

Evidence Issues in IPV Litigation

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Myers on Evidence of Interpersonal Violence:

- Child Maltreatment, Intimate Partner Violence, Rape, Stalking, and Elder Abuse
- 5th ed. 2011. Wolters Kluwer Law & Business.

Hearsay in IPV cases

It ain't hearsay

- Why the police became involved.

Prior inconsistent statements

Recantation and prior inconsistent statements

Victim who recants for the first time at trial

- Impeach away.

Victim recanted prior to trial

- May prosecutor call victim at trial if prosecutor believes victim will stick to the recantation and exculpate defendant?

Yes, if the prosecutor believes the victim will contribute *something*

- Walker v. State, 818 A.2d 1079 (Md. 2003).
- Nature of the relationship.
- Whether a restraining order was operative.
- Names, addresses, dates.
- Time and place of injury.

But what if prosecutor is sure victim will only hurt government's case?

- May prosecutor put victim on the stand for primary purpose of impeaching with a prior inconsistent statement implicating defendant?

At trial, victim takes refuge in “I can’t remember”

Prior inconsistent statement impeachment

- State v. Cabbell, 24 A.3d 758, 772 (N.J. 2011).
- “when a witness testifies at trial inconsistent with a signed or sound-recorded statement, admissible under N.J.R.E. 803(a)(1), the Confrontation Clause is not offended by the reading or playing of the out-of-court statement to the jury provided that the defedant has the opportunity to cross-examine the witness.”

Oregon Evid. Code 803(26)

- Statement describing IPV made by the victim within 24 hours.
- Recorded electronically or in writing or made to police.
- Sufficiently reliable.

Waiver and Forfeiture of Confrontation Right

- Failure to object waives error.
- Forfeiture by wrongdoing.

Forfeiture by wrongdoing

- D commits a crime, and is awaiting trial.
- To prevent a potential witness from testifying at trial, D threatens or murders the witness.
- At trial, the prosecutor offers testimonial hearsay.
- D can forfeit both Confrontation Clause and the hearsay objections.

Render v. State, 347 S.W.3d 905, 918 (Tex. Ct. App. 2011)

- “A defendant does not forfeit the right of confrontation by merely engaging in conduct that causes the witness to be absent. Rather, to establish a forfeiture of the right, it must be shown that the defendant engaged in wrongful conduct specifically for the purpose of preventing the witness from testifying.”

Giles v. California, 554 U.S. 353 (2008)

- Court suggests forfeiture applies beyond the situation where defendant's intents to prevent testimony in court.
- Forfeiture extends to cases in which defendant intends to keep declarant from making hearsay statements the declarant would utter to get help.

If forfeiture applies, no need to assess
reliability

Rule against character evidence to convict

- Abolish the rule: Cal. Evid. Code 1109.

Impeachment by conviction

Oregon R. Evid. 609(2)

- D testifies when charged with crime against family or household member.

Uncharged misconduct evidence

- FRE 404(b)

Plan

- ID.
- Mens rea.
- Actus reus.

Two theories of plan

- Narrow—the uncharged acts are connected to the charged offense—all part of one plan.
- Broad—a series of unrelated but similar crimes.

Motive

- Broad theory of motive.
- Narrow theory of motive.

It was an accident

- The doctrine of chances

THE FAR SIDE



Tensions mount on the Lewis and Clark expedition.

Doctrine of chances

Issues under the doctrine of chances

- How many similar occurrences must there be?
- Are anonymous acts admissible?
- Do the charged and uncharged acts have to be identical?

Intent

- Intent can be established with evidence of defendant's motive or plan.

A is charged with the murder of B

- A admits she put a white powdery substance in B's brandy (arsenic), but A says, "I didn't know it was poison."
- In A's trial for murder, what is the issue?

At A's murder trial

- The prosecutor seeks to offer evidence that a week before B's death, A and B had a heated argument over money.

At A's murder trial

- The prosecutor seeks to offer evidence that on the day B died:
- A removed a bottle of arsenic from a locked basement cabinet.
- Hid the bottle in B's room.
- Gave the butler and maid the night off.

An additional way to prove intent

- Infer intent on the charged occasion from intent on uncharged occasions.

Expert testimony on the effects of IPV

- Prosecution uses of expert testimony.
- Defense uses of expert testimony when the victim of IPV is on trial for murder

Prosecution use of expert testimony

- “Why didn’t she leave?”

Cycle of violence

- People v. Brown, 33 Cal. 4th 892, 94 P.3d 574 (2004).
- Multiple episodes the norm, but not always required.
- Nothing in law suggests that “a batterer gets one free episode of domestic violence before admission of evidence to explain why a victim of domestic violence may make inconsistent statements about what occurred and why such a victim may return to the perpetrator.”

Learned helplessness

- State v. Kelly, 478 A.2d 364 (N.J. 1984).
- State v. Edwards, 60 S.W.3d 602, 613 (Mo. Ct. App. 2001)(“Victims exhibit a ‘learned helplessness’ in which repeated trauma causes the victims to learn that they have no control and cannot escape, and therefore, they stop trying to escape from the situation, even when an opportunity to do so is present.”).

Recantation and minimization

- People v. Brown, 33 Cal. 4th 892, 94 P.3d 574 (2004).

Daubert/Frye and expert testimony on IPV

- Generally accepted re self-defense.
- But see *People v. Williams*, 773 N.E.2d 1238 (Ill. Ct. App. 2002)(there was no evidence of the scientific acceptance of the cycle of violence).

When the victim of IPV kills her batterer

- Self-defense

Continuum of confrontation: from imminent attack to sleeping batterers

Courts generally reject expert testimony in “sleeping batterer” cases

Battered Woman Syndrome

- “Battered Woman’s Syndrome provides a clinical explanation of the psychological mindset, and behavior, of a woman who has been physically or mentally abused over a period of time by a domestic partner.”
- State v. Stewart, 2011 WL 5986392 (W. Va. 2011).

How many incidents of abuse needed to trigger expert testimony?

- People v. Brown, 33 Cal. 4th 892, 94 P.3d 574 (2004).

Expert testimony—self-defense: substantive evidence

- Objective reasonableness of a woman's belief.
- Subjective belief in the need for self-defense.

Expert testimony—self-defense: credibility

- State v. Edwards, 60 S.W.3d 602 (Mo. Ct. App. 2001).
- Marley v. State, 747 N.E.2d 1123 (Ind. 2001).

Self-defense: People v. Hartman, 926 N.Y.S.2d 746 (A.D. 2011)

- Brenda approached her husband from behind, stabbing him in the back as he was unarmed and on his hands and knees looking for something on the floor. Brenda testified she only intended to “poke” him. The trial judge refused to allow expert testimony on BWS.
- “the evidence at trial, including defendant’s own testimony, undermined her claim of self-defense.”

State v. Stewart, 2011 WL 5986392 (W. Va. 2011)

- Rhonda shot her husband of 38 years in the head as he lay in a hospital bed. Rhonda was charged with first degree murder. Rhonda said it was an accident. The trial judge rejected lay and expert testimony that Rhonda had been beaten by her husband for decades.
- Note: Rhonda did not claim self-defense.

State v. Stewart

- “evidence that a defendant meets the profile of the [BWS] is admissible to explain to the jury how domestic abuse may affect a defendant’s reasoning, beliefs, perceptions, or behavior. This evidence is relevant because it may negate an essential element of the crime charged, such as premeditation, malice or intent. If premeditation is negated, then the defendant may only be convicted of second degree murder. If malice is negated, then the defendant may only be convicted of manslaughter.”

State v. Stewart

- Expert testimony on BWS is admissible in non-self-defense cases.

Justice Davis, dissenting

- “The trial judge found that, because Mrs. Stewart’s defense alleged an accidental shooting, evidence of the [BWS] had no relevancy. The trial court’s conclusion is supported by every court in the country that recognizes the [BWS]. All courts that have judicially recognized the [BWS] allow a defendant to present expert testimony on the issue when self-defense has been asserted.”

Justice Davis, dissenting

- “Absent a statute to the contrary, no court in the country has allowed a defendant to introduce evidence of the [BWS] when she alleges only that the crime was an accident.”

Psychological abuse may warrant expert testimony

- Mobley v. State, 505 S.E.2d 722 (Ga. 1998).

Imperfect self-defense

- People v. Jaspar, 98 Cal. App. 4th 99, 119 Cal. Rptr. 2d 470 (2002).

Duress and the effects of battering

Does raising a claim of BWS place her mental state at issue?

- People v. Gonzales, 253 P.3d 185 (Cal. 2011).
- Veronica was the aunt of the 4-year-old victim, who was living with Veronica and Ivan.
- The 4-year-old was tortured and murdered by Ivan and Veronica.
- Charged with murder, Veronica raised BWS to explain why she did not protect the child from Ivan.
- Veronica presented expert testimony on BWS. Veronica's expert had examined her.

People v. Gonzales

- The issue: Because Veronica had experts who had evaluated her, was the prosecution entitled to have Veronica evaluated by its own experts?
- “It is settled that a defendant who makes an affirmative showing of his or her mental condition by way of expert testimony waives his or her Fifth and Sixth Amendment rights to object to examination by a prosecution expert.” p. 214.

Commonwealth v. Adkinson, 954 N.E.2d 564 (Mass. Ct. App. 2011)

- BWS can render a person incompetent to stand trial.

State v. Hess, 23 A.3d 373 (N.J. 2011)

- Evidence of IPV at sentencing.
- Marie pled guilty to manslaughter for killing her husband. Defense counsel provided ineffective assistance of counsel at sentencing by failing to provide evidence of the husband's violence.

