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The Admissibility of Expert Testimony on Battered Woman Syndrome in Battered Women's Self-Defense Cases in Louisiana

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THE ADMISSIBILITY OF EXPERT TESTIMONY ON BATTERED WOMAN SYNDROME IN BATTERED WOMEN'S SELF-DEFENSE CASES IN LOUISIANA

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"[T]he general aim of law is to serve human justice rather than, solely, to achieve a logically perfect application of abstract rules."
The Honorable Albert Tate[1]

Introduction

Whatever the particular area of Louisiana law, it is never surprising to come across an opinion authored by the Honorable Albert Tate, whether it be a concurring, dissenting or majority opinion, recognizing the injustice of a particular rule with a view toward its future improvement. So it was that, during the course of preparing for the trial of a client charged with the murder of her husband, this writer came across several opinions by Judge Tate critical of Louisiana jurisprudence limiting the admissibility of expert testimony on the defendant's mental condition except in connection with an insanity plea. The Judge's comments foreshadow both the problems and the solutions to our "stubborn adherence" to rules restricting the admissibility of expert psychiatric[2] testimony in the context of battered women's self-defense cases. What follows is a discussion of expert psychiatric testimony on battered woman syndrome and its admissibility in light of this Louisiana jurisprudence.

Battered Woman Syndrome Defined

During Judge Tate's tenure on the Louisiana Supreme Court, the Court was never presented with the precise issue of the admissibility of expert psychiatric testimony concerning battered women. This is not unusual, as the field of expert study concerning battered women is of

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1. Tate, the "New" Judicial Solution: Occasions for and Limits to Judicial Creativity, 54 Tul. L. Rev. 877, 912 (1980).

2. As used in this article, this term is intended to include expert psychological testimony as well.

fairly recent vintage.[3] Undoubtedly, however, some of the defendants whose cases were considered by the court were battered women.[4]

A battered woman is defined as:

> a woman who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights. Battered women include wives or women in any form of intimate relationships with men. Furthermore, in order to be classified as a battered woman, the couple must go through the battering cycle at least twice.[5]

Not surprisingly, the battered woman often experiences significant psychological reactions to living in a violent relationship. These reactions are commonly referred to as battered woman syndrome.[6] An understanding of these powerful psychological forces is a necessary prerequisite to defeating the many myths surrounding battered women[7], to answering the age-old question, "why do these women stay?" and to explaining how battered women who kill may have acted in self-defense.

One significant psychological reaction observed in battered women is what is termed "learned helplessness." As a result of repeated, non-contingent violence from the batterer, the battered woman becomes psychologically paralyzed with respect to her relationship with the batterer.[8] Battered women suffering from learned helplessness perceive that

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3. See generally L. Walker, The Battered Woman (1979) [hereinafter Walker].

4. See, e.g., State v. Jones, 359 So. 2d 95 (La. 1978) (Tate, J.), cert. denied, 439 U. S. 1049, 99 S. Ct. 727 (1978) (defendant convicted of killing her husband claimed she was neurotic and prone to hysteria); State v. Trombino, 352 So. 2d 682 (La. 1977) (Tate, J.) (defendant convicted of killing her husband claimed self-defense on the basis of his having severely beaten her prior to the killing).

5. Walker, supra note 3, at XV.

6. See generally L. Walker, The Battered Woman Syndrome (1984) [hereinafter Syndrome]; Walker, supra note 3; D. Martin, Battered Wives (1976) [hereinafter Martin].

7. These myths include:

(1) battered women are masochistic;
(2) battered women are crazy;
(3) religious beliefs will prevent battering;
(4) battered women are uneducated and have few job skills;
(5) drinking causes battering behavior;
(6) police can protect the battered woman;
(7) long-standing battering relationships can change for the better;
(8) battered women deserve to get beaten;
(9) battered women can always leave home.

Walker, supra note 3, at 18-31.

8. Syndrome, supra note 6, at 86-87; Walker, supra note 3, at 43. The psychological theory of learned helplessness was first developed by experimental psychologist Martin Seligman based on his work with dogs in cages who were administered random electrical

they cannot control the batterer's violence; as that perception becomes reality, they become passive, submissive and helpless.[9] This helplessness has a debilitating effect on the battered woman's problem solving ability. She becomes blind to her options and expects battering as a way of life over which she has no influence.[10] While the battered woman takes responsibility for that which she cannot control, the batterer's behavior, she is unable to take responsibility for that which she could control, her ability to flee the relationship.[11] In order to escape the battering relationship, the battered woman must overcome her learned helplessness survival techniques by becoming angry rather than depressed and self-blaming, active rather than passive, and more realistic about the likelihood of the relationship continuing on its aversive course rather than improving.[12] Unfortunately, most battered women do not have access to the expert assistance needed to reverse the trend toward helplessness and, thus, remain in the battering relationship.

Another powerful psychological force in the battering relationship is what is termed the cycle theory of violence.[13] Battered women are not battered all the time by their batterers. The battering is cyclical in nature and consists of three distinct phases: (1) the tension building phase, (2) the acute battering incident, and (3) the loving contrition phase.[14] During the first phase, tension builds as the result of what the woman views as relatively minor battering incidents on the part of the batterer, such as name-calling, other intentionally mean behaviors, and/or physical abuse.[15] The woman attempts to placate the batterer in the

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shocks. The dogs quickly learned that no matter what voluntary response they made, they could not control the shock. They became compliant, passive and submissive. Eventually, the dogs' perception of their own helplessness became so strong that they would not even leave their cages when the door was left open and they were shown the way out. Once the dogs were taught how to respond voluntarily again, their helplessness disappeared. Id. at 45-46.

9. Walker, supra note 3, at 47.

10. Id. at 48.

11. Waits, The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions, 60 Wash. L. Rev. 267, 282-85 (1985) [hereinafter Waits].

> Thus, a destructive psychological spiral is established: the beatings lead to lowered self-esteem and learned helplessness, which in turn make her unable to escape; her inability to escape makes her feel even more inadequate and helpless and also leaves her in a relationship which will lead to further beatings, which will further decrease her self-esteem.

Id. at 283.

12. Syndrome, supra note 6, at 87.

13. Syndrome, supra note 6, at 95.

14. Id. Dr. Walker identified this tension reduction theory, see Walker, supra note 3, at 55, and tested it as a part of a National Institute of Mental Health project involving the study of over 400 battered women. Syndrome, supra note 6, at 95. Thus, it is properly referred to as the Walker Cycle Theory of Violence. Id.

15. Syndrome, supra note 6, at 95.

hope of preventing further escalation of his anger and preventing him from hurting her more. During this phase, the woman may have occasional control over the batterer.[16] However, her efforts to reduce the building tension are at most only momentarily successful, thus reinforcing her perception of helplessness.[17]

The second phase, the acute battering incident, is the inevitable discharge of the tensions that have built up during phase one.[18] The acute battering incident is usually triggered by an outside event or by the internal state of the batterer.[19] The phase is characterized by total lack of control on the part of the batterer and the battered woman. During this period, which may last anywhere from two to twenty-four hours, the battered woman may suffer serious physical and psychological injuries. In most instances, the battered woman does not resist the batterer. She usually believes that if she does try to resist, her attacker will become more violent. Instead, the woman will try to distance herself from the actual attack through disassociation, almost as if she were watching her disembodied self being thrown against a wall.[20] The violence at this stage is acute, even when compared to the tension-building incidents occurring in phase one. If the police are called at all, it will be at this stage.[21]

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16. Id.; Walker, supra note 3, at 56. The battered woman often believes that she can control the batterer by using general anger reduction techniques. However, as Dr. Walker explains:

> Women who have been battered over a period of time know that these minor battering incidents will only escalate. However, using the same psychological defense, they deny this knowledge to help themselves cope. They also deny their terror of the inevitable second phase by making themselves believe they have some control over the batterer's behavior. During the initial stages of this first phase, they indeed do have some limited control. As the tension builds, however, the control is rapidly lost. Each time a minor battering incident occurs, there are residual tension-building effects. The battered woman's anger steadily increases, even though she may not recognize it or express it, and any control she may have over the situation diminishes. The batterer, spurred on by her apparent passive acceptance of his abusive behavior, does not try to control himself.

Walker, supra note 3, at 57.

17.

> For her part, the abused woman continues in her efforts to satisfy [the batterer's] increasingly irrational and inconsistent demands. Naturally, she feels tremendous anger at his actions and her growing inability to control them . . . . She is likely to withdraw, hoping thereby to avoid an explosion, but this only causes him to bear down on her even harder.

Waits, supra note 11, at 293.

18. Syndrome, supra note 6, at 96.

19. Walker, supra note 3, at 60.

20. Id. at 62.

21. Syndrome, supra note 6, at 96; Walker, supra note 3, at 60-65. Only since 1985

When the batterer stops (possibly because of exhaustion or emotional depletion), the acute battering incident ends, usually resulting in a sharp physiological reduction in tension.[22] Thus begins phase three of the battering cycle, the loving contrition phase. This phase is characterized by extremely loving, kind, and contrite behavior on the part of the batterer.[23] The batterer expresses great sorrow for what he has done and promises that he will never again hurt the woman. The batterer can be quite charming during this period, bestowing generous gifts and attention on the battered woman.[24] This third phase provides positive reinforcement for the woman to remain in the relationship, even if the phase is simply characterized by an absence of tension or violence.[25] Before long, however, the tension building recurs, and the battering cycle begins anew. Significantly, both the frequency and the severity of the abuse escalates over time.[26]

The battered woman often believes that the batterer will eventually kill her regardless of whether she leaves or stays.[27] Thus, she may decide to stay, either hoping he will change, or giving up hope altogether.[28] Even if she does leave, the batterer will usually succeed in manipulating her to return.[29]

Battered Woman Syndrome and the Plea of Self-Defense

The doctrine of self-defense traditionally is applied to situations involving persons of equal force. Male perceptions of danger, immediacy and harm typically define what constitutes a reasonable physical re-

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has the Louisiana legislature mandated that the police arrest the batterer when probable cause exists to believe that an aggravated or second degree battery has been committed. Domestic Abuse Assistance, La. R.S. 46:2140 (Supp. 1987).

22. Syndrome, supra note 6, at 96.

23. Walker, supra note 3, at 65.

24. Id. at 66-67.

25. Syndrome, supra note 6, at 96.

26. Id. at 43. As the severity of the abuse increases, so does the risk of death. Factors identified as creating a higher risk of homicide include:

(1) the presence of children in the home who are somehow involved in the violence either by protecting their mother or as victims or their father's violence as well;
(2) a high occurrence of threats to kill made by the batterer;
(3) the presence of weapons in the home;
(4) threats of retaliation by the batterer;
(5) excessive jealousy on the part of the batterer;
(6) alcohol and drug abuse.

Id. at 41-43.

27. Walker, supra note 3, at 75, 105. See also Martin, supra note 6, at 76-79.

28. Walker, supra note 3, at 49-51.

29. Id. at 66-67.

sponse.[30] The battered woman's use of deadly force very likely will not conform to the traditional concept of self-defense. Battered women may perceive danger and imminence differently from men. Because the attacker is someone with whom they have an intimate relationship and a pattern of violence, they are particularly attuned to signs of danger.[31] The key to women's self-defense, then, lies in the definition of what perceptions are reasonable for a female victim of violence.[32]

Louisiana law on self-defense requires that the person attacked must actually believe that he is in imminent danger of losing his life or or receiving serious personal injury and that the belief is a reasonable one.[33]

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30. Crocker, The Meaning of Equality for Battered Women Who Kill Men in Self-Defense, 8 Harv. Women's L.J. 121, 127 (1985) [hereinafter Crocker]. See also Comment, Self-Defense: Battered Woman Syndrome On Trial, 20 Cal. W.L. Rev. 485 (1984) [hereinafter Comment]; Schneider, Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense, 15 Harv. C.R.-C.L. L. Rev. 623 (1980) [hereinafter Schneider].

In Schneider & Jordan, Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault, in Women's Self-Defense Cases 1, 18 (E. Bochnak ed. 1981) [hereinafter Schneider & Jordan], the authors detail the extent of the sex bias permeating the doctrine of self-defense:

> The law assumes that both the attacker and the victim have approximately equal capacities. While a man is assumed to have the ability to perceive danger accurately and respond appropriately, a woman is viewed as responding hysterically and inappropriately to physical threat. However, certain factors relevant to women's experiences are not taken into account. For example, women are less likely to have had training or experience in hand-to-hand fighting. Socially imposed proscriptions inhibit their ability to fend off an attacker. The fact that women generally are of slighter build also gives a male assailant an advantage. All of these conditions will have an impact on the reasonableness of a woman's perception of an imminent and lethal threat to her life such as would justify the use of deadly force. These factors, however, have not usually been considered during the trial.

31. Bochnak, Case Preparation and Development, in Women's Self-Defense Cases 41, 44-45 (E. Bochnak ed. 1981) [hereinafter Bochnak]:

> [W]hen the defendant is a battered woman, the very intimacy of the relationship explains the reasonableness of her perception of danger.
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> The battered woman learns to recognize the small signs that precede periods of escalated violence. She learns to distinguish subtle changes in tone of voice, facial expression, and levels of danger. She is in a position to know, perhaps with greater certainty than someone attacked by a stranger, that the batterer's threat is real and will be acted upon.

Dr. Walker reports that when a battered woman does finally fight back and uses deadly force, she typically does so because she perceived the final violent assault as somehow different from the ones before it—possibly due to a subtle change in the batterer's physical or mental state—to the extent that she is convinced that this time the batterer really is going to kill her. Walker, supra note 3, at 220.

32. See Walker, Thyfault and Browne, Beyond the Juror's Ken: Battered Women, 7 Vt. L. Rev. 1, 3-4 (1982).

33. La. R.S. 14:20(1) (1986) provides that a homicide is justifiable

> [w]hen committed in self-defense by one who reasonably believes that he is in

Factors that may be considered in determining the reasonableness of the person's belief include: the excitement and confusion of the occasion, the possibility of avoiding the necessity of killing by using force or violence less than killing, the person's knowledge of his assailant's bad character, and the possibility of avoiding the necessity of taking human life by retreat.[34]

Due to the non-traditional nature of the battered woman's use of deadly force, the reasonableness of her perceptions of danger and imminence may not be readily apparent. Expert testimony is often necessary to explain the complexity of the violent relationship and the effect the violence may have on the battered woman's perceptions of danger.[35] Whereas the uninformed juror may not see any threat or impending danger, expert witnesses would help to elucidate how a battering relationship generates different, but entirely reasonable, perceptions of dan-

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imminent danger of losing his life or receiving great bodily harm and that the killing is necessary to save himself from that danger.

34. Reporter's Comments to Subdivision (1) of La. R.S. 14:20 (1986). Evidence of the deceased's dangerous character or threats against the battered woman is relevant and admissible:

1) to show the battered woman's reasonable apprehension of danger which would justify her conduct; and

2) to help determine who was the aggressor in the conflict. See, e.g., State v. Lynch, 436 So. 2d 567 (La. 1983); State v. Savoy, 418 So. 2d 547 (La. 1982); State v. McMillan, 64 So. 2d 856 (La. 1953). However, the admissibility of such evidence is premised upon the existence of appreciable evidence in the record tending to establish an overt act or hostile demonstration. La. R.S. 15:482 (1981). The term "overt act" refers to any act of the deceased which manifests to the mind of a reasonable person a present intention on his part to kill or do great bodily harm to the accused. State v. Edwards, 420 So. 2d 663, 669 (La. 1982); State v. Williams, 410 So. 2d 217, 221 (La. 1982), State v. Lee, 331 So. 2d 455 (La. 1976). Expert psychiatric testimony on battered woman syndrome would likewise be relevant in making the latter determination which, in many cases, is more appropriately made in advance of trial. See State v. Verrett, 419 So. 2d 455, 457 n.1 (La. 1982) (Lemmon, J., concurring).

The Proposed Louisiana Code of Evidence (Recommendation of the Louisiana State Law Institute, West 1986 Special Pamphlet), Rule 404.A.(2), would eliminate the "overt act" requirement and substitute in its place a requirement that admissibility of a pertinent trait of character of the victim be premised upon the "introduction of appreciable other evidence tending to establish a defense." More importantly, the proposed code would limit this prerequisite to evidence of the victim's character offered as tending to prove that the victim acted or did not act in a particular way on the occasion in question. Thus, it would be inapplicable to evidence of the character and background of the victim and the victim's specific acts of violence toward the defendant offered to show the reasonableness of the defendant's apprehension of serious bodily harm and the defendant's state of mind. Comments to Paragraph (A), comment (g).

35. Comment, supra note 30, at 490. This is not to suggest that the use of expert witnesses is appropriate in every case. In some instances, the defendant may be able to convey her story without the assistance of expert testimony. Crocker, supra note 30, at 132 n.56.

ger, imminence, and necessary force.[36] Expert testimony may also be used to defeat the myths that may cloud a juror's judgment by explaining why the woman stayed in the relationship, why she did not seek help from police or friends, or why she feared increased violence.[37] For example, expert testimony can be used to counter jurors' assumptions that the defendant stayed in the abusive relationship and did not seek outside help because the abuse was not serious or because she enjoyed it.[38] Expert testimony can also be used to counter jurors' assumptions that the battered woman unreasonably feared repeated or escalated abuse.[39]

The Louisiana Rule on Admissibility of Expert Psychiatric Testimony

Louisiana jurisprudence has long held that evidence of mental condition or defect is inadmissible in the absence of a defense plea of "not guilty and not guilty by reason of insanity."[40] Additionally, a mental defect or disorder short of insanity (typically referred to as diminished responsibility) cannot serve to negate specific intent and reduce the degree of the crime.[41] The Louisiana Supreme Court has held that due process is not offended by the Louisiana rule that a defendant cannot rebut

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36. Crocker, supra note 30, at 132.

37. Id.

38. Id. at 133.

39. Id. Further:

> More generally, expert testimony can explain that the battered woman's response to the danger did not develop and cannot be understood in a vacuum. Rather, her response was molded by the passivity in which women have been trained. A battered woman who does not leave her husband, seek help, or fight back is behaving according to societal expectations. The cultural perception of marriage as a lifelong bond and commitment instructs a woman to stay and work to improve—not abandon—the marriage. By explaining why battered women stay, why they do not call for help and why they do not fight back, and by relating these acts specifically to the defendant, expert testimony on battered woman syndrome allows the jury to judge the defendant on all the facts of the case and more accurately determine her claim of self-defense.

Id. at 135.

40. State v. Edwards, 420 So. 2d 663, 678 (La. 1982); State v. Wade, 375 So. 2d 97, 98 (La. 1979), cert. denied, 445 U.S. 971, 100 S. Ct. 1665 (1980); State v. LeCompte, 371 So. 2d 239, 243 (La. 1979); State v. Jones, 359 So. 2d 95, 98 (La. 1978); State v. Rideau, 193 So. 2d 264, 271 (La. 1967).

Louisiana Code of Criminal Procedure article 651 provides:

> When a defendant is tried upon a plea of "not guilty", evidence of insanity or mental defect at the time of the offense shall not be admissible.

The Official Revision Comment states that the article is a codification of the Louisiana jurisprudence as to when the defense of insanity at the time of the offense is available.

41. State v. Edwards, 420 So. 2d at 678; State v. Murray, 375 So. 2d 80, 87 (La. 1979); State v. Andrews, 369 So. 2d 1049, 1054 (La. 1979); State v. Weber, 364 So. 2d 952, 956 (La. 1978); State v. James, 241 La. 233, 240, 128 So. 2d 21, 24 (La. 1961).

evidence of specific intent by presentation of psychiatric testimony without pleading not guilty by reason of insanity.[42]

Judge Tate expressed concern that the Louisiana rule may arbitrarily deprive the defendant of relevant testimony which might mitigate his degree of criminal guilt, thus unconstitutionally relieving the State of its constitutional burden to prove guilt of every element of the crime beyond a reasonable doubt.[43] He urged reconsideration of the court's "stubborn adherence" to the rule that, in a trial on the merits, evidence of mental disease or disability is not admissible except in connection with a plea of legal insanity.[44] The Judge did not find intellectually satisfying, however forcefully practical, the arguments that the court has never historically considered this type of evidence relevant and that "it

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42. State v. LeCompte, 371 So. 2d at 243, 245. Each of the cases presenting this issue to the court have done so in the context of the admissibility of expert psychiatric testimony to negate the specific intent element of the State's case. See, e.g. State v. Edwards, 420 So. 2d at 677 (expert testimony on battered woman syndrome offered to address whether defendant had the mental capacity to formulate a specific intent to kill in a non-self-defense situation); State v. Wade, 375 So. 2d at 98 (psychiatric testimony offered solely to prove a defense of lack of mental capacity to form specific intent); State v. LeCompte, 371 So. 2d at 246 (psychiatric testimony offered to corroborate defense that, due to mental disease or defect, defendant had no inclination or desire to have sexual intercourse with the victims); State v. Jones, 359 So. 2d at 96 (medical testimony introduced to prove that defendant was neurotic and subject to hysteria and, because of this mental defect, lacked the requisite specific intent to kill her husband).

However, in two Louisiana Supreme Court cases where psychiatric evidence was offered as to whether the defendant had the psychological capacity to commit a particular crime, the court did not indicate in any way that the admission of the testimony violated either of the above rules. State v. Dawson, 392 So. 2d 445 (La. 1980) (defendant charged with aggravated rape of thirteen year old girl offered psychiatric testimony that defendant did not have the capacity to obtain sexual gratifications through the use of force, violence or threats); State v. Mallett, 357 So. 2d 1105 (La. 1978), cert. denied, 439 U.S. 1074, 99 S. Ct. 848 (1979) (defendant charged with crime of contributing to delinquency of a juvenile offered psychiatric testimony that he did not have the psychological capacity to commit the crime charged).

43. State v. LeCompte, 371 So. 2d at 246 (Tate, J., concurring). See also, State v. Wade, 375 So. 2d 97, 98 (La. 1979) (Tate, J.), cert. denied, 445 U.S. 971, 100 S. Ct. 1665 (1980). State v. Jones, 359 So. 2d at 98 (Tate, J.). While the Judge's concern was expressed in the context of the admissibility of evidence to negate the specific intent element which the State must prove, his comments are likewise applicable in the context of the admissibility of evidence to support a plea of self-defense, since the State has the entire and affirmative burden of proving beyond a reasonable doubt that a homicide was not perpetrated in self-defense. State v. Lynch, 436 So. 2d 567, 569 (La. 1983); State v. Savoy, 418 So. 2d 547, 550 (La. 1982).

44. The Judge noted that the vast majority of American jurisdictions have adopted the doctrine of diminished responsibility, whereby evidence of a mental condition (although short of legal insanity) is relevant and admissible for the limited purpose of proving that the defendant did not have the requisite specific intent to commit the crime charged. State v. LeCompte, 371 So. 2d at 246 (Tate, J., concurring); State v. Jones, 359 So. 2d at 98.

would unnecessarily complicate trials in clear cases of guilt through the introduction of frivolous defenses based upon the vagaries of psychiatric diagnoses."[45]

The Judge's call for the liberalization of the rule on admissibility of expert psychiatric testimony is particularly instructive in the context of battered women's self-defense cases. Significantly, the Louisiana rule has been invoked to prohibit the admissibility of expert testimony on battered woman syndrome in battered women's self-defense cases when the defendant has failed to enter an insanity plea.[46] In *State v. Edwards*, the defendant was charged with the second degree murder of her husband and was convicted of manslaughter.[47] At trial, the defendant attempted to offer expert psychiatric testimony for the purpose of giving an opinion as to whether or not the defendant had the mental capacity to formulate a specific intent to kill in a non-self-defense situation.[48] The trial court disallowed the testimony on the grounds that the testimony was irrelevant, that such psychiatric testimony invaded the fact finding province of the jury and that the defense had failed to give the required notice of intent to introduce such expert testimony.[49]

On appeal, the Louisiana Supreme Court upheld the district court ruling, relying upon the longstanding jurisprudence.[50] The court reasoned,

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45. State v. LeCompte, 371 So. 2d at 246 (Tate, J., concurring).

46. State v. Edwards, 420 So. 2d 663 (La. 1982); State v. Necaise, 466 So. 2d 660 (La. App. 5th Cir. 1985); State v. Burton, 464 So. 2d 421 (La. App. 1st Cir.), writ denied, 468 So. 2d 570 (1985).

47. 420 So. 2d at 667.

48. Id. at 677.

49. Id. at 678. La. Code Crim. P. art. 726 provides:

> A. If a defendant intends to introduce testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether he had the mental state required for the offense charged, he shall not later than ten days prior to trial or such reasonable time as the court may permit, notify the district attorney in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other orders as may be appropriate.
>
> B. If there is a failure to give notice as required by Subsection A of this Article, the court may exclude the testimony of any witness offered by the defendant on the issue of mental condition.

This provision was taken in large part from Fed. R. Crim. P. 12.2, requiring notice of insanity defense or expert testimony of defendant's mental condition. However, Rule 12.2(b) was amended in 1983 to broaden the scope of the notice requirement to include expert testimony relating to any "mental condition of the defendant bearing upon the issue of his guilt," rather than simply expert testimony on whether the defendant had the mental state required for the crime charged. Absent similarly broad language in article 726, as well as article 651, those provisions should be irrelevant to the determination of the admissibility of expert psychiatric testimony on battered woman syndrome in a battered woman's self-defense case.

50. 420 So. 2d at 678.

as it had done previously,[51] that because an expert witness must state the facts upon which his opinion is based, the testimony of an expert in psychiatry concerning the defendant's lack of specific intent would necessarily include testimony of a mental defect or condition.[52] Such testimony, the court held, would be precluded by defendant's not guilty plea.[53]

The Louisiana courts' adherence to the rules governing admissibility of expert psychiatric testimony, however appropriate in the contest of testimony negating specific intent in order to reduce the degree of the crime,[54] should not apply when expert psychiatric testimony is offered to explain the reasonableness of the defendant's perception of danger and imminence in the context of a self-defense plea.[55] As discussed in the previous sections, the thrust of the self-defense plea of a defendant suffering from battered woman syndrome who kills her batterer is that she was acting entirely reasonably (not insanely or with a diminished capacity) when she used deadly force.[56] Previous attempts to offer expert

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51. State v. Jones 359 So. 2d 95 (La. 1978) (Tate, J.).

52. 420 So. 2d at 678.

53. Id.; La. Code Crim. P. art. 651.

54. Judge Tate, of course, would have supported abolition of the rule even in this context in order to allow the admission of evidence of a mental condition short of insanity to prove that the defendant did or did not have a state of mind which is an element of the offense charged.

55. Florida jurisprudence, like Louisiana jurisprudence, prohibits the admissibility of testimony regarding the mental state of a defendant in the absence of a plea of not guilty by reason of insanity, and does not recognize the doctrine of diminished capacity. However, the Florida courts, when presented with the issue in Hawthorne v. State, 408 So. 2d 801, 806-07 (Fla. App.), rev. denied, 415 So. 2d 1361 (Fla. 1982), recognized the inapplicability of the above rules to the battered woman's offer of expert testimony in the self-defense context, reasoning that

> a defective mental state on the part of the accused is not offered as a defense as such. Rather, the specific defense is self-defense which requires a showing that the accused reasonably believed it was necessary to use deadly force to prevent imminent death or great bodily harm to herself or her children. The expert testimony would have been offered in order to aid the jury in interpreting the surrounding circumstances as they affected the reasonableness of her belief. The factor upon which the expert testimony would be offered was secondary to the defense asserted. Appellant did not seek to show through the expert testimony that the mental and physical mistreatment of her affected her mental state so that she could not be responsible for her actions; rather, the testimony would be offered to show that because she suffered from the syndrome, it was reasonable for her to have remained in the home and, at the pertinent time, to have believed that her life and the lives of her children were in imminent danger. It is precisely because a jury would not understand why appellant would remain in the environment that the expert testimony would have aided them in evaluating the case.

56. Thus, like the defendants in *Mallett*, 357 So. 2d 1105, and *Dawson*, 392 So. 2d

testimony on battered woman syndrome have been understood as, in effect, attempts to assert a diminished responsibility defense.[57] This interpretation of the purpose of the expert testimony is clearly incorrect when the battered woman defendant pleads self-defense and offers expert testimony to explain the reasonableness of her actions.[58] Her responsibility is no more "diminished" than the male who uses deadly force in a barroom brawl based on his reasonable belief that he is in imminent danger of receiving great bodily harm; like the male, she is justified in acting. The difference is that the circumstances surrounding the battered woman's use of deadly force do not fit the "traditional" self-defense situation and, therefore, may require expert testimony to explain what is otherwise beyond the knowledge of ordinary citizens.[59] She should

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445, discussed in supra note 42, her defense is that she is normal, not abnormal. Like the defendants in those cases, the battered woman should be allowed to present expert testimony to this effect without entering the obviously inconsistent insanity plea.

57. See State v. Edwards, 420 So. 2d at 678; State v. Necaise, 466 So. 2d at 665. See also State v. Jones, 359 So. 2d at 98. For instance, in *Necaise*, the court noted:

> We believe that allowing testimony which would attempt to prove the defendant a victim of "battered women syndrome" and which would seek to establish her "state of mind" at the time of the shooting, absent a plea of "not guilty and not guilty by reason of insanity", would be, in effect, condoning the concept of "partial responsibility"—the allowing of proof of mental derangement short of insanity as evidence of lack of deliberate or premeditated design. The concept of partial or impaired responsibility has been rejected in this State in favor of an "all or nothing" (i.e., sane or insane) approach.

466 So. 2d at 665 (footnote omitted).

It is to be noted that often this understanding (or misunderstanding) originates with defense counsel who has offered the expert testimony for the specific purpose of negating the requisite specific intent.

58. Nor is it appropriate to label battered woman syndrome as a defense itself, somehow entitling the battered woman to a unique right to defend herself. See, e.g., State v. Burton, 464 So. 2d at 428, where the court incorrectly concluded that, "[s]uccinctly stated, defendant attempts to establish the defense that one who is a victim of family abuse is justified in killing the abuser." The point is not that battered women have more of a right to use deadly force, but that they have the *same* right to act in self-defense, a right effectively denied them if they are not allowed the opportunity to present expert testimony to counter the ordinary person's misconceptions with respect to their circumstances.

59. La. R.S. 15:464 (1981) provides: "On questions involving a knowledge obtained only by means of a special training or experience the opinions of persons having such special knowledge are admissible as expert testimony." Courts in other jurisdictions have ruled that an understanding of the battered woman's self-defense claim is beyond the ken of the average juror. See, e.g., Smith v. State, 247 Ga. 612, 277 S.E.2d 678 (1981); Ibn-Tamas v. United States, 407 F.2d 626 (D.C. 1979). See also Comment, The Admissibility of Expert Testimony on Battered Wife Syndrome: An Evidentiary Analysis, 77 Nw. U.L. Rev. 348 (1982).

Article 702 of the Proposed Louisiana Code of Evidence (Recommendation of the Louisiana State Law Institute, West 1986 Special Pamphlet), would allow for the admissibility of 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."

not be required to make this showing in the context of an insanity plea.

Conclusion

Expert psychiatric testimony on battered woman syndrome should be admissible in support of the plea of self-defense of a battered woman who kills her batterer in the absence of a plea of not guilty by reason of insanity. The purpose of the testimony is to explain the reasonableness of the battered woman's perceptions of danger and imminence at the time of the killing. The testimony is not offered for the purpose of establishing that the battered woman suffered from a defective mental state. Thus, the Louisiana rule that evidence of mental defect is inadmissible absent an insanity plea and that a mental defect short of insanity cannot negate intent should not be invoked to prevent the admissibility of expert psychiatric testimony on battered woman syndrome in battered women's self-defense cases.