

EXPERT TESTIMONY AND DOMESTIC VIOLENCE: A TOOL FOR WISCONSIN PROSECUTORS

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INTRODUCTION

Expert witness testimony can be a vital domestic violence prosecution tool.¹

Expert witnesses can provide jurors with a battered woman's perspective and an educated perspective of evidence at trial. Like most citizens, the average juror does not understand what fears and experiences motivate a battered woman's behavior. Without accurate information, jurors may assess a victim's behavior or choices based on myths and victim blaming assumptions. Without understanding how the cycle of abuse influences a victim, jurors fail to recognize the conflicts for reluctant victim witnesses.

Victims of domestic violence are often reluctant to participate in prosecution of their abusers.² The woman may decline to testify, may recant, or may display "disinterest" or "uncooperative" behavior at trial. Professionals familiar with domestic violence understand that such "illogical" reactions are often orchestrated attempts to stay alive. However, most jurors do not. Without information about the experience of a battered woman, jurors question the woman's credibility and the importance of prosecution. Under such circumstances, batterers often escape prosecution and battered women are left unprotected.

Jurors bring their misconceptions and victim blaming ideology to the fact-finding process. Like most people, jurors perceive domestic violence to occur with certain races

¹ See Appendix A for tips on prosecution with reluctant witnesses.

² The vast majority of victims of domestic violence are women abused by male partners. While domestic violence occurs in homosexual relationships and men infrequently report abuse by women, in this article, abusers will be referred to as men, and abused parties will be referred to as women.

and in lower socio-economic groups. They are skeptical of claims made by people who do not fit the stereotype.

Jurors do not want to believe that criminal violence can occur in the house next door. They feel threatened by the belief that the violence could be so close to home. Rather than admit or believe violence could happen next door, they make exceptions and excuses for the behavior and rationalize alternative explanations.³ Thus, defense theories of "mutual abuse"⁴ or the "minor domestic dispute" are attractive alternatives to reality.

Additionally, juries blame victims and evaluate victim behavior very critically. They expect victims to behave like victims - to display the "appropriate" behavior of a victim, to show interest in the case, and may place a heavy burden on the victim's testimony.⁵ Jurors are skeptical about absent or recanting witnesses. Jurors are skeptical about witnesses who have flat affect or are belligerent or angry. Jurors are skeptical about prosecuting cases when the victim doesn't want to prosecute.

A domestic violence expert can educate the jury about a victim's common reactions to domestic violence. An expert can guide a juror into the terrifying world of domestic violence and replace myths with facts. An expert can explain a victim's choices. When an abuser threatens harm if the victim cooperates, the victim's choice is obstruction or death.⁶ An expert can provide battered women with a voice she is unable to use at trial.

³ Interview with Paul Humphrey, Dane County Assistant District Attorney (October 16, 1995). Mr. Humphrey discusses his cases with the jury at the conclusion of the trial.

⁴ Darald Hanusa, *Mutual Abuse: How mutual is it?*, Common Woman: Dane County Advocates for Domestic Violence, July 1993, at 1.

⁵ One Dane County prosecutor had an experience with a domestic violence case with ample evidence and full victim cooperation, but the jury found the defendant not guilty because "it seemed the victim didn't care."

⁶ Interview with Jill Karofsky, Dane County Assistant District Attorney (October 13, 1995).

The Prosecutor

The necessity or utility of an expert witness will depend upon the victim's potential testimony. An initial interview with the victim will provide information about the victim's ability to participate. If the victim will recant or seems to be reluctant, an expert would be valuable.

Additionally, the interview with the victim can provide insight into the woman's situation, which can shape the direct examination with the expert witness.

Admissibility of Expert Testimony

Expert testimony should be presented for consideration in matters involving special skill, knowledge, or experience that is beyond ordinary experience or knowledge of the fact finder.⁷ The expert testimony will be admissible if the judge determines that the testimony will assist the fact finder in understanding evidence or determining a fact in issue.⁸ Withholding expert testimony in a case where it is necessary constitutes an insufficiency of proof.⁹

Scope of Expert Testimony

An expert witness may not testify as to whether or not a witness is telling the truth or has been abused.¹⁰ However, expert testimony about battered woman's syndrome may assist a jury in an area where its knowledge might be mistaken but where an expert has

⁷ State v. Johnson, 54 Wis. 2d 561, 564, 196 N.W.2d 717, 719 (1972).

⁸ Id. at 564-65, 719 (citing Anderson v. Eggert, 234 Wis. 348, 361, 291 N.W. 365, 370 (1940)).

⁹ Id. at 565, 719.

¹⁰ State v. Jensen, 147 Wis. 2d 240, 249, 432 N.W.2d 913, 917 (1988) (citing State v. Haseltine, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984)). Witness permitted to testify about victim's behavior and how behavior was consistent with other sexually abused children to rebut defense theory that the child made up allegations.

special knowledge.¹¹ In *State v. Bednarz*, the court held that testimony on battered woman's syndrome may be admissible to provide one possible explanation for a victim's recantation of her original complaint.¹²

The correct parameters of expert testimony concerning battered woman's syndrome is to allow an expert to describe the behavior of victims of the same type of crime, behavior of the complainant, and if the complainant's behavior is consistent with behavior of other victims.¹³ In *Bednarz*, the state presented the police reports, the victim's prior inconsistent statements, and expert testimony to explain how women in similar situations respond to domestic violence.¹⁴

Additionally, expert testimony may be admissible to rebut the defense's suggestion that the woman's behavior is inconsistent with the behavior of a domestic violence victim.¹⁵ Expert testimony on post assault behavior has been admitted in sexual assault cases to help explain the meaning of ambiguous or contradictory behavior.¹⁶ In domestic violence cases, an expert could help explain a victim's flat affect, hostility toward police, or other reactions that victims of domestic violence experience after an attack.

Expert opinions used to explain ambiguous or contradictory conduct of the victim should be elicited in the form of hypothetical questions which compare the victim's behavior to that of a victim of domestic violence. The questions should be accompanied

¹¹ *State v. Richardson*, 189 Wis. 2d 418, 525 N.W.2d 378, 380 (Ct. App. 1994).

¹² *State v. Bednarz*, 179 Wis. 2d 460, 462, 507 N.W.2d 168, 169 (Ct. App. 1993), *review denied* 513 N.W.2d 406.

¹³ *Id.* at 171. *See also* Jensen holding that such "consistency" testimony is admissible so long as the expert witness does not convey his or her own beliefs as to the veracity of the complainant with respect to the assault." 147 Wis. 2d at 256-57, 432 N.W.2d at 920.

¹⁴ *Id.*

¹⁵ Jensen at 256-57, 920.

by a cautionary instruction that the victim's behavior cannot be used as evidence that the assault occurred.

Current Judicial "Requirements"

Although Wisconsin case law regarding domestic violence testimony does not require incidents of past violence, there seems to be an unwritten requirement for past incidents of violence for the admissibility of expert testimony.¹⁷ It seems that some judges want evidence that the incident was "domestic violence" not an isolated incident. Prosecutors in Dane County report success in using expert testimony when there is evidence of other abusive incidents.¹⁸

Evidence of past abuse may be shown with statements made to police officers or prior written statements about the abuse, which indicate abuse has happened in the past.¹⁹

Although not required, previous convictions on domestic violence charges are clearly evidence of past assaultive behavior.²⁰

Although prosecutors in Dane County have reported that they have not had success in admitting expert testimony absent a history of domestic violence, case law does not require a showing of previous incidents of violence. In State v. Jensen, the Wisconsin Supreme Court, permitted the admissibility of expert testimony to explain contradictory behavior because the victim's behavior had the tendency to confuse the jury, not because the abuse had occurred on several occasions.²¹ Domestic violence advocates have experience working with women after the first assault. The reasoning in

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Id.

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Interview with Linda Dawson, former Dane County Deputy District Attorney (August 15, 1995).

¹⁸

Id.

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Id.

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Id.

Jensen should apply to domestic violence cases.

Expert Qualifications

The trial court has broad discretion in determining whether a witness has sufficient skill, knowledge, training, or experience to qualify as an expert.²² An expert's competence is not conditioned upon formal education.²³ "Experience is a proper basis for giving an expert opinion as well as technical and academic training."²⁴ Witnesses with any form of specialized knowledge, however obtained, may be permitted to assist the trier of fact.²⁵

Thus, prosecution witnesses are not limited to academic professionals. The use of "lay experts" has been specifically acknowledged in Wisconsin case law. The opinions of lay witnesses are valid even though they are not based on technical or academic knowledge, but on expertise gained from experience.²⁶ Such standards invite the use of shelter workers who often have vast experience with battered women and knowledge of women's reactions to the experience of being battered.²⁷ Practical experience provides better testimony than mere "theoretical" education. In fact, witnesses without an extensive background in domestic violence are unable to answer questions about domestic violence satisfactorily.²⁸

Foundation

²¹ Jensen at 256-57, 920.

²² State v. Jensen, 141 Wis. 2d 333, 336-37, 415 N.W.2d 519, 520 (Ct. App. 1987) *aff'd*, 147 Wis. 2d 240, 432 N.W.2d 913 (1988).

²³ See the Federal Advisory Committee Note to Federal Rule 702 reprinted at 59 Wis. 2d R 207-208.

²⁴ Johnson, *supra* 54 Wis. 2d at 565, 196 N.W.2d at 719.

²⁵ R.A. Fine, *Fine's Wisconsin Evidence* 209 (1988). *See also* State v. Hollingsworth, 160 Wis. 2d 883, 895, 467 N.W.2d 555, 560 (Ct. App. 1991).

²⁶ State v. Sarabia, 118 Wis. 2d 655, 667, 348 N.W.2d 527, 534 (1984).

²⁷ In State v. Robinson, a rape crisis worker was qualified as an expert with 6 years of experience and work with 70-80 victims. 146 Wis. 2d 315, 431 N.W.2d 165 (1988).

To use an expert, there must be an issue beyond the juror's experience. The skillful use of jury questions can clarify the domestic violence issues, bring out common biases and misinformation, and confront stereotypes and myths about domestic violence, perpetrators, and victims.²⁹ Establishing such jury biases will demonstrate that the subject is sufficiently beyond the juror's experience and that expert testimony is needed for an educated evaluation of the facts.³⁰

On voir dire, questions should focus on widely held myths and stereotypes surrounding domestic violence.³¹ Questions should challenge jurors beliefs that the violence is private, can be justified and only effects certain populations in society. This technique will not only establish the need for expert testimony; it will also provide an introduction of domestic violence to the jury and judge.³²

Selecting an Expert Witness

As with any witness, credentials, appearance, presentation, and an ability to remain credible under cross-examination are crucial.

Credentials

A witness with both academic credentials and direct experience with battered women would be very desirable. However, an expert witness does not need an advanced

²⁸ Dawson Interview.

²⁹ Linda Dawson, *Tips for Successfully Prosecuting Domestic Violence Cases With or Without the Cooperation of the Victim*, Dane County District Attorney's Office (July 27, 1994). (Appendix A) See also Alana Bowman, *A Matter of Justice: Overcoming Juror Bias in Prosecutions of Batterers Through Expert Witness Testimony of the Common Experiences of Battered Women*, 2 S. Cal. Rev. L. & Women's Stud. 219, 235.

³⁰ Johnson, *supra* at 565, 719. (Withholding expert testimony in a case where it is necessary constitutes an insufficiency of proof. Court stated jury needed expert testimony in order to determine whether tablet taken was LSD because such knowledge was beyond the ordinary experience.)

³¹ Sample voir dire questions. See Appendix C.

³² Dawson Interview. Every opportunity should be used to educate the judge.

degree to help a jury understand why a battered woman could be frightened of her violent partner. In fact, not all mental health professionals receive basic domestic violence education in graduate school. Formal education does not create a skilled domestic violence advocate.

The most important qualification for an expert will be his or her direct experience with battered women. Battered women's advocates, shelter workers or other direct service professionals are excellent choices. Local or state-based domestic violence organizations are excellent resources for locating skilled advocates in your community.

Additionally, remember that well-trained police officers can serve as expert witnesses. Police officers are qualified to testify to what they observed as a witness and to provide an expert evaluation, based on training and experience, of what they observed at the scene.³³ Like domestic violence advocates, police officers have professional experiences with women who have reported violence and then recanted at trial.

Appearance

Experts need to be professional and competent. Experts should be able to respond articulately to questions with poise and confidence. The expert should respond as an expert, not a zealous advocate. It is important that the expert responds calmly and dispassionately and not appears to have a personal bias for the victim or against the defendant. The interview process should include assessing the expert's demeanor and knowledge.

Presentation

All experts must have a thorough understanding of domestic violence and be able to explain an abuse victim's experience in a clear fashion using layperson's terms. The

expert should be able to explain common experiences of battered women, be able to hear about the woman's experience and be able to give an opinion as to whether the two experiences are consistent.

Planning Ahead

Because misdemeanor trials often present limited opportunities to prepare, pre-screening possible witnesses is advisable. Some counties have established relationships with several experts to ensure that adequate resources are available when needed.

Credibility

If the judge admits the testimony, the power and duty of determining the credibility of expert witnesses and the probative value of their testimony rests with the jury.³⁴

A witness should stick to what he or she knows and keep it simple.³⁵ There are a variety of theories and endless studies regarding domestic violence. Testimony based on experience, observations, and basic explanations of common cycles will not only be easier for the jury to understand, but will also limit challenges to testimony. An interview with a potential witness should test their ability to respond to questions about alternative theories or concepts.

Although not all defense attorneys will have a sophisticated knowledge of domestic violence, a defense attorney may challenge psychoanalytical aspects of battered women's syndrome. If an expert labels the experience as battered women's syndrome, the

³³ Dawson Interview.

³⁴ Johnson at 567, 720 (citing Pollock v. Pollock, 273 Wis. 233, 77 N.W.2d 485 (1956)).

³⁵ Interview with Janine Geske, Wisconsin Supreme Court Justice (July 7, 1995). Experts undermine their credibility when they try to respond to theories beyond their knowledge.

expert has opened the door to post-traumatic stress disorder and a variety of differing theories and opinions about battered women's syndrome. An expert using the strict "syndrome" should be very familiar with the literature and discrepancies or stick to a basic description of battered women's experiences.

Witnesses who only have academic credentials will not pass initial screening interviews.³⁶ Theory alone is not as effective as explaining the common experiences of battered women. Further, isolated academic knowledge will not enable an expert to respond to questions about common reactions to abusive circumstances.

Caution

1. In some cases, it may be helpful to call a witness who has direct experience with the victim. There may be more latitude with rules of evidence if a witness knows the victim. However, a witness who has provided the victim with professional assistance and testifies about the victim may waive potential privileges and open the door to cross-examination and potentially unflattering testimony.³⁷

2. In California, defense attorneys have been bringing in "experts" to testify about the common occurrence of mutual abuse and relationship violence. Such testimony affirms the victim blaming assumptions and myths that jurors bring to court. This type of testimony has not been reported in Wisconsin.

3. Caution should also be employed with the application of "battered women's syndrome" (BWS). Battered women's syndrome is identified as a form of post-traumatic stress disorder with specific component parts. There are three major risks to using the "scientific" theory.

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Dawson Interview.

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Justice Geske Interview.

First, there is the risk of labeling the woman as being mentally ill. Second, a defense attorney could attack the admissibility of the expert testimony on "technical" grounds if the woman's experience doesn't fit the mold of BWS. Third, the use of BWS opens the door for attacks on the expert's credibility and expertise. BWS is the subject of hot debate in the mental health community. There are multiple theories and conclusions about the legitimacy of BWS. Unless the application of BWS is on point and essential, the safest solution may be to use an expert to testify about the "experiences" of battered women, rather than the specific issue of BWS.

PREPARING YOUR WITNESS

Witnesses should be given guidance on the legal limitations of their testimony, and prepared for direct and cross-examination.

1. Make sure witnesses understand that they may not state whether they believe the victim is a battered woman or if the victim is telling the truth. If the witness has personal information about the victim or information about other incident of abuse perpetrated by the defendant, be sure the witness understands this information should not be given in any form without your specific direction.

2. As with any witness, you should run through possible direct and cross-examination questions.³⁸ Even the most experienced professional may be a dud on the stand or appear to have a strong bias against batterers that could undermine the witness's credibility.

Additionally, you should provide the expert with basic details of the case and critical information that will provide additional understanding of the woman's situation.³⁹

³⁸ See Appendix B.

³⁹ Alana Bowman, *Los Angeles Domestic Violence Prosecution Training Manual*, p.

The expert must be prepared to address the victim's behaviors, which could confuse the jury. Such behaviors could include but are not limited to: hostility toward the police at the scene, recanting, minimizing the abuse, unsuccessful attempts to leave, or anticipated hostility toward the prosecution at trial.

The Expert Witness⁴⁰

Addressing the Jury's Misconceptions

Most people hold inaccurate beliefs about domestic violence that can warp the fact-finding process.⁴¹ Juries, like other members of the community, often hold victim-blaming ideologies and minimize domestic violence as a private affair. Jurors may doubt the victim's testimony because they believe she "provoked" the violence, or believe if she was really in danger she'd just leave, or mistake flat affect for a lack of sincerity. Your testimony is needed to dispel some of the myths and help the jury understand the battered women's experience and reactions.

You will not be permitted to testify as to whether the specific victim has been abused. However, you will be able to explain the common experiences of battered women based on your experiences, education, and research in your field. Additionally, you may be asked if a set of behaviors or experiences are consistent with the experiences of battered women. Thus, when answering direct questions, address the questions in terms of the general experiences of battered women, not the specific victim. Include

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Id. at 10-13.

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Bowman *supra* at 235, 236, (citing Charles P. Ewing and Moss Aubrey, *Battered Women and Public Opinion: Some Realities About the Myth*, 2 J. Fam. Violence 257 (1987)). See also Mary Dodge and Edith Green, *Juror and Expert Conceptions of Battered Women*, 6 Violence and Victims 271 (1991).

general information such as:⁴²

- Factors bearing on the decision of battered women to continue to live in an abusive relationship
- The difficulty, both emotionally and financially, to escape abuse and live independently
- The pattern that most women do not disclose, even to relatives or close friends, that they have been beaten, and the reasons they hide the abuse
- The general hostility or lack of understanding expressed by most people hearing about domestic violence
- The common failure of battered women to report violent incidents to police
- The vast numbers of domestic violence and spouse abuse; the wide, non-specific demographics of abusers and their victims
- The rate of return to abusers, the number of homicides when women leave, the limitations of resources, the lack of alternatives
- The escalating and repetitive nature of domestic abuse
- The effect of one incident of physical abuse, and the ability of the abuser to refer to that abuse through minor incident or threats in order to control the victim

Additionally, the prosecutor will shape the direct exam to address the specific issues in the case. Remember that jurors will be assessing the evidence from their own bias and belief system. Think about the facts of the case and what types of myths and assumptions jurors might apply to the facts. Again, frame the answers to address a broad range of victim experiences and common myths surrounding domestic violence.

Jurors who are uncomfortable accepting that abuse occurs in homes like their own may acquit because they want to believe there is an alternative explanation for behavior that could have occurred in their neighborhood. Jurors may also believe domestic violence only occurs in certain racial and socio-economic groups. Jurors are skeptical of cases that involve victims and defendants who do not fit the stereotypical profile.

Jurors will also subject the victim's statements to victim-blaming assumptions like a victim in "real" danger would leave a violent relationship. If a woman is still living

⁴² The following section has been reprinted with permission from a training manual written by Alana Bowman, Supervising Deputy in the Domestic Violence Prosecution

with her partner and is not "cooperating" with the prosecution, some jurors may determine that such an isolated incident does not constitute abuse and acquit.

Some people are skeptical about an isolated incident about domestic violence. If it is just one incident, it was probably an argument and the woman probably was at fault. But if the evidence supports multiple incidents of violence, a jury may be skeptical that the reports are accurate because a "truly" battered woman would not stay.⁴³

If women protect themselves and the abuser is injured, people are skeptical that the woman is abused because she isn't helpless, the abuse is mutual,⁴⁴ and she may even be the aggressor. Thus, a juror may believe that the woman may have provoked or "deserved" the violence. A juror may also believe that a woman who fights back is capable of protecting herself and would leave if she was really being abused.

However, if the claim is marital rape, a jury is skeptical if the abuser doesn't have injuries because if a woman were really in danger, she'd protect herself.⁴⁵

Jurors are also critical of the victim's behavior at trial. Jurors may think a woman with flat affect doesn't care enough about the case to justify a conviction. Jurors may also be critical of victims who express anger and perceive them as aggressors who probably provoked the incident. Finally, jurors are ready to believe that victims recant because the abuse really isn't serious and the case should be dismissed.

You can explain to the jury why a battered woman may be fearful to testify. Additionally, you can help the fact-finder understand confusing behavior, low affect, fear, shock, and full recantation. You can explain how certain emotional reactions in

Unit in Los Angeles, California.

⁴³ Bowman, *supra* at 243.

⁴³ Hanusa, *supra* note 4, 1.

court are normal within the context of domestic violence.

Preparation

First, relax. You are an expert in your field. Your task is not to defend your credentials or battered women. Your task is to help the jury understand the experience of battered women so they can understand the victim and the evidence at trial. This is a task you undertake every time you help a battered woman understand her experience. This is the task you undertake when people ask, "Why don't women leave? Why do they take it?" These are questions you can answer well.

Second, prepare for trial. Read over the "Expert Witness Questions" in Appendix B. Use these materials in connection with the information the prosecutor has supplied about the case. The prosecutor should tell you what type of questions to expect. At this point, there will be few surprises, if any, at trial. You are prepared.

Third, try to anticipate what type of assumptions jurors will make about the victim's behavior. Consider what types of theories the defense attorney will use to discredit the victim. Then consider what type of information will be useful for the jury. Try to incorporate that information in your answers during direct examination by the prosecution and cross-examination by the defense.

Remember that your experience with battered women creates the foundation of your expertise. Keep focused on your experiences and direct observations. You will be providing a voice for the victim that she cannot safely use in court. Your testimony is invaluable.

⁴⁵ Bowman, *supra* at 243.

