant and immaterial to the issue of whether defendant acted in self-defense at the time of the shooting.”⁴⁴ Second, “the subject of the expert testimony is within the understanding of the jury.”⁴⁵ Third, “the battered [woman] syndrome is not sufficiently developed, as a matter of commonly accepted scientific knowledge, to

³⁶423 N.E.2d 137 (Ohio 1981).

³⁷*Id.* at 138.

³⁸*Id.*

³⁹*Id.*

⁴⁰*Id.* It was undisputed that Thomas shot Daniels once in the forehead and once in the left arm. Thomas gave three different versions of the killing to the police. In the first version, the couple had an argument over cooking and as a result Daniels became very angry and slapped Thomas and pushed her down. Thomas stated that after she got up she walked to the chair where Daniels was sitting and shot him. *Id.* In the second version, Thomas stated the couple had an argument, which led to Daniels pushing her down on the couch. This time, however, further arguments ensued and as Daniels was rising from the chair to attack Thomas, she reached for the gun on the couch and shot him. *Id.* In the third story, Daniels, upon pushing Thomas to the couch, turned and walked away from her when she picked up the gun. Thomas followed Daniels and stated “I’ve had enough,” and then shot Daniels. *Id.*

⁴¹*Id.*

⁴²*Id.* The Court of Appeals reversed the conviction and ordered a new trial because of the trial court’s refusal to allow the expert testimony on the battered woman syndrome and the peculiar state of mind which might prompt the shooting of the “battering husband.” *Id.*

⁴³*Id.* at 140.

⁴⁴*Id.* The court stated that in a trial where the evidence raises an issue of self-defense, “the only admissible evidence pertaining to that defense is evidence which establishes that defendant had a bona-fide belief she was in imminent danger of death or great bodily harm, and that the only means of escape from such danger was through the use of deadly force.” *Id.* at 139.

⁴⁵*Id.* at 140. The court believed that the jury was able to understand and determine whether self-defense had been proven without expert testimony on the battered woman syndrome. *Id.* at 139. The court stated that, “the jury will base its decision upon the material and relevant evidence concerning the participants’ words and actions before, at, and following the murder, including defendant’s explanation of the surrounding circumstances.” *Id.*

warrant testimony under the guise of expertise.”⁴⁶ Finally, the court believed that the prejudicial impact of the testimony outweighed its probative value.⁴⁷

Thomas survived several challenges over the next decade and remained good law until 1990.⁴⁸ In *State v. Koss*, the Ohio Supreme Court was again faced with the same issue as in *Thomas*.⁴⁹ Defendant, Brenda Koss, after several years of brutal beatings and threats to her life, killed her husband.⁵⁰ Koss claimed self-defense and at trial she sought to introduce expert testimony on the battered woman syndrome in support of her claim.⁵¹ Following *Thomas*, the trial court refused the testimony.⁵² Koss was convicted of voluntary manslaughter, and was sentenced to eight to twenty-five years in prison.⁵³

Justice Alice Robie Resnick wrote the majority opinion for the court in *Koss*.⁵⁴ Justice Resnick began by discussing *Thomas*'s emphasis on the syndrome's lack of scientific basis.⁵⁵ She contended that in the nine years since the holding in *Thomas*,

⁴⁶*Id.* at 140. The court stated that the expert testimony was “distinctly related to some science, profession or occupation so as to be beyond the ken of the average lay person.” *Id.* at 139. Additionally, there was no general acceptance of the expert's particular methodology. *Id.*

⁴⁷ *Id.* at 140. The court stated that it believed “the expert testimony offered here would tend to stereotype defendant, causing the jury to become prejudiced.” *Id.* It feared that the jury would decide the case based on the typical facts of the battered woman and not the actual facts. *Id.*

⁴⁸See, e.g., *State v. Branham*, No. C-850269, 1986 WL 6810, (Ohio App. 1 Dist. 1986); *Tourlakis v. Morris*, 738 F.Supp. 1128 (S.D. Ohio 1990); *State v. Tourlakis*, No. 52035, 1987 WL 10040 (Ohio App. 8 Dist. 1987).

⁴⁹551 N.E.2d 970 (Ohio 1990).

⁵⁰*Id.* at 971. Koss was questioned at the police department after her husband's body was found in the Kosses' house. She told the police that she came home around midnight and went into the bedroom and began changing. She stated that her husband then “hailed off” and hit her. *Id.* The next thing that she remembered was hearing a “noise or something” and seeing a holster on the ground, but she denied shooting her husband. *Id.* She stated that she did not remember seeing the gun until she was in the car fleeing the scene. *Id.* At trial her story changed significantly. She stated that when she came home she saw the gun on a bedside table and it frightened her. *Id.* She testified that, before her husband hit her, she “must have picked up the gun” out of fear. *Id.* After her husband hit her she heard a noise, which sounded like gurgling blood. *Id.* She stated that, “I purposely did not kill Michael Koss,” and “[I]f I killed him, it was an accident.” *Id.*

⁵¹*Id.* Koss sought to introduce experts to testify that there are two components of the battered woman syndrome. The first component is establishing that the woman is, in fact, a battered woman. Second, is that “at the time of the incident, all the prior battering incidents appear in a flashback to the woman, thus triggering an immediate fear of death and causing her to respond almost instinctively in self-defense.” *Id.* at 972.

⁵²*Id.*

⁵³*Id.*

⁵⁴*Id.*

⁵⁵*Id.*

several books and articles were written on the battered woman syndrome.⁵⁶ She cited to decisions in several jurisdictions that had already approved the use of expert testimony on the battered woman syndrome.⁵⁷ Then, following a general discussion of expert testimony rules in Ohio, Justice Resnick discussed in general terms the scope of admissible expert testimony. She stated that “[e]xpert testimony in Ohio is admissible if it will assist the trier of fact in search of the truth.”⁵⁸ Justice Resnick also cited Ohio Evidence Rule 702’s requirement that the expert testimony must be “specialized” and “assist the trier of fact to understand evidence or to determine a fact in issue.”⁵⁹ She wrote that “[e]xpert testimony regarding the battered woman syndrome can be admitted to help the jury not only to understand the battered woman syndrome but also to determine whether the defendant had reasonable grounds for an honest belief that she was in imminent danger when considering the issue of self-defense.”⁶⁰ Thus, *Thomas* was explicitly overruled to the extent that expert testimony relative to the battered woman syndrome could now be admitted to support the affirmative defense of self-defense.⁶¹

For the purposes of this Note, however, Justice Resnick’s dicta regarding the syndrome itself are more important than the specific holding in *Koss*.⁶² Justice Resnick maintained:

Expert testimony on the battered woman syndrome would help dispel the ordinary lay person’s perception that a woman in a battering relationship is free to leave at any time. The expert evidence would counter any “common sense” conclusions by the jury that if the beatings were really that bad the woman would have left her husband much earlier. Popular misconceptions about battered women would be put to rest, including the beliefs that the women are masochistic and enjoy the beatings and that they intentionally provoke their husbands into fits of rage.⁶³

She acknowledged that it might seem as if the expert is giving testimony on a subject of common knowledge, the reasonableness of a person’s fear of imminent serious danger.⁶⁴ Regarding the purpose of the testimony, though, Justice Resnick contended:

⁵⁶*Id.*

⁵⁷*Id.*; see *People v. Torres*, 488 N.Y.S.2d 358 (N.Y. Sup. Ct. 1985); *State v. Hodges*, 716 P.2d 563 (Kan. 1986); *Smith v. State*, 277 S.E.2d 678 (Ga. 1981); *Hawthorne v. State*, 408 So.2d 801 (Fla. Dist. Ct. App. 1982); *State v. Kelly*, 478 A.2d 364 (N.J. 1984).

⁵⁸*Koss*, 551 N.E.2d at 973.

⁵⁹*Id.*

⁶⁰*Id.*

⁶¹*Id.* at 974–75.

⁶²See Part V.B. *infra*, for a discussion on the importance of Justice Resnick’s dicta in *Koss*.

⁶³*Koss*, 551 N.E.2d at 973.

⁶⁴*Id.* at 974.

It is aimed at an area where the purported common knowledge of the jury may be very much mistaken, an area where jurors' logic, drawn from their own experience, may lead to a wholly incorrect conclusion, an area where expert knowledge would enable the jurors to disregard their prior conclusions as being common myths rather than common knowledge.⁶⁵

This reasoning applies with equal force to the prosecutorial use of expert testimony on the battered woman syndrome in Ohio.

Moreover, the court's recognition of these matters in *Koss* is now also part of Ohio statutory law. Six months before *Koss* came before the Ohio Supreme Court on December 5 1989, Representative Joseph Koziura introduced a bill on the House floor of the Ohio legislature. House Bill 484 was introduced as the General Assembly's official recognition that the battered woman syndrome was a matter of commonly accepted scientific knowledge and that the subject matter is not within the general understanding of average person.⁶⁶ The legislation was also designed to permit evidence on the syndrome to prove self-defense.⁶⁷ House Bill 484, now codified as Ohio Revised Code § 2901.06, was eventually signed into law on August 6, 1990, approximately five months after the decision in *Koss* was handed down.⁶⁸

Subsection (A) of § 2901.06 declares that the General Assembly recognizes both of the following in regard to the battered woman syndrome:

- (1) That the syndrome currently is a matter of commonly accepted scientific knowledge;
- (2) That the subject matter and details of the syndrome are not within the general understanding or experience of a person who is a member of the general populace and are not within the field of common knowledge.⁶⁹

Subsection (B) continues by stating:

If a person is charged with an offense involving the use of force against another and the person, as a defense to the offense charged, raises the affirmative defense of self-defense, the person may introduce expert testimony of the 'battered woman syndrome' and expert testimony that the person suffered from that syndrome as evidence to establish the requisite belief of an imminent danger of death or great bodily harm that is necessary, as an element of the affirmative defense, to justify the person's use of the force in question. The introduction of any expert

⁶⁵*Id.*

⁶⁶H.R. 118-HB484, Reg. Sess., at 2 (Ohio 1990), available at http://han2.hannah.com/htbin/f.com/oh_ban_118:HB484.lsc.

⁶⁷*Id.*

⁶⁸*Id.* The house initially passed the bill by a vote of 83 – 9, on March 1, 1990. *Id.* The senate then passed the bill by a vote of 31 – 1 on June 14, 1990. *Id.* The house passed the final amended version on July 20, 1990 and the bill became effective on November 5, 1990. *Id.* The importance of the timing of the introduction of this bill will be fully developed in Part V.B. of this note.

⁶⁹OHIO REV. CODE ANN. § 2901.06 (A) (1)-(2) (West 2003).

testimony under this division shall be in accordance with the Ohio Rules of Evidence.⁷⁰

As will be seen in the next section, however, Ohio courts have cited to subsection (B) of § 2901.06 as a limitation on the use of expert testimony on the battered woman syndrome. Part V.B. explains why the court's interpretation is wrong.

B. Initial Prosecutorial Attempts to Use the Battered Woman Syndrome in Ohio

In the years following *Koss*, two Ohio Courts of Appeals have heard and rejected prosecutorial attempts to introduce testimony on the syndrome in domestic violence cases. The Ohio Supreme Court has yet to address this issue, however, seemingly leaving the door open for future prosecutorial attempts.

Just one year after the initial admission of expert testimony concerning the battered woman syndrome in *Koss*, a prosecutor attempted to extend the use of testimony on the syndrome by introducing it in a domestic violence case.⁷¹ *State v. Pargeon* involved the prosecution of Randy Pargeon for the alleged battering of his wife.⁷² At trial, the prosecution called Diane Roberts, director of the local battered woman's shelter, as an expert witness to testify on the syndrome.⁷³ The trial court permitted the testimony and Pargeon was convicted on two counts of domestic violence.⁷⁴ Pargeon appealed his conviction to the Fifth District Court of Appeals.⁷⁵

On appeal, the Fifth District Court of Appeals reversed the trial court's decision.⁷⁶ The court began its analysis by citing two Ohio Rules of Evidence as prohibiting expert testimony on the battered woman syndrome in domestic violence cases. First, the court believed that the testimony was prohibited under Ohio Evidence Rule 403(A) because the probative value of the testimony was substantially outweighed by the danger of unfair prejudice.⁷⁷ Second, it stated that Ohio Evidence Rule 404(B) prohibited the testimony because evidence that Pargeon's wife is a battered woman "really serves as evidence of the prior bad acts of [Pargeon] from which the inference may be drawn that [Pargeon] has the propensity to beat his wife and that he beat her on this particular occasion."⁷⁸

The court, however, cited the holding in *Koss* and the language of O.R.C. § 2901.06 as a "more compelling" reason for not allowing expert testimony on the battered woman syndrome in domestic violence cases.⁷⁹ The court reasoned that the holding in *Koss* limited the admissibility of expert testimony on the battered woman

⁷⁰OHIO REV. CODE ANN. § 2901.06 (B) (West 2003).

⁷¹*Pargeon*, 582 N.E.2d 665.

⁷²*Id.*

⁷³*Id.* at 666.

⁷⁴*Id.*

⁷⁵*Id.*

⁷⁶*Id.*

⁷⁷*Id.* See Part V.A., *infra*, for the language of Ohio Evidence Rule 403(A).

⁷⁸*Id.*; see Part V.A., *infra* for the language of Ohio Evidence Rule 404(B).

⁷⁹*Pargeon*, 582 N.E.2d at 666.

syndrome to cases where a woman charged with the murder of her husband uses it to establish the “imminent danger of death or great bodily harm” element of the affirmative defense of self-defense.⁸⁰ Additionally, the court understood O.R.C. § 2901.06(B) to limit the use of expert testimony on the battered woman syndrome to cases where a woman raises the affirmative defense of self-defense. Therefore, the trial court’s decision was reversed and the case was remanded for further proceedings.⁸¹

Likewise, *State v. Dowd* involved the prosecution of Joseph Dowd for domestic violence against Amanda Demich.⁸² As mentioned in the Introduction, the problem arose when Demich, who had previously told police and a grand jury that Dowd had beaten her, recanted her story at Dowd’s bond hearing.⁸³ At trial, the prosecution attempted to call a licensed psychiatrist as an expert witness.⁸⁴ The psychiatrist was to testify on the characteristics of a battering relationship and how a woman suffering from the battered woman syndrome will often recant or retract earlier statements implicating her significant other for abuse.⁸⁵ The trial court cited *Pargeon* and found that the state could not offer expert testimony on the battered woman syndrome in a domestic violence prosecution.⁸⁶

The Court of Appeals affirmed, finding “no reason to deviate from the Fifth District’s analysis in *Pargeon*.”⁸⁷ The court was especially concerned that the expert testimony “could create the potentially prejudicial inference that Dowd has the propensity to beat Demich and that he did so on this particular occasion.”⁸⁸

⁸⁰*Id.* The court cited the syllabus in *Koss*, which states, [a]dmission of expert testimony regarding the battered woman syndrome does not establish a new defense or justification. It is to assist the trier of fact to determine whether the defendant acted out of an honest belief that she is in imminent danger of death or great bodily harm and that the use of such force was her only means of escape.

Koss, 551 N.E.2d at 971.

⁸¹*Pargeon*, 582 N.E.2d. at 668. The court also addressed the issue of whether Diane Roberts, as Director of the Licking County Battered Woman’s Shelter, qualified as an expert on the battered woman syndrome. *Id.* at 666. The court held that, “[t]he competency of a witness to testify as an expert (and thus give opinion testimony) is directed to the sound discretion of the trial court and is to be determined by the court as a matter of law.” *Id.* at 667. The jury must determine whether they believe the witness’ testimony is credible and decide what weight to give the opinion testimony. *Id.* The court stated that this rule “applies to *any* opinion testimony, not just expert testimony regarding the battered woman syndrome.” *Id.*

⁸²*Dowd*, No. 93CA005638, 1994 WL 18645 at *1.

⁸³*Id.*

⁸⁴*Id.*

⁸⁵*Id.*

⁸⁶*Id.*

⁸⁷*Id.* at *2.

⁸⁸*Id.* The court acknowledged that, based on photographs of her injuries, Demich was assaulted, but held that the issue for the jury to determine was whether Dowd committed the assault. *Id.* Excluding evidence on the syndrome, however, essentially shut the door on the prosecution’s case and sent Demich back into her abusive relationship with Dowd.

The practical effect of the holdings in *Dowd* and *Pargeon* is the complete dismantling of the prosecution's case. In *Pargeon* the defense was given a free pass to attack the credibility of the victim by implying that she would have left the relationship if she had actually been abused. In *Dowd*, where the victim recanted, the situation was much more bleak. The prosecution was left with a few photographs of Demich's injuries and perhaps some testimony of outside witnesses, but the absence of the victim's testimony most certainly crippled the case.⁸⁹

IV. PROSECUTORIAL USE OF THE SYNDROME OUTSIDE OF OHIO

Several jurisdictions outside of Ohio have addressed the admissibility of expert testimony on the battered woman syndrome. An overwhelming majority of these jurisdictions, even while operating under rules of evidence that mirror Ohio's, have allowed prosecutors to introduce at least some form of expert testimony on the battered woman syndrome.⁹⁰

With its Supreme Court's decision in *State v. Ciskie*, Washington became the first state to allow prosecutorial use of the battered woman syndrome.⁹¹ The defendant in *Ciskie* was charged with four counts of rape over a 23-month period with a woman with whom he had an intimate relationship.⁹² At trial, counsel for

⁸⁹There are several other instances outside of self-defense and domestic violence cases where attempts have been made to introduce expert testimony on the battered woman syndrome in Ohio courts. In *State v. Lundgren*, No. 90-L-15-125, 1994 WL 171657 (Ohio App. 11 Dist. 1994), Alice Lundgren sought the reversal of her conviction on several counts resulting from the kidnapping and murder of five family members at her residence in Kirtland, Ohio. *Id.* at *1. Lundgren challenged several evidentiary rulings by the trial judge including one involving expert testimony on the battered woman syndrome. *Id.* At trial, Lundgren sought to admit testimony on the battered woman syndrome to show that she was in a state of duress at the time of the murder because she was under the control of her abusive husband. *Id.* at *18. The trial court refused to allow the testimony and the Eleventh District Court of Appeals affirmed the decision citing *Koss* and O.R.C. § 2901.06 as limiting the use of testimony on the battered woman syndrome to self-defense cases. *Id.*

State v. Sonko, No. 95CA006181, 1996 WL 267749 (Ohio App. 9 Dist. 1996), involved Melissa Sonko's appeal of her conviction for aggravated trafficking in drugs. *Id.* at *1. Sonko was convicted along with her boyfriend Robert Mantelero for attempting to sell lysergic acid diethylamide (LSD). *Id.* At trial, Sonko attempted to present expert testimony on the battered woman syndrome to explain why she had agreed to participate in the selling of the LSD. *Id.* at *3. Again, the trial court excluded the evidence and the Ninth District Court of Appeals affirmed this decision citing *Koss*, O.R.C. § 2901.06, *Pargeon*, and *Dowd*. *Id.*

⁹⁰See note 11, *supra*; see also Rogers, *supra* note 6, at 69.

⁹¹751 P.2d 1165 (Wash. 1988); see also Rogers, *supra* note 6, at 78.

⁹²*Ciskie*, 751 P.2d at 1166-67. The facts in *Ciskie* offer an all too vivid description how a woman can become entrapped in the vicious cycle of domestic violence. The record states that the victim was a 55-year-old who met Ciskie in a bar. *Id.* at 1167. He was the first man she was involved with since her divorce. *Id.* Just less than a year after they met, and three months after Ciskie lost his job, the relationship began to deteriorate. *Id.* She testified that she tried to "cool" the relationship, but Ciskie kept demanding to see her and called her repeatedly. *Id.* She also testified that Ciskie had a drinking problem at this time. Their first sexual incident occurred approximately two months later when they had a "physical fight" because the victim would not go to bed with Ciskie. *Id.* The victim testified that Ciskie called several times the next day to apologize. *Id.* She testified that she continued contact with

defense claimed that the sexual acts were consensual, as evidenced by the victim's failure to report the incidents immediately or to leave the relationship.⁹³ In fact, the defense team had Ciskie, over the vigorous objections of the prosecutor, personally question the alleged victim during the defense case.⁹⁴ He asked the alleged victim, "If I did as you – as you have said I'd done, why didn't you call the police?"⁹⁵

In an attempt to explain the victim's refusal to leave Ciskie, the prosecution introduced an expert to testify as to the symptoms a hypothetical victim suffering from the battered woman syndrome would exhibit.⁹⁶ She testified that "the failure of the woman in the hypothetical to report the sexual assaults until two days after the last incident and nine months after the first, was characteristic of a person suffering from the battered woman syndrome."⁹⁷ The trial court admitted the expert testimony and Ciskie was convicted of several counts of rape.⁹⁸

The Supreme Court of Washington found battered woman evidence useful to help the trier of fact, and thus properly admitted under Washington Evidence Rule 702.⁹⁹ The court relied heavily on its decision four years earlier in *State v. Allery*,¹⁰⁰ which allowed expert testimony on the battered woman syndrome to support a woman's claim of self-defense.¹⁰¹ The court in *Allery* stated the following with regard to expert testimony on the battered woman syndrome:

Where the psychologist is qualified to testify about the battered woman syndrome, and the defendant establishes her identity as a battered woman, expert testimony on the battered woman syndrome is admissible. This evidence may have a substantial bearing on the woman's perceptions and

Ciskie because she "felt sorry for him." *Id.* This pattern of repeated sexual violence followed by contrition for several months, including the four alleged incidents of rape for which Ciskie was charged. *Id.* The record continues by describing with great detail the terror that the victim in *Ciskie* was subjected to over the next several months. *Id.*

⁹³*Id.* at 1168-69.

⁹⁴*Id.* at 1173.

⁹⁵*Id.* Furthermore, the defense challenged the victim's credibility by explaining to the jury that her failure to leave the relationship and to not call the authorities was "inconsistent with that of a rape victim." *Id.*

⁹⁶*Id.* at 1166, 1173. The State, at defense counsel's request, asked the expert to express her opinion about a hypothetical case history that paralleled the evidence presented by the State in *Ciskie*. *Id.* at 1173. The expert said that "woman in the hypothetical case history suffered from post-traumatic stress disorder," and the facts "were consistent with the cycle theory of violence." *Id.*

⁹⁷*Id.*

⁹⁸*Id.* at 1166, 1169.

⁹⁹*Id.* at 1166, 1171. Washington Evidence Rule 702 states the following: "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." WASH. R. EVID. 702.

¹⁰⁰682 P.2d 312 (Wash. 1984).

¹⁰¹*Id.* at 316.

behavior at the time of the killing and is central to her claim of self-defense.¹⁰²

Over the objection of the dissent, the majority in *Ciskie* refused to read the language in *Allery* as limiting the admissibility of expert testimony to self-defense cases.¹⁰³ According to the majority, *Allery* required only that the testimony be “helpful to the jury’s understanding of the victim’s perceptions and behavior.”¹⁰⁴ The Washington Supreme Court held that the trial court had “fully complied” with this guideline in admitting the expert testimony on the battered woman syndrome introduced by the prosecution.¹⁰⁵

The court was concerned that the testimony might present a danger of unfair prejudice under Washington Evidence Rule 403.¹⁰⁶ The court held, however, that the trial court properly limited the expert’s testimony by not allowing her specifically to diagnose the alleged victim as a rape victim.¹⁰⁷ The expert may testify only to hypothetical situations and must avoid offering any specific opinion on the case at bar.

The decision in *Ciskie* opened the door for what now appears to be a modern trend towards allowing prosecutorial introduction of battered woman evidence.¹⁰⁸

¹⁰²*Id.*

¹⁰³Justice Dore’s dissent argued that, “[n]othing in *Allery* suggests use of the battered woman testimony as affirmative evidence to prove elements of the crime charged.” *Ciskie*, 751 P.2d at 1176. The difference between a self-defense claim and a prosecution for domestic violence, Justice Dore states, is that the woman’s state of mind is at issue in a self-defense case. *Id.* Testimony on the battered woman syndrome helps the jury understand the defendant’s state of mind at the time she murdered her abuser. *Id.* “Battered woman testimony plays no such role in a rape prosecution.” *Id.* Justice Dore also contended that the lack of understanding of battering relationships that an average member of the jury may have, “is not a sufficient ground to admit expert testimony that other wise has only limited probative value but substantial prejudicial impact on the defendant. *Id.* at 1177.

¹⁰⁴*Id.* at 1172.

¹⁰⁵*Id.* at 1174.

¹⁰⁶*Id.* at 1173. Washington Evidence Rule 403 states the following: “Although 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.” WASH. R. EVID. 403.

¹⁰⁷*Ciskie*, 751 P.2d at 1173-74. The trial court permitted the expert to testify that she had diagnosed the alleged victim as suffering from post-traumatic stress disorder. *Id.* at 1173. She qualified this statement by acknowledging that the “stressors” that might cause the disorder “could be any unusual stressful event, not necessarily a rape or assault.” *Id.* The trial court would not allow the prosecutors to question the expert on what she believed the “stressor” to be in the alleged victim’s case. *Id.* at 1173-74. The Washington Supreme Court believed that, while this diagnosis “was not necessarily helpful to the trier of fact,” it was not overly prejudicial to the defendant. *Id.* at 1174. If the trial court would have allowed the expert to diagnose the alleged victim as a rape victim the testimony would have likely been inadmissible under Evidence Rule 403. *Id.*

¹⁰⁸*See* Rogers, *supra* note 6, at 69. Rogers notes that prior to 1991, only five jurisdictions had addressed the issue of prosecutorial use of expert testimony on the battered woman syndrome. *Id.* at 68, 92. She continues by stating that between 1991 and 1997 “appellate

The Superior Court of New Jersey, Appellate Division, with its decision in *State v. Frost*,¹⁰⁹ was one of the first courts to follow in the footsteps of the Washington Supreme Court.

Frost involved the prosecution of Gregory Frost for violation of a restraining order and abuse of his girlfriend.¹¹⁰ At trial, the defense attacked the credibility of the victim on the theory that she was not in an abusive situation because, on the day of the alleged incident, the victim had consensual sex with Frost and spent the whole day talking with him.¹¹¹ They argued that she fabricated the story to get back at Frost.¹¹² The prosecution introduced expert testimony on the battered woman syndrome in an attempt to bolster the victim's credibility.¹¹³ Again the expert testified to a lengthy hypothetical situation mirroring the actual case at bar. She testified that the victim's failure to call for help on the day of the incident "was consistent with the battered woman syndrome."¹¹⁴

The court held that the expert's testimony was admissible as evidence to bolster the victim's credibility.¹¹⁵ As in *Ciskie*, the court in *Frost* was faced with precedent allowing expert testimony on the battered woman syndrome in support of a victim of domestic violence's claim of self-defense.¹¹⁶ The court rejected the view that

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." *Id.* at 69. Of those thirteen jurisdictions, Ohio was the only one to fail to approve the prosecutorial use of expert testimony (*Pargeon*). *Id.*

¹⁰⁹577 A.2d 1282 (N.J. Super. Ct. App. Div. 1990).

¹¹⁰*Id.* at 1284. Frost and his girlfriend had been romantically involved for over three years prior to this incident. *Id.* The couple had a violent relationship, and, in fact, the police had been called to the victim's apartment approximately nine times due to domestic disputes. *Id.* at 1285. The victim had gotten a restraining order against Frost due to "fights and because they were no longer able to get along." *Id.* On the date in question in this case, Frost had just gotten out of jail and returned to see the victim. *Id.* at 1284. Frost entered the victim's house and began to yell at her and hit her. *Id.* The victim tried to leave, but when she could not get the front door open, Frost approached her and cut her arm with a box cutter. *Id.* She proceeded to talk with him and they ended up having sex to "calm him down." *Id.* They spent the better part of the day together until the police were called to the house due to a domestic disturbance. *Id.* at 1285.

¹¹¹*Id.* at 1288.

¹¹²*Id.*

¹¹³*Id.* at 1286. The expert testified on eight behavioral characteristics from which battered women suffer from. She stated that the victim was suffering from battered woman syndrome because she exhibited "a very high degree of seven out of eight of the characteristics: low self-concept, belief in the family unit, a belief that her pregnancy would end the abuse, a history of abuse in her own family, self-blame, and a fear that defendant would come back no matter where she was." *Id.* at 1287.

¹¹⁴*Id.*

¹¹⁵*Id.* at 1288.

¹¹⁶*Id.* at 1287; see *Kelly*, 478 A.2d 364. In *Kelly*, the Supreme Court of New Jersey allowed expert testimony on the battered woman syndrome intended to explain the defendant's state of mind and to bolster her claim of self-defense. *Id.* at 375-76.

precedent from self-defense cases necessarily limited the use of such testimony to self-defense.¹¹⁷ Rather, the court explained, “there is nothing about the testimony itself which makes it inappropriate for admission as part of the State’s case in chief where the woman eventually asserts herself and reports her abuser to the authorities, before she becomes the defendant on trial for committing murder.”¹¹⁸

One federal court has also considered the issue and has permitted battered woman evidence. The Eighth Circuit faced this issue in *Arcoren v. United States*.¹¹⁹ The defendant in *Arcoren* was charged with the aggravated sexual abuse of his wife.¹²⁰ The victim initially testified to the grand jury that her husband had sexually and physically assaulted her, but she recanted her testimony when called as a witness at trial.¹²¹ The District Court of South Dakota allowed the prosecution to introduce testimony on the battered woman syndrome to explain the victim’s recantation.¹²² The expert testified as to the general characteristics associated with the battered woman syndrome based on her knowledge and experience with the subject.¹²³

The Eighth Circuit Court of Appeals acknowledged that the jury was “faced with a bizarre situation” because of the victim’s recantation of her story.¹²⁴ The court felt that the expert testimony would provide an explanation to the jury as to why the victim would act in such a manner.¹²⁵ The court further held that there was “no persuasive reason” for limiting testimony on the battered woman syndrome to claims of self-defense.¹²⁶ The court, however, limited the scope of the expert’s testimony, stating that the expert should not express any opinion on whether the particular victim suffers from symptoms of the battered woman syndrome.¹²⁷

Also instructive is the case of *State v. Cababag*, from the Hawaii Intermediate Court of Appeals.¹²⁸ *Cababag* involved the prosecution of Alfred Cababag for the

¹¹⁷*Frost*, 577 A.2d at 1287.

¹¹⁸*Id.*

¹¹⁹929 F.2d 1235 (8th Cir. 1991). This case was in Federal court because it involved Indians and took place on an Indian Reservation.

¹²⁰*Id.* at 1237-38.

¹²¹*Id.* At trial the victim denied that defendant had abused her, and stated that the cuts and bruises on her faces were from an earlier motorbike wreck. *Id.* at 1238. She stated that, “she could not remember making the statements or that, where she did recall making them, they were incorrect. *Id.*

¹²²*Id.* at 1238-39. The prosecution initially used the victim’s grand jury testimony to impeach her later recantation at trial. *Id.* at 1238. To further support its case the government called an expert witness to testify regarding the battered woman syndrome. *Id.*

¹²³*Id.* at 1239. The District Court, while acknowledging that the testimony was admissible under Evidence Rule 702, warned that the expert could not “testify as to the ultimate fact that a particular party in this case . . . actually suffers from battered woman syndrome.” *Id.*

¹²⁴*Id.* at 1240.

¹²⁵*Id.*

¹²⁶*Id.* at 1241.

¹²⁷*Id.*

¹²⁸850 P.2d 716 (Haw. Ct. App. 1993).

abuse of his girlfriend Susan Cuthbertson.¹²⁹ At trial, Cuthbertson stated that she “made up” her previous statements to police implicating Cababag as her batterer.¹³⁰ Over the objection of defense counsel, the prosecution called a witness to testify as an expert on domestic violence.¹³¹ The trial court allowed the testimony and Cababag was convicted of abuse of family and household members.¹³²

After acknowledging that the testimony met the requirements of Hawaii Evidence Rule 702, the Court of Appeals turned its focus to the limitations of Hawaii Evidence Rule 403.¹³³ Hawaii Evidence Rule 403 operates in effectively the same manner as Ohio Evidence Rule 403. Hawaii Evidence Rule 403 excludes relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice.”¹³⁴ The trial court placed several limitations on the expert’s testimony to avoid unfairly prejudicing the defendant:

[The expert] will not be permitted to express any opinion about whether abuse occurred in the instant case, or whether the alleged victim’s report of abuse, either to the police initially, or in her testimony at trial, is truthful or untruthful The court will not allow (the expert) to state what percentage of alleged victims are female versus what percentage are male The court will not allow (the expert) to offer any testimony of predicting future violence by Cababag¹³⁵

Counsel for the defense argued that, despite the limitations set by the trial court, the probative value of the testimony was still outweighed by its prejudicial effect.¹³⁶ The Court of Appeals, however, denied this argument and affirmed the decision of the trial court.¹³⁷

The preceding cases are only a sampling of the several jurisdictions that have allowed some form of testimony on the battered woman syndrome in domestic violence prosecutions. Many, if not all, of these jurisdictions that have allowed prosecutorial use of the battered woman syndrome have set forth limitations similar

¹²⁹*Id.* at 718.

¹³⁰*Id.* at 719.

¹³¹*Id.* The expert testified on the general characteristics of a victim of domestic violence, including recantation. *Id.* at 719-20.

¹³²*Id.* at 717.

¹³³*Id.* at 720-22. The relevant portion of Hawaii Evidence Rule 702 is as follows: “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.” HAW. R. EVID. 702.

¹³⁴HAW. R. EVID. 403.

¹³⁵*Cababag*, 850 P.2d at 719.

¹³⁶*Id.* at 720.

¹³⁷*Id.* at 722-23. In support of its holding, the court actually acknowledged the Ohio Supreme Court’s decision in *Koss*. *Id.* at 721. The court also stated that its holding in this case was “in accord with *Arcoren v. United States*.” *Id.* at 722.

to those in *Ciskie*, *Frost*, and *Arcoren*.¹³⁸ The decisions in these cases provide several guiding principles that can be applied to prosecutorial attempts to use expert testimony on the battered woman syndrome in Ohio. The next part of this note will attempt to incorporate these principles into a potential framework for the prosecutorial introduction of testimony on the syndrome in Ohio.

V. DEVELOPING A FRAMEWORK FOR THE PROPER USE OF EXPERT TESTIMONY ON THE BATTERED WOMAN SYNDROME IN DOMESTIC VIOLENCE CASES

The Supreme Court of Ohio has yet to address this issue. The court, however, will surely feel increased pressure to address this issue in the coming years as a result of the emerging trend supporting admissibility,¹³⁹ and the continued prevalence of battering relationships.¹⁴⁰ This Part first discusses the applicable rules of evidence in Ohio, with which any potential framework for admissibility must comply. Second, it attempts to refute the arguments presented in *Pargeon* and *Dowd* against admissibility. Finally, it proposes a framework for the prosecutorial use of expert testimony that will provide the best opportunity for having the precedent set in *Pargeon* and *Dowd* overturned.

A. *The Ohio Rules of Evidence*

Ohio Evidence Rule 702 specifically governs the admissibility of testimony by experts.¹⁴¹ Under Rule 702, a witness may testify as an expert if all of the following apply:

- (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

¹³⁸*See, e.g., State v. Stringer*, 897 P.2d 1063 (Mont. 1995). For example, the defendant in *Stringer* was charged with assault and aggravated kidnapping. *Id.* at 1065. The state introduced testimony on the battered woman syndrome to explain why the victim had recanted her story that her ex-husband had committed the acts. *Id.* at 1067. While the Supreme Court of Montana held that the evidence in the case at bar was improperly admitted because the prosecution failed to show that the alleged victim was actually a victim of domestic violence, the court held that expert testimony on the battered woman syndrome should generally be admissible in domestic violence prosecutions. *Id.* at 1069. The court cautioned, however, that the expert should not testify as to whether the alleged victim's statements were credible or as to whether, in her opinion, the alleged victim was an actual victim of domestic violence. *Id.*

In *State v. Borrelli*, 629 A.2d 1105 (Conn. 1993), the defense objected to the prosecution's introduction of expert testimony on the battered woman syndrome on the grounds that it was actually opinion testimony as to the credibility of a witness and therefore should have been excluded because it improperly invaded the province of the jury. *Id.* at 1115. The court held that the testimony was properly admitted, however, because the expert did not testify that the victim was, in fact, battered nor presented any opinion testimony as to the credibility of any other witness. *Id.*; *see also Rogers, supra* note 6, at 79-80.

¹³⁹*See Part IV, supra.*

¹⁴⁰*See Part II.A, supra.*

¹⁴¹OHIO R. EVID. 702.

- (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
- (C) The witness' testimony is based on reliable scientific, technical, or other specialized information¹⁴²

Two additional Rules apply to battered woman evidence. First, Evidence Rule 403 provides an exception to the rule that all relevant evidence is admissible. Ohio Evidence Rule 403 provides that “[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.”¹⁴³

Second, Ohio Evidence Rule 404 limits the use of evidence on the character of the accused and the victim.¹⁴⁴ Generally, under Rule 404, “[e]vidence of a person’s character or a trait of his character is not admissible for the purposes of proving that he acted in conformity therewith on a particular occasion.”¹⁴⁵ There are, however, exceptions to this general rule:

- (1) Evidence of a pertinent trait of his character offered by an *accused*, or by the prosecution to rebut the same is admissible....
- (2) Evidence of a pertinent trait of character of the *victim* of the crime offered by an accused, or by the prosecution to rebut the same...is admissible....¹⁴⁶

Additionally, Rule 404 prohibits evidence of other crimes, wrongs, or acts introduced to prove the character of a person in order to show that he acted in conformity therewith.¹⁴⁷

B. Removing the Barriers Set Forth in Pargeon and Dowd

1. Ohio Evidence Rule 702

Initially, Ohio Evidence Rule 702 was cited as the primary reason for excluding any expert testimony on the battered woman syndrome.¹⁴⁸ As stated previously, the Ohio Supreme Court believed that the battered woman syndrome did not meet the

¹⁴²*Id.*

¹⁴³OHIO R. EVID. 403(A). The trial court must exclude all evidence that falls under subsection (A). *Id.* Subsection (B) provides a discretionary restriction on relevant evidence. OHIO R. EVID. 403(B). Subsection (B) states: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.” *Id.*

¹⁴⁴OHIO R. EVID. 404.

¹⁴⁵OHIO R. EVID. 404(A).

¹⁴⁶OHIO R. EVID. 404(A)(1)-(2) (emphases added).

¹⁴⁷OHIO R. EVID. 404(B).

¹⁴⁸*Thomas*, 423 N.E.2d 137; see Part V.A., *supra*, for the text of Ohio Evidence Rule 702.

requirements of Rule 702 because its subject matter was within the understanding of the jury and not sufficiently developed as a matter of commonly accepted scientific knowledge.¹⁴⁹ Rule 702, however, no longer provides a barrier to the admission of expert testimony on the battered woman syndrome.

As previously discussed, the Ohio Supreme Court in *Koss*, officially recognized that testimony on the battered woman syndrome dispelled common misconceptions about abused women common among lay persons.¹⁵⁰ Additionally, the court held that the subject matter of the syndrome had gained substantial scientific acceptance to warrant admissibility.¹⁵¹ Thus, the court has clearly acknowledged that testimony on the battered woman syndrome satisfies the Rule 702 threshold requirements for expert testimony.

Furthermore, the Ohio General Assembly, with the enactment of O.R.C. § 2901.06, formally accepted the battered woman syndrome as satisfying the Rule 702 requirements for expert testimony.¹⁵² Section 2901.06 reiterated that the battered woman syndrome is a matter of commonly accepted scientific knowledge and that the subject matter and details of the syndrome are not within the general understanding of an average lay person.¹⁵³ Therefore, in light of the enactment of § 2901.06 and the decision in *Koss*, Ohio Evidence Rule 702 no longer provides an obstruction to the prosecutorial introduction of expert testimony on the battered woman syndrome.¹⁵⁴ This contention is further supported by the fact that Rule 702 was not cited as a reason to bar testimony on the battered woman syndrome in both *Pargeon* and *Dowd*.

2. Evidence Rule 403

While the courts in *Pargeon* and *Dowd* did not cite to Evidence Rule 702, they did hold that Evidence Rule 403 prohibited the prosecutorial introduction of testimony on the battered woman syndrome.¹⁵⁵ Both courts maintained that the probative value of expert testimony on the battered woman syndrome is substantially outweighed by the danger of unfair prejudice to the defendant in a domestic violence

¹⁴⁹*Id.* at 140; *See* Part III.A., *supra*, for a discussion on the court's decision in *Thomas*.

¹⁵⁰*Koss*, 551 N.E.2d at 973-74; *see* Part III.A., *supra*, for discussion on the court's decision in *Koss*.

¹⁵¹*Id.* at 974.

¹⁵² *See* Part III.A., *supra*, for a full discussion on the language of § 2901.06.

¹⁵³ OHIO REV. CODE. ANN. § 2901.06(A)(1)-(2) (West 2003).

¹⁵⁴ Although *Koss* was a murder case where the defendant introduced testimony on the battered woman syndrome in support of her claim of self-defense, it necessarily follows that the court's analysis on the syndrome in and of itself would apply to prosecutorial use of the syndrome. *See* Part III.A., *supra*, for a discussion of Justice Resnick's opinion in *Koss*. Justice Resnick recognized the merits of the syndrome as a matter outside of the jury's knowledge and acknowledges the scientific merits of the syndrome. The subject matter of the battered woman syndrome approved by Justice Resnick in *Koss* and by the Ohio General Assembly in § 2901.06 is the same subject matter that would be used by prosecutors in domestic violence cases.

¹⁵⁵ *Pargeon*, 582 N.E.2d at 666; *Dowd*, 1994 WL 18645 at *1; *see* Part III.B., *supra*, for a discussion on the decisions in *Pargeon* and *Dowd*.

prosecution.¹⁵⁶ Neither court, however, provided any rationale to support this contention.¹⁵⁷

As mentioned earlier, prosecutors encounter difficulties in domestic violence prosecutions that they would not otherwise encounter in most non-domestic-violence related criminal prosecutions. Victims of domestic violence often refuse to testify or recant prior stories implicating their significant other, or they may be attacked on the witness stand for failing to leave their alleged batter or report battering incidents to the police.¹⁵⁸ Therefore, as all other jurisdictions to consider the issue have acknowledged, the probative value of expert testimony on the battered woman syndrome to prosecutors in such cases is *extremely* high. The testimony allows the prosecution an opportunity to explain to the jury this seemingly abnormal behavior by the alleged victim.¹⁵⁹

Moreover, Justice Resnick recognized the probative value of testimony on the battered woman syndrome with her dicta in the *Koss* decision.¹⁶⁰ She noted that expert testimony on the battered woman syndrome would “help dispel the ordinary lay person’s perception that a woman in a battering relationship is free to leave at any time,” and “counter any ‘common sense’ conclusions by the jury that if the beatings were really that bad the woman would have left her husband much earlier.”¹⁶¹ That Justice Resnick’s statements were made in the context of a self-defense case is irrelevant because she was describing the probative value of testimony on the battered woman syndrome in and of itself and not specifically in self-defense cases. This is evidenced by her statement that “[e]xpert testimony regarding the battered woman syndrome can be admitted to help the jury not only to understand the battered woman syndrome *but also* to determine whether the defendant had reasonable grounds for an honest belief that she was in imminent danger when considering the issue of self-defense.”¹⁶²

It is only in light of such high probative value that the prejudicial impact of prosecutorial introduction of testimony on the battered woman syndrome should be analyzed. While some commentators urge caution in approaching this Rule 403 balance,¹⁶³ it has been observed that “[t]estimony concerning Battered Woman

¹⁵⁶*Pargeon*, 582 N.E.2d at 666; *see also Dowd*, 1994 WL 18645 at *1.

¹⁵⁷The court in *Pargeon* simply stated that “[t]he probative value of such testimony is substantially outweighed by the danger of unfair prejudice, and therefore its exclusion is mandatory.” 582 N.E.2d at 666. The court in *Dowd* simply cited to the holding in *Pargeon* on this issue and stated that they would not deviate from it. 1994 WL 18645 at *1.

¹⁵⁸*Rogers*, *supra* note 6, at 68.

¹⁵⁹*See Arcoren*, 929 F.2d at 1240; *see also Ciskie*, 751 P.2d 1165 at 1173.

¹⁶⁰*See* Part III.A., *supra*.

¹⁶¹*Koss*, 551 N.E.2d at 973.

¹⁶²*Id.* (emphasis added).

¹⁶³*See* Faigman & Wright, *supra* note 8, at 98-99. Faigman and Wright state that “[t]he Rule 403 balance does not obviously favor admission of the syndrome to bolster the credibility of a prosecution witness,” because of its low probative value. *Id.* at 98. They also contend that the battered woman syndrome was not designed with this use in mind and that battered women are not more likely to recant previous statements at trial than anyone else. *Id.*

Syndrome is not unduly prejudicial to the defendant because virtually all the evidence presented concerns behavioral characteristics of the battered woman, not the abuser.”¹⁶⁴ However, even acknowledging that some potential for prejudice does exist, it does not justify outright exclusion. Rule 403 is a balancing test between probative value and potential prejudicial impact. As several courts have declared, the potential danger of prejudice in domestic violence cases can be significantly diminished by properly limiting the scope of the testimony.¹⁶⁵ Where the expert limits testimony to the general characteristics of the battered woman syndrome and hypothetical situations, the probative value of such testimony is not outweighed by the danger of unfair prejudice.

Prosecutors in Ohio should adhere to these limitations when presenting expert testimony on the battered woman syndrome in domestic violence cases. This will put them in the best position when a court is called upon again to make a Rule 403 balancing judgment on the testimony. The prosecutor in *Pargeon* clearly failed to adhere to these limitations when introducing testimony on the syndrome and as a result the court refused to admit it. The prosecutor offered the testimony to “prove that [Pargeon’s] wife was a battered woman suffering from the battered woman syndrome.”¹⁶⁶ This testimony would not have been admitted under the standards set forth in *Ciskie* and *Arcoren* because it was being used to identify the specific witness as suffering from battered woman syndrome. Prosecutors in Ohio must focus on limiting any potential testimony to the characteristics of the battered woman syndrome in general and responses to hypothetical questions.

3. Ohio Evidence Rule 404

In addition to Evidence Rule 403, the courts in both *Pargeon* and *Dowd* cited Evidence Rule 404 as a second reason to bar battered woman syndrome testimony.¹⁶⁷ The court in *Pargeon* held that “evidence that appellant’s wife is a battered woman really serves as evidence of the prior bad acts of the appellant from which the inference may be drawn that appellant has the propensity to beat his wife and that he beat her on this particular occasion,” which is prohibited under Evidence Rule 404(B).¹⁶⁸ Again, the problem is that the prosecutor in *Pargeon* attempted to introduce testimony that specifically identified the alleged victim as suffering from the battered woman syndrome. Thus, *Pargeon* can easily be distinguished from the numerous cases outside of Ohio that have held that testimony on the battered woman syndrome in domestic violence productions does not violate Evidence Rule 404.

By avoiding testimony identifying the alleged victim as suffering from the battered woman syndrome, a prosecutor will avoid Rule 404 prohibition. The expert witness in *Arcoren* expressed no opinion on whether the alleged victim suffered from

¹⁶⁴See Patton, *supra* note 15, at 13.

¹⁶⁵See *Ciskie*, 751 P.2d at 1173-74; *Arcoren*, 929 F.2d at 1241; *Cababag*, 850 P.2d at 719; *Borrelli*, 629 A.2d at 1115; see also *People v. Morgan*, 58 Cal. App. 4th 1210 (Cal. Ct. App. 1997).

¹⁶⁶*Pargeon*, 582 N.E. at 666.

¹⁶⁷*Id.*; see also *Dowd*, 1994 WL 18645 at *1.

¹⁶⁸*Pargeon*, 582 N.E. at 666.

the syndrome or on which of her conflicting statements was more credible.¹⁶⁹ The court held that the expert did not “interfere or impinge upon the jury’s role in determining the credibility of witnesses.”¹⁷⁰ Her testimony simply aided the jury in evaluating the evidence that was presented by the prosecution.¹⁷¹ Therefore, by limiting the expert’s testimony to describing the characteristics of the battered woman syndrome generally and answering only hypothetical questions, the prosecution will avoid violating Evidence Rule 404.

The decision in *Dowd* is somewhat more troubling because the expert there was to testify concerning the characteristics of a battering relationship and that it was not uncommon for those who suffer from the battered woman syndrome to recant previous statements that they were abused.¹⁷² However, the *Dowd* court’s Rule 404 “analysis,” such as it was, seems plainly mistaken. The court failed to recognize this distinguishing fact and simply adhered to the holding in *Pargeon*, rejecting the testimony. The court did not provide any analysis on why it felt this limited form of testimony violated Rule 404. Therefore, *Dowd* really should be given no weight when discussing the merits of such limited testimony under Rule 404.

4. *State v. Koss*

Evidence Rules 403 and 404 were not the only bars to prosecutorial introduction of the battered woman syndrome cited in *Pargeon* and *Dowd*. A “more compelling reason” for the exclusion of such testimony, according to the court in *Pargeon*, was that the Ohio Supreme Court in *Koss* had limited the use of testimony on the battered woman syndrome to cases where a defendant uses it in support of her claim of self-defense.¹⁷³ Such a narrow reading of the decision in *Koss*, however, is not required.

An examination of Justice Resnick’s language in the majority opinion in *Koss* fails to reveal any language indicating that the court intended to limit the use of testimony on the syndrome to self-defense cases. Absent from Justice Resnick’s opinion is any statement that expert testimony on the battered woman syndrome may *only* be introduced in cases where the defendant asserts the affirmative defense of self-defense. The holding in *Koss* states only the following: “Where the evidence establishes that a woman is a battered woman, and when an expert is qualified to testify about the battered woman syndrome, expert testimony concerning the syndrome *may* be admitted to assist the trier of fact in determining whether the defendant acted in self-defense.”¹⁷⁴ This holding simply asserts that self-defense cases are one of the permissible categories of cases in which expert testimony on the battered woman syndrome may be admitted. Had Justice Resnick intended to limit the testimony to such cases, she could have easily done so by stating that testimony “may be admitted . . . *only* in self-defense cases.” The majority opinion in *Koss*, thus is neither a restriction on, nor an endorsement of the use of expert testimony on the syndrome in domestic violence cases.

¹⁶⁹*Arcoren*, 929 F.2d at 1241.

¹⁷⁰*Id.*

¹⁷¹*Id.*

¹⁷²*Dowd*, 1994 WL 18645 at *1.

¹⁷³*Pargeon*, 582 N.E.2d at 666.

¹⁷⁴*Koss*, 551 N.E.2d at 975 (emphasis added).

One court that has addressed *Koss* has come to a similar conclusion regarding the ambiguity of its language.¹⁷⁵ In *State v. Daws*, the Second District Court of Appeals heard Susan Daws' appeal from her conviction for voluntary manslaughter.¹⁷⁶ The primary issue on appeal was whether the trial court erred by precluding Daws' expert from testifying regarding whether Daws reasonably believed that she was in imminent danger and needed to use deadly force on the night of the shooting.¹⁷⁷ The court encountered difficulty when it attempted to interpret Justice Resnick's statement that expert testimony on the syndrome could be admitted to "help the jury not only understand the battered woman syndrome," but also to "determine whether defendant had reasonable grounds for an honest belief that she was in imminent danger when considering the issue of self-defense."¹⁷⁸ The court offered the following interpretation:

Nowhere in its opinion did the court define or explain what it meant by "expert testimony regarding the battered woman syndrome" or in what context such testimony could be used. Only the purpose for the admission of such testimony is clear. That is, expert testimony on the battered woman syndrome is to be admitted for both its original purpose of dispelling the misconceptions of jurors concerning battered women and its broader purpose of informing the jurors' determination of whether the accused's beliefs and use of force were reasonable.¹⁷⁹

The court concluded that the Supreme Court's opinion in *Koss* did "not establish the limits, if any, on expert testimony on the battered woman syndrome."¹⁸⁰

While not finding any limitations set forth in *Koss*, *Daws* did define two permissible purposes for use of the syndrome based on *Koss*: 1) dispelling the misconceptions of jurors concerning battered women; and 2) informing the jurors' determination of whether the accused's beliefs and use of force were reasonable.¹⁸¹ Prosecutorial use of the syndrome clearly falls under the first permissible purpose. This interpretation of the language in *Koss* is inconsistent with that of *Pargeon* and *Dowd*, but is in line with the interpretation advocated in this note.

The contention that *Koss* is not a limitation is further supported by the case law from outside Ohio that has addressed this exact issue. As previously discussed, the defense counsel in *Ciskie* argued that *Allery*, a previous Washington Supreme Court decision allowing testimony on the battered woman syndrome in a self-defense case, limited the use of testimony on the syndrome to such cases.¹⁸² Over Justice Dore's

¹⁷⁵*Daws*, 662 N.E.2d 805.

¹⁷⁶*Id.* at 810.

¹⁷⁷*Id.*

¹⁷⁸*Id.* at 812.

¹⁷⁹*Id.*

¹⁸⁰*Id.*

¹⁸¹*Id.*

¹⁸²See Part IV, *supra*, for a full discussion on how the court in *Ciskie* addressed the precedent set by *Allery*.

dissent,¹⁸³ the court failed to find such a limitation set forth in *Allery*. This decision is highly instructive for purposes of this note because of the similarities between *Allery* and *Koss*.

While the decision in *Ciskie* was highly instructive, the *Frost* case may even be more enlightening. In *Frost*, counsel for the defendant argued that New Jersey precedent had limited the use of testimony on the syndrome to self-defense cases.¹⁸⁴ Once again the court disagreed, asserting that there was no reason to believe that the testimony would be any more inappropriate if used by the prosecution as opposed to the defense in a murder case.¹⁸⁵ The court offered the following common sense rationale to support this contention:

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 the same opportunity when she is the complaining witness and/or victim and her abuser is the criminal defendant.¹⁸⁶

This little bit of common sense, if adopted by Ohio courts, could go a long way in alleviating the prevalent domestic violence problem in Ohio.

5. Ohio Revised Code § 2901.06

The second principal argument in *Pargeon* is that the Ohio General Assembly, with the enactment of O.R.C. § 2901.06, limited the use of the syndrome to self-defense cases.¹⁸⁷ The court cited the plain text of the statute as its only rationale supporting their contention.¹⁸⁸ This contention is clearly fallible, however, as no clear evidence of the General Assembly's intent is present in the plain text of the statute or the legislative history surrounding the enactment of § 2901.06.

As previously stated, the plain text of § 2901.06 offers persons who have been charged with an offense involving force the opportunity to introduce testimony on the syndrome in support of a claim of self-defense.¹⁸⁹ There is no language present in the statute, though, that specifically limits the use of such testimony to self-defense cases. The *Pargeon* court failed to recognize this important distinction.

This distinction is further evidenced by examining the legislative history surrounding the enactment of § 2901.06. Evidence of the legislature's intent in introducing House Bill 484, later codified as § 2901.06, can be seen in the following excerpt from a Legislative Services Commission report on the bill:

¹⁸³See note 106, *supra*, for a discussion on Justice Dore's dissenting opinion in *Ciskie*.

¹⁸⁴*Frost*, 577 A.2d at 1287; see Part IV, *supra*, for a full discussion on how the court in *Frost* addressed the precedent set by *Kelly*.

¹⁸⁵*Frost*, 577 A.2d at 1287.

¹⁸⁶*Id.*

¹⁸⁷*Pargeon*, 582 N.E.2d at 667.

¹⁸⁸*Id.*

¹⁸⁹OHIO REV. CODE ANN. § 2901.06 (B) (West 2003); see Part III.A., *supra*, for the full text of § 2901.06.

Declares that the General Assembly recognizes that the “battered woman syndrome” currently is a matter of commonly accepted scientific knowledge and that the subject matter and details of the syndrome are not within general understanding or experience of the general public or within the field of common knowledge.

Permits a person who is charged with an offense involving the use of force against another and who argues self-defense to introduce expert testimony of the “battered woman syndrome” and that the person suffered from the syndrome.¹⁹⁰

Furthermore, the legislative declarations section of the Legislative Services Commission report reiterates that H.B. 484 was intended to “permit” the use of testimony on the syndrome in self-defense cases.¹⁹¹ Nothing contained in the legislative history specifically indicates that the General Assembly intended H.B. 484 to act as a limitation on the use of the syndrome. There is no evidence that prosecutorial use of the syndrome was even contemplated by the legislature, either negatively or positively. The only thing that can be absolutely ascertained is that the legislature wanted to end Ohio’s past practice of disallowing all evidence on the battered woman syndrome.

Further support for this contention can be found in the timing of the introduction of H.B. 484. As previously stated, the bill was introduced on May 2, 1989, approximately six months before *Koss* came before the Ohio Supreme Court.¹⁹² While the bill was officially signed into law after the *Koss* decision, the fact that it was introduced before that decision indicates an intention on the part of the legislature to “open the door” for testimony on the syndrome as opposed to an intention to “close the door,” limiting its use to supporting self-defense claims. Had the bill been introduced in the wake of the *Koss* decision, a much stronger argument could be made that the legislature was trying to limit use of the syndrome to self-defense cases such as *Koss*.

C. A Proposed Framework for Admission

As outlined above, the prosecutorial introduction of testimony on the battered woman syndrome must be in accordance with the applicable Ohio Rules of Evidence. The best way to approach this is by utilizing the limited format advocated by the courts in *Ciskie* and *Arcoren*. Under this approach, experts who are called to testify in domestic violence prosecutions must limit their testimony to the general characteristics of a victim suffering from the battered woman syndrome. The expert may also answer hypothetical questions regarding specific abnormal behaviors exhibited by women suffering from the syndrome, but should never offer an opinion relative to the alleged victim in the case.

The second limitation on the prosecutorial use of the syndrome involves when it may be used. Prosecutors must limit their use of the syndrome to cases in which the

¹⁹⁰H.R. 118-HB484, Reg. Sess., at 1 (Ohio 1990), available at http://han2.hannah.com/htbin/f.com/oh_ban_118:HB484.lsc.

¹⁹¹*Id.* at *2.

¹⁹²*Id.*

victim exhibits abnormal behavior that may appear baffling to the jury. Specifically, testimony should be offered when a victim is questioned for remaining in a battering relationship or refusing to seek immediate police intervention, or when the victim recants a previous statement implicating her significant other as an abuser. Testimony on the syndrome should not be used in the absence of such circumstances because of the danger of prejudice of the defendant. Introducing testimony on the battered woman syndrome in this manner should give prosecutors their best chance at approval by the courts.

VI. CONCLUSION

While conducting research for this note, the author spent quite a bit of time viewing a wide variety of websites dealing with domestic violence issues. While he was troubled by the horrific stories of abuse and the alarming statistics presented one particular item truly caught his attention. On the National Domestic Violence Hotline's website appears the following warning: "Safety alert: Computer use can be monitored and is impossible to completely clear. If you are afraid your internet and/or computer usage might be monitored, please use a safer computer, call your local hotline, and/or call the National Domestic Violence Hotline."¹⁹³ This was not a generic warning to all computer users that an employer or the government may be monitoring their Internet usage. This was a specific warning to victims of domestic violence that their batterer may be monitoring their behavior on the Internet. The author can only begin to imagine the feelings of fear and entrapment that a battered woman must feel when they view this warning.

This type of warning clearly illustrates the problems that prosecutors face in domestic violence prosecutions. An average person does not easily understand the amount of control that a batterer can exert over his victim. A batterer will employ emotional and financial coercion, destruction of property, and physical battering to "maintain the male's domination of his mate."¹⁹⁴ Acts of contrition by the batterer further confuse the matter. The victim is led to believe that the violence is over and that she is safe in the relationship.¹⁹⁵ The problem is that this period of time is when outside persons most often come into contact with the victim.¹⁹⁶ Thus, the outside person sees the victim in a state of apparent happiness, which makes it more difficult to understand her actual situation.

The current state of law in Ohio provides an uphill battle for any victim that gathers up the tremendous amount of courage necessary to leave her batterer and report the incidents to the police. Defense attorneys have a license to assault the victim's credibility, questioning why she stayed in the relationship if it was so bad and why she failed to seek police intervention at an earlier time. A jury is easily persuaded by these arguments because they just don't understand the situation that these women are actually in. The problem is often intensified when the victim is lured back into her battering relationship before trial and subsequently recants her

¹⁹³National Domestic Violence Hotline, available at <http://www.ndvh.org> (last visited February 18, 2004).

¹⁹⁴Raeder, *supra* note 16, at 793.

¹⁹⁵See LENORE E. WALKER, *THE BATTERED WOMAN* 65-70 (1979).

¹⁹⁶See *id.*

previous story. An average member of the jury would surely not understand this action taken by the victim. They have no concept of the power that the batterer's contrition has over the victim, or the fact that she will almost surely be victimized again shortly thereafter.¹⁹⁷

The prosecution must have an opportunity to present a case in such situations. Allowing prosecutors to introduce expert testimony on the battered woman syndrome in the limited scope proscribed in this note will educate the average juror on the plight of a battered woman, but not unduly prejudice the defendant. The Ohio Supreme Court has yet to speak on this difficult issue. The fates of an extraordinary number of women in Ohio will rest on their decision.

MATTHEW P. HAWES

¹⁹⁷*See id.*