



## **Arguments in Favor of Allowing Prosecutor-Introduced Evidence of Battering and Its Effects**

In the 1970s, Lenore Walker developed the concept of “Battered Woman Syndrome” (BWS).<sup>i</sup> The term was coined to describe “a series of common characteristics found in women who are abused both physically and emotionally by the dominant male figures in their lives over a prolonged period of time.”<sup>ii</sup> In the decades following its introduction, there has been a shift away from using the term “Battered Woman Syndrome” to describe this concept, as the term inaccurately “implies that a single effect or set of effects characterizes the responses of all battered women, a position unsupported by the research findings or clinical experience.”<sup>iii</sup> The more inclusive phrase “battering and its effects” is now commonly used to describe such evidence.<sup>iv</sup>

Currently, every state allows a defendant who is claiming an affirmative defense to a crime on the basis of being a victim of domestic violence<sup>v</sup> to introduce expert testimony on battering and its effects.<sup>vi</sup> However, approximately only half of the states explicitly, by statute or case law, allow the prosecution to introduce expert testimony on battering and its effects.<sup>vii</sup> The majority of the remaining states have not yet addressed whether the prosecution can introduce such evidence. This article discusses the policy rationales for allowing prosecutors to introduce expert testimony on battering and its effects, and surveys those states where it has been found to be admissible. This article also provides a roadmap for seeking the admission of expert testimony on battering and its effects in those jurisdictions that have not yet affirmatively ruled on its admissibility.

### **Policies Supporting the Admission of Expert Testimony on the Dynamics of Domestic Violence**

More than other crimes, the credibility of the victim is a core issue in domestic violence cases. As one commentator noted, “credibility is the central factor around which . . . abuse and rape cases revolve.”<sup>viii</sup> Sadly, domestic violence cases often boil down to “he said, she said,” “and the trial unfolds into a focus on the victim’s – rather than the defendant’s – behavior.”<sup>ix</sup>

Unfortunately, the victim's credibility is often called into question because the psychological effect that these crimes have on victims is so misunderstood.<sup>x</sup> Our society has certain expectations as to how a victim should behave:

she should report immediately; she should leave her abuser; she should fully cooperate with the prosecution. As the California Supreme Court noted:

When the trial testimony of an alleged victim of domestic violence is inconsistent with what the victim had earlier told the police, the jurors may well assume that the victim is an untruthful or unreliable witness. And when the victim's trial testimony supports the defendant or minimizes the violence of his actions, the jurors may assume that if there really had been abusive behavior, the victim would not be testifying in the defendant's favor.<sup>xi</sup>

When the victim's behavior does not meet the jury's expectations, the tendency is to disbelieve that the victim was a "victim" at all. As the Washington Supreme Court noted in a domestic violence case: "The average juror's intuitive response could well be to assume that someone in such circumstances could simply leave her mate, and that failure to do so signals exaggeration of the violent nature of the incidents and consensual participation."<sup>xii</sup>

Because a victim's credibility is central to the prosecution of a domestic violence case, and because a victim's credibility is likely to be misperceived by the jury, it is essential that jurors are aware of the reasons why the victim is not acting in conformity with their expectations. Expert testimony on the psychological effects and behavioral ramifications of domestic violence is a relevant, not unduly prejudicial way to set forth the rationales for this seemingly inconsistent behavior.

Accordingly, policy dictates that such evidence should be admissible, absent contrary rule or law.

### **Jurisdictions that Allow Testimony on Battering and Its Effects**

In those jurisdictions where prosecutor-introduced evidence of battering and its effects is admissible, courts base their decisions about admissibility on three factors. They first look to whether the evidence is relevant. In making this determination, courts also consider a second factor: whether admission of the evidence would create a risk of undue prejudice. Their final consideration is whether the introduction of this evidence would be helpful to the jury. As discussed below, case law from these jurisdictions may guide those jurisdictions that have not yet made a determination as to the admissibility of such evidence.

#### **The Evidence must be Relevant**

Federal Rule of Evidence 402 sets forth the presumption that "all relevant evidence is admissible. . . . Evidence which is not relevant is not admissible."<sup>xiii</sup> Evidence is "relevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."<sup>xiv</sup> Those forty or so states that have adopted the Uniform Rules of Evidence as the basis of their state codes have rules largely similar rule to the federal rule.<sup>xv</sup>

As discussed above, in domestic violence cases, the victim's credibility is routinely at issue.

Accordingly, courts consider expert testimony that may tend to explain why a victim is behaving in a way that a jury may find incredible to be relevant. For instance, the Indiana Supreme Court found that evidence on battering and its effects was relevant to provide an explanation as why the victim recanted her accusations against the defendant.<sup>xvi</sup> The New Hampshire Supreme Court held that expert testimony was relevant to preempt negative inferences based on the victim's "inconsistent" actions.<sup>xvii</sup>

### **The Evidence must not be Unduly Prejudicial**

Even if a court determines that the evidence is relevant, it may still find the evidence to be inadmissible 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."<sup>xviii</sup> Courts have most often found that when an expert testifies as to whether the victim in the case before them is a victim of domestic violence, the relevance of testimony regarding battering and its effects is outweighed by prejudice.<sup>xix</sup> On the other hand, courts generally find such testimony admissible where the expert does not offer to diagnose the victim as someone who suffers from the effects of battery.<sup>xx</sup> For instance, the Wisconsin Court of Appeals allowed expert testimony on the cycle of violence in abusive relationship where the expert did not opine as to whether the victim in the case in fact suffered from abuse.<sup>xxi</sup> In reaching this decision, the court noted that, had the expert diagnosed the victim "as a person with battered woman's syndrome, . . . such opinion would have been reversible error."<sup>xxii</sup> Accordingly, such assertions should be avoided.<sup>xxiii</sup>

### **The Evidence must Assist the Trier of Fact**

Federal Rule of Evidence 702, the text of which is similar to the corresponding rule of most states, allows expert testimony "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." Most courts admit evidence on battering and its effects on the basis that jurors would not understand why a victim may be acting in a way that is inconsistent with their expectations. As the Indiana Supreme Court noted: "Most courts agree that the reactions and behaviors of domestic violence are not commonly understood by lay persons."<sup>xxiv</sup> The Massachusetts Supreme Court similarly recognized "that the pattern of behavior and emotional characteristics common to the victims of battering lies beyond the ken of the ordinary juror and may properly be the subject of expert testimony."<sup>xxv</sup>

In the majority of cases, the expert evidence is not introduced until the victim affirmatively acts in a way that is inconsistent with the jurors' expectations – most often, by recanting testimony or by being unwilling to go forward with the case.

For instance, the Connecticut Supreme Court allowed expert testimony on battering and its effects when the victim had recanted,<sup>xxvi</sup> and the Georgia Supreme Court allowed expert testimony on battering and its effects when the victim did not want to go forward with the case.<sup>xxvii</sup>

However, other courts have allowed expert testimony on battering and its effects without recantation or an unwillingness to go forward. For instance, the Massachusetts Supreme Court allowed expert testimony to explain the victim's failure to get out of a relationship with her batterer.<sup>xxviii</sup> The Washington Supreme Court allowed such testimony to explain the victim's failure to leave, as well as her failure to complain about the abuse earlier.<sup>xxix</sup> A New Jersey

appellate court allowed such testimony upon finding that the victim's credibility "was very much under attack" because the theory of defense was that the defendant and the victim had consensual intercourse and spent the remainder of the day together.<sup>xxx</sup>

Rule 702 also requires that the expert be "qualified as an expert by knowledge, skill, experience, training, or education." The level of expertise required varies state to state, however those courts allowing for testimony on battering and its effects generally do not require that the testifying expert be a psychologist or psychiatrist in order to have sufficient expertise to testify.<sup>xxxii</sup> Thus, many courts have qualified domestic violence advocates as experts for the purpose of testifying about battering and its effects.<sup>xxxiii</sup>

Finally, Rule 702 requires that "(1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."<sup>xxxiiii</sup> There is significant research on battering and its effects, and testimony on battering and its effects has been allowed, when offered through the defense, in every jurisdiction.<sup>xxxv</sup> Courts considering the use of battering and its effects when introduced through the prosecutor have also found that this type of testimony is sufficiently established under Rule 702 to be admissible.<sup>xxxvi</sup> Indeed, as one court noted, "[i]t is beyond debate that battered women's syndrome has gained general acceptance as a scientific doctrine within the scientific community."<sup>xxxvii</sup>

### **Road Map for Jurisdictions Yet to Rule on the Admissibility of Testimony on Battering and Its Effects**

As the above-cited cases make clear, the central inquiries to determining the admissibility of battering and its effects are whether the evidence is relevant and not unduly prejudicial, and if so, whether the evidence would be helpful to the trier of fact. It is thus important to establish, through local case law and rules of evidence, that these three inquiries are satisfied.

A state without case law on battering and its effects can draw from other jurisdictions to show that this type of evidence has been found admissible in other jurisdictions. The state should also point to the important policy reasons, described above, for allowing such testimony.

Even if a state does not have case law regarding the admissibility of battering and its effects, it may have case law regarding parallel issues. For instance, North Carolina, while silent on the admissibility of testimony on battering and its effects, has case law allowing for expert testimony on Post-Traumatic Stress Disorder and Rape Trauma Syndrome.<sup>xxxviii</sup> Similarly, Utah does not have any case law regarding whether a prosecutor can introduce evidence on battering and its effects, but it does have case law finding that an expert's testimony regarding the behavior of a child sexual assault victim was admissible.<sup>xxxix</sup> Courts may rely on these parallel arguments in ruling on the admissibility of expert testimony on battering and its effects.<sup>xl</sup> As with those jurisdictions that already allow such expert testimony, it is important that the testifying expert not opine directly as to whether the victim in the case actually suffers from battering and its effects so as to avoid a finding of undue prejudice.<sup>xli</sup>

### **Conclusion**

Great importance is placed on a victim's credibility in domestic violence proceedings. When a victim of domestic violence does not act in a manner consistent with the trier of fact's expectations, that victim's credibility may be called into question. Accordingly, it is important

for prosecutors to be able to explain this “inconsistent” behavior through the use of expert testimony on battering and its effects.

Those states that have allowed such testimony base their decisions on the relevance of the evidence and the likelihood that such evidence will assist the trier of fact. States that have not yet ruled on the admissibility of expert testimony on battering and its effects can use the decisions of these jurisdictions as a roadmap, as well as relying upon the strong policy reasons for allowing such testimony and, where applicable, the states’ own laws on parallel issues, such as Post-Traumatic Stress Disorder, Rape Trauma Syndrome or Battered Child Syndrome.<sup>xli</sup>

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<sup>i</sup> Jennifer G. Long, *Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions*, 13 (Aug. 2007), available at [http://www.ndaa.org/pdf/pub\\_introducing\\_expert\\_testimony.pdf](http://www.ndaa.org/pdf/pub_introducing_expert_testimony.pdf).

<sup>ii</sup> Christine Emerson, *Note: United States v. Willis: No Room for Battered Woman Syndrome in the Fifth Circuit?*, 48 *Baylor L. Rev.* 317, 320 (1996).

<sup>iii</sup> U.S. Department of Justice, Office of Justice Programs, National Institute of Justice & U.S. Health and Human Services, National Institute of Mental Health, *The Validity and Use of Evidence Concerning Battering and its Effects in Criminal Trials: Report Responding to § 40507 of the Violence Against Women Act*, vii (1996), available at <http://www.ncjrs.gov/pdffiles/batter.pdf>.

<sup>iv</sup> The term “battering and its effects” will be used in this article, whenever possible, instead of BWS.

<sup>v</sup> The term “victims of domestic violence” is used in this article to describe victims of non-sexual domestic violence, as well as victims of spousal or partner rape and other domestic sexual assaults.

<sup>vi</sup> Long, *Introducing Expert Testimony* at 19.

<sup>vii</sup> *Id.*

<sup>viii</sup> Jennifer Adler Lifschitz, *Battered Woman Syndrome and Prosecution of Domestic Abuse and Rape Cases*, 5 *Geo. J. Gender & L.* 149, 150 (2004).

<sup>ix</sup> Long, *Introducing Expert Testimony* at 1.

<sup>x</sup> Such misunderstanding is also common in the context of sexual assault. Because the credibility of victims of sexual violence, including both domestic and non-domestic sexual assaults, is often called into question, expert testimony regarding rape myths and the dynamics of sexual assault is often necessary to dispel juror misperceptions. Courts often address these topics in the context of BWS, despite the shift toward characterizing this type of evidence as evidence of battering and its effects. While the testimony at issue may not be styled as BWS evidence, because of the overlap between evidence on battering and its effects and BWS, a court would likely consider this, for all intents and purposes, to be evidence regarding BWS. *See Odom v. State*, 711 N.E.2d 71 (Ind. 1999) (finding that, although the expert did not testify about BWS specifically, the court would treat the testimony as such because, like BWS, the expert’s testimony involved both an explanation as to why a victim may recant and the psychological dynamics common to victims of sexual violence).

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- <sup>xi</sup> *People v. Brown*, 33 Cal. 4th 892, 906-907 (Cal. 1984).
- <sup>xii</sup> *State v. Ciskie*, 751 P.2d 1165, 1166 (Wash. 1988).
- <sup>xiii</sup> Fed. R. Evid. 402.
- <sup>xiv</sup> Fed. R. Evid. 401.
- <sup>xv</sup> See generally Unif. R. Evid. 74 References & Annotations (table of jurisdictions that adopted 1974 Rules of Evidence with 1986 Amendments).
- <sup>xvi</sup> *Odom*, 711 N.E.2d at 75-76.
- <sup>xvii</sup> *State v. Searles*, 680 A.2d 612, 615-16 (N.H. 1996).
- <sup>xviii</sup> Fed. R. Evid. 403.
- <sup>xix</sup> See, e.g., *Ciskie*, 751 P.2d at 1173-74 (finding that defendant might suffer undue prejudice if expert were to diagnose victim as a rape victim); *State v. Townsend*, 897 A.2d 316, 330-31 (N.J. 2006) (collecting cases).
- <sup>xx</sup> See, e.g., *State v. Borrelli*, 629 A.2d 1105, 1113-14 (Conn. 1993) (finding that expert testimony on battering and its effects, when not specific to the victim, did not invade the province of the jury); *State v. Clark*, 926 P.2d 194, 203-04 (Haw. 1996) (allowing expert to testify about domestic violence generally, but not as to specific facts of the case or whether victim was, in fact, a victim of domestic abuse); *State v. Bednarz*, 507 N.W.2d 168, 171-72 (Wis. Ct. App. 1993) (allowing expert testimony on cycle of abuse when expert did not testify as to whether the victim in question suffered from domestic abuse).
- <sup>xxi</sup> *Bednarz*, 507 N.W.2d at 171-72.
- <sup>xxii</sup> *Id.* at 171.
- <sup>xxiii</sup> Contrary to the great weight of authority allowing prosecutorial experts on battering and its effects is *State v. Ogden*, 6 P.3d 1110, 1114 (Ore. Ct. App. 2000). In *Ogden*, the court found the testimony by an expert on battering and its effects was not relevant because the state had not shown that the victim in fact suffered from battering and its effects. *Id.* As noted above, this analysis is at odds with that of most courts, which find that such evidence will be admitted only if it is *not* tied to the victim by the expert, and that no evidence need be given that the victim in fact suffers from battering and its effects. Moreover, *Ogden* does not hold that such expert testimony will never be admissible, but the state must first establish that the victim in fact suffers from battering and its effects before the evidence can be found relevant for the purposes of admissibility. *Id.*
- <sup>xxiv</sup> *Odom*, 711 N.E.2d at 75.
- <sup>xxv</sup> *Commonwealth v. Goetzendanner*, 679 N.E.2d 240, 244 (Mass. 1997); see also *Ciskie*, 751 P.2d at 1166 (“Neither logic nor law requires us to deny victims an opportunity to explain to a jury, through a qualified expert, the reasons for conduct which would otherwise be beyond the average juror’s understanding.”).

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<sup>xxvi</sup> *Borrelli*, 629 A.2d at 1113-15.

<sup>xxvii</sup> *Hawks v. State*, 479 S.E.2d 186, 189 (Ga. 1996).

<sup>xxviii</sup> *Goetzendanner*, 679 N.E.2d at 244.

<sup>xxix</sup> *Ciskie*, 751 P.2d at 1173.

<sup>xxx</sup> *State v. Frost*, 577 A.2d 1282, 1287 (N.J. Super. Ct. App. Div. 1990).

<sup>xxxi</sup> *See, e.g., Goetzendanner*, 679 N.E.2d at 244 (“The witness did not have to be a trained clinician, capable of diagnosing particular cases of BWS, in order for the judge properly to qualify her as an expert concerning the general or typical characteristics of BWS.”).

<sup>xxxii</sup> *See, e.g., id.* (allowing director of New York State Office for Prevention of Domestic Violence to testify as an expert); *Clark*, 926 P.2d at 203-04 (allowing director of a crisis shelter to testify as an expert); *Frost*, 577 A.2d at 1287 (allowing the director of clinical services at a local shelter to testify as an expert).

<sup>xxxiii</sup> Fed. R. Evid. 702.

<sup>xxxiv</sup> Long, *Introducing Expert Testimony* at 19.

<sup>xxxv</sup> *See, e.g., Clark*, 926 P.2d at 203 (finding testimony on battering and its effects admissible under Hawaii Rule of Evidence 702 and was not “junk science”); *Borrelli*, 629 A.2d at 1110 (finding BWS evidence admissible under rules of evidence and the “*Frye* test,” which requires that the subject matter of scientific expertise testimony is sufficiently established to have gained general acceptance in the field to which it belongs).

<sup>xxxvi</sup> *Townsend*, 897 A.2d at 327 (internal citation omitted).

<sup>xxxvii</sup> *See, e.g., State v. Hall*, 412 S.E.2d 883, 821 (N.C. 1992); *State v. Strickland*, 387 S.E.2d 62, 65-66 (N.C. Ct. App. 1990).

<sup>xxxviii</sup> *See, e.g., State v. Hall*, 946 P.2d 712, 720-22 (Utah App. 1997).

<sup>xxxix</sup> In 2007, NCVLI, along with the Maryland Coalition Against Sexual Violence, National Alliance to End Sexual Violence, and Women’s Law Center of Maryland, thoroughly discussed the arguments in favor of admitting expert testimony on Rape Trauma Syndrome in an amici curiae brief to the Maryland Court of Special Appeals in *State v. Baby*, No. 14 (Md. Ct. App. Sept. Term 2007). *Baby* involved a challenge to the admission of expert testimony about rape trauma and the experience, reactions, and behavior of sexual assault victims. Amici argued that expert testimony is necessary to help ameliorate common myths about rape and give jurors the information that they need to make a fair decision in rape cases.

<sup>xl</sup> *See nn. 19-23 supra; see also State v. Huang*, 394 S.E.2d 279, 283 (N.C. Ct. App. 1990) (finding probative value of testimony regarding the behavioral patterns of sexual assault victims in the context of Post-Traumatic Stress Disorder was outweighed by testimony’s prejudicial nature where expert testimony explicitly implicated defendant); *State v. Rimmasch*, 775 P.2d 388, 401 (Utah 1989) (finding inadmissible expert testimony that a child-victim fit a profile for battered children and therefore was abused).

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<sup>xli</sup> An effective means of educating courts on the importance of allowing expert testimony on topics such as battery and its effects is the submission of amicus curiae briefs.

NCVLI regularly submits amicus curiae briefs in state and federal courts, and welcomes the opportunity to further educate courts on the need for expert testimony in domestic violence and sexual assault cases. If you are aware of a case that would benefit from such assistance, please contact NCVLI at [ncvli@lclark.edu](mailto:ncvli@lclark.edu).

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