

TESTIFYING ABOUT SELF-DEFENSE AND PREDOMINANT AGGRESSORS¹

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I. Introduction

A domestic violence advocate may be called upon to testify in court as an expert witness on the dynamics of domestic violence in cases involving the issues of self-defense and/or predominant aggressors. These issues are most likely to arise in a criminal case where a domestic violence victim has been charged with a crime. Less frequently, they may arise in custody and protection order hearings.

Batterers are increasingly adept at manipulating the criminal justice system to further control their partners. Batterers learn what to say and how to act in front of law enforcement officers so that their partners will be arrested instead of them. When law enforcement officers conduct insufficient investigations and/or allow their personal attitudes to interfere with their professional judgment, erroneous arrests can be made.

An expert witness may be necessary to sort out the confusion. Expert witness testimony can help the judge or jury understand the dynamics of domestic violence so that they can make informed, appropriate decisions in cases involving a victim's use of self-defense or in cases where there is a question as to which party was the predominant aggressor.

II. Self-Defense

A. *Introduction*

Domestic violence survivors may find themselves charged with criminal offenses as the result of a domestic violence incident in which they were the victim. They face potential criminal sanctions such as

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incarceration, fines and the stigma and consequences of having a criminal record.

It is human nature to try to defend oneself against a physical attack. Therefore, the law recognizes that a person is legally justified in using physical force against another within certain parameters. The law varies as to what constitutes justifiable self-defense from jurisdiction to jurisdiction. Expert witnesses should understand the dynamics of domestic violence as well as the legal justifications for the use of force as self-defense.

B. General Self-Defense Doctrine

These are general self-defense concepts that are recognized in most jurisdictions:

1. An individual is justified in using physical force against another only when she reasonably believes that force is immediately necessary to protect herself from the imminent use of unlawful force by another.
2. An individual is justified in using deadly force against another only when she reasonably believes that deadly force is immediately necessary to protect herself from the imminent use of deadly force by another.

It is important to understand the legal meaning of the terms used above:

1. "Physical force"-- Force used upon or directed toward another, including confinement. Most jurisdictions allow only the amount of force reasonably necessary to prevent or stop the infliction of bodily harm (and no more).
2. "Reasonably believes"—Most jurisdictions use an "objective" standard of reasonableness. This means that an average, reasonable person must have "reasonably believed" she was in danger (it does not matter that the victim actually believed herself to be in danger if that belief was unreasonable)

3. "Immediately necessary"—Most jurisdictions require that the force be necessary to guard against physical force that is immediately threatened and that there be no time to call for assistance from others.
4. "Imminent use"—Most jurisdictions require that the danger of force to be guarded against be actual (already being used) or imminent (about to be used).
5. "Unlawful force"—This means that the force she faced must not have been legally justified itself. For example, most jurisdictions do not allow civilians to use self-defense against a police officer legally performing his or her duty.
6. "Deadly force"—Force which is used with the purpose of causing, or in its manner of use actually causes, death or serious physical injury (i.e., injury causing serious and permanent disfigurement or loss or protracted impairment of the function of any organ or limb)

C. Other Self-Defense Related Concepts

1. "Retreat to the Wall"—A few jurisdictions require that before a person uses deadly force against another, she must use all reasonable means to avoid taking human life before resorting to deadly force in self-defense. However, even these jurisdictions recognize a "dwelling exception"—that a person is not required to retreat from her home or lodging.
2. Many jurisdictions provide for the use of force in defense of others, property, or premises.
3. In a trial, the judge ultimately determines the law which will apply to the case. In a trial before a judge (bench trial), the judge is also the trier of fact. In a jury trial, the judge will instruct the jury as to the law to be applied and the jury, acting as the trier of fact, is to apply the law to the facts in rendering its verdict.

D. “Battered Woman Syndrome” or “Battered Spouse Syndrome”²

1. History of Battered Woman Syndrome

The “Battered Woman Syndrome” (BWS) or “Battered Spouse Syndrome” is not a defense *per se*, but is closely related to self-defense. It was introduced to help explain the victim’s behavior, including: why she stayed in an abusive relationship and why she believed it was reasonably necessary to assault or kill her abusive partner when there did not appear to be an imminent physical threat (for example, victims who kill their sleeping abusers).

This concept emerged in the late 1970s based on Lenore Walker’s cycle of violence and learned helplessness. Ms. Walker’s concepts of cycle of violence and learned helplessness have been criticized as inadequately describing the experience of most victims of domestic violence. Her largely criticized theory explains the cycle of violence for domestic violence victims in three phases: (1) the tension building phase, marked by a gradual increase in verbal abuse, culminating in (2) the active battering phase, followed by (3) the calm, loving, respite phase where the batterer expresses remorse and promises to change. After the cycle has played out several times, the victim begins to manifest symptoms of learned helplessness and the victim may not seek the help she needs because she feels powerless to escape.

Ms. Walker’s theory forms the basis of “the battered woman syndrome.” However, this theory fails to incorporate the social and psychological context necessary to “see what the victim sees and know what the victim knows” in considering her actions. It has also been criticized as placing the focus on the victim’s state of mind or mental health issues rather than placing responsibility for the abuse on the batterer.

² This section draws heavily upon “Validity of ‘Battered Woman Syndrome’ in Criminal Cases Involving Battered Women,” by Mary Ann Dutton, Ph.D., edited by Malcolm Gordon, Ph.D. and reprinted in *The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trial: Report Responding to Section 40507 of the Violence Against Women Act*, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice & U.S. Department of Health and Human Services, National Institute of Mental Health (1996) available at <http://www.ojp.usdoj.gov/ocpa/94Guides/Trials/>

Over the years, BWS was re-characterized as indicating that a battered woman suffers from Post-Traumatic Stress Disorder as a reaction to her experience of physical violence. This model has also been criticized as focusing on the victim's state of mind or mental health rather than on the batterer's abuse. It has also been criticized as inadequately explaining the experience of victims who are women of color, women with disabilities, and women in same sex relationships.

However, some jurisdictions do consider evidence on Battered Woman Syndrome as it relates to a self-defense claim. Testimony about BWS may be a valuable legal defense tool for victims charged with killing or assaulting their abusers. In particular, BWS may explain why a victim believed it was reasonably necessary to assault or kill her batterer when there did not appear to be an imminent threat. In these cases, the victim will probably need to be examined and diagnosed by a psychiatrist or psychologist. It is important for an expert witness to have an understanding of BWS and to be able to explain why it may or may not apply in any given case.

2. Effects of Battering on Domestic Violence Survivors

A more accurate representation of battering and its effects includes a range of issues on the nature and dynamics of battering, the effects of violence, battered women's responses to violence, and the social and psychological context in which domestic violence occurs.

Expert testimony on battering and its effects can be introduced in criminal cases involving battered women by both defense counsel and prosecuting attorneys. It is used by defense counsel to support various types of criminal defenses including self-defense, duress, and insanity. In self-defense cases, testimony about battering and its effects is offered to assist the trier of fact in assessing whether the battered woman reasonably believed she was in danger of harm when she assaulted her abuser. Expert witness testimony may also be used by the defense in conjunction with the sentencing phases of a trial for purposes of mitigation.

Prosecutors use expert testimony in domestic violence prosecution cases to explain such matters as the battered victim's recantation or lack of cooperation with the prosecution. Further, both the prosecution

and defense use expert witness testimony to provide an explanation for what may be misconceptions about battered women, battering, and its effects.

III. Predominant Aggressor

"Predominant aggressor" is a term often used as shorthand by law enforcement officers and professionals within the field of domestic violence to identify the person who used "more substantial" force when two or more people have used physical force against one another. Generally, law enforcement and professionals within the field of domestic violence make the determination based upon the larger context of the history and relationship between the parties. The following are some of the relevant factors:

- The person most likely to inflict injury
- The person least likely to be afraid
- What led up to the violent episode
- Comparison of the type, location, and severity of injuries (offensive and defensive injuries or wounds)
- Who has injuries that do not appear to be consistent with statements made
- Who could not make a legitimate claim for self-defense
- Use of force and intimidation used by each party
- History of domestic violence
- Comparable size, strength of the parties
- Character evidence or known propensity for violence
- Plausibility of statements from parties, witnesses, etc.
- Who has access to or control of resources
- Who has the history of help-seeking behaviors
- Who has attempted to change her/his behavior to stop the abuse
- Who has access to or threatened use of weapons
- Likelihood of future harm

Victims who are being assaulted or threatened by their batterers sometimes respond with force. They may do so out of fear or in trying to defend themselves. When the force that the batterer used was "more substantial" in the context of the relationship and the above criteria, the batterer should be identified as the predominant aggressor and arrested.

However, it is possible that *on a particular occasion*, the domestic violence survivor used more substantial *actual* force than her batterer. In those cases, law enforcement officers may wrongly identify the victim as the predominant aggressor and charge her with a crime (even though in the context of the relationship and the history of abuse her partner is the abusive party). In those cases, the domestic violence survivor may be able to make a self-defense argument.

The term "primary aggressor" is also used, but can be misleading. "Primary aggressor" may wrongly indicate that the first person to use force is always the primary aggressor. In fact, the predominant aggressor may not have been the first person to use force.

A. Importance of Identifying the Predominant Aggressor As Opposed to Making Mutual Arrests

It is important for law enforcement to identify the predominant aggressor to avoid arresting the wrong party or both parties. Where a predominant aggressor determination is not made:

1. Batterers are not held responsible when mutual arrests are made.

If both parties claim they have been assaulted and have injuries or visible marks, the law enforcement officer may choose to arrest both parties without further investigation.

The criminal justice system is not able to function where mutual arrests have been made. Mutual arrest cases often are not charged by the prosecutor because of ethical obligations and because of other difficulties in prosecuting such cases. The end result is that there may be no criminal consequences for the batterer's behavior.

2. Victims may be prosecuted: This places blame on the victim for the abuse she endures and fails to hold batterers accountable.

Domestic violence calls are among the most prevalent and the most dangerous calls to which law enforcement officers must respond. They can also be among the most frustrating for law enforcement, especially when they have been called to the same house many times. Based on

their previous experiences with the victim, they may feel certain that the victim will not want her partner to be prosecuted and that the call is "a waste of time." Unfortunately, these attitudes lead some law enforcement officers to perform cursory investigations that lead to erroneous arrests.

If the law enforcement officer is already frustrated with the victim, he is more likely to believe a batterer when he claims that she hit him. If the batterer does have injuries or visible marks, the law enforcement officer may choose to arrest her without further inquiry. If the victim is arrested (alone or along with her batterer) she is being held responsible for the abuse she endures.

Where a victim has used some physical force, she may very likely plead guilty to charges she would be acquitted of at trial. She may not understand that what she did could have been legally justified. Victims whose batterers have told them over and over that the abuse is their fault may truly believe that they deserve to go to jail for what they did. She may mistakenly believe that she is guilty because she injured or left visible marks on her batterer.

A victim who has children at home may also choose to plead guilty simply to get out of jail sooner. She may not realize the ramifications of having a criminal conviction on her record. If her batterer was also arrested, there may be no one to care for her children. She may decide that pleading guilty is preferable to having her children placed into the Child Protective Services (CPS) system. If her batterer was not arrested and she knows that her children are not safe home alone with the batterer, she may also choose to plead guilty.

3. Victims are put at further risk.

An insufficient investigation by law enforcement officers can close the door to the criminal justice system for battered women. If a batterer is not identified as the predominant aggressor and arrested, the victim may have difficulty obtaining a protection order. She may also be less likely to call law enforcement in the future which may place her and her children at a greater risk of death or serious injury.

Many domestic violence survivors learn about other available services (shelters, legal services, victim compensation funds, etc.) as a result

of their contact with law enforcement. If the victim stops calling law enforcement, she is also less likely to access those other services that could help make her safer.

By failing to hold the batterer accountable, law enforcement has handed the batterer one more tool that he can use to control his partner. The next time he assaults or threatens to assault her, he can tell her, "Don't bother to call the cops. You know what they did last time. You're going to spend the night in jail." Or "You know the cops just think you're crazy. They didn't believe a word you said last time."

4. Children suffer—they enter the CPS system or are parented by the batterer

Survivors of domestic violence are often the primary caregivers for their children. When they are arrested, the children are left in the care of their batterer parent³ or, if both parents are arrested and no other arrangements can be made for temporary custody, the children may enter the Child Protective Services system.

IV. Testifying

Expert witness testimony is extremely important in cases where issues of self-defense or predominant aggressors are raised. In both of these types of cases, an expert witness can provide information that can help the judge or jury decide, within the larger context of the history and relationship between the parties, which of the parties acted as the predominant aggressor or in self-defense.

Testimony in these types of cases involves a detailed analysis of the dynamics of domestic violence and the effects of battering. The following are some factors that an expert witness may wish to raise in cases where there is a question as to which of the parties acted as the predominant aggressor:

³ For more information on batterers as parents, including citations to reference materials, see *supra* article, "Testifying About the Effects of Domestic Violence on Children."

A. *Review the dynamics of domestic violence.*⁴

Be sure to include financial, emotional, and other types of abuse that may not be commonly identified as domestic violence by the trier of fact. This can provide the trier of fact with a better understanding of the context within which the present incident occurred.

B. *Review lethality risk factors.*⁵

Be sure to include the presence of weapons and previous threats of violence that may have occurred. If the batterer has exhibited lethality risk factors, it may help the trier of fact understand why the victim was fearful and acted with force.

C. *Explain how interviewing the victim and the batterer together or separately might impact the victim's statements.*

Note whether the parties were interviewed separately and, if not, how that may affect a victim's statements to law enforcement. Because of the history of violence, the batterer may be able to intimidate his partner with just a glance. The victim may know that she will face further violence after the officers leave if her batterer hears her talking about the violence.

D. *Explain how and why victims minimize injuries or violence to law enforcement and medical personnel*

A victim may minimize their batterer's violence by telling law enforcement or medical personnel that her injuries occurred in commonplace ways: she fell down some stairs, she walked into a door, it was just an accident, etc. A victim may have any number of reasons for minimizing the abuse. She may fear repercussions from her batterer if she does not minimize the violence and/or defend her partner's actions. She may fear law enforcement involvement could further endanger her or her children. She may fear that her children will be taken away from her if she discloses to her doctor that there is violence in the home. If she and her children rely on her batterer's

⁴ For more details, see *supra* article, "Testifying About the Dynamics of Domestic Violence."

⁵ For more details, see *supra* article, "Testifying About Lethality Risk Factors."

income for housing and food, she may fear for the well-being of her children if her batterer is incarcerated. She may love her batterer and not be ready to admit to herself the extent of his violence against her.

E. *Discuss the prior history of abuse against the victim including previous arrests of the batterer, law enforcement calls to the home, and unreported incidents.*

Prior acts of violence by the batterer are important to give the trier of fact a more comprehensive understanding of the context in which the present incident occurred. If prior acts of violence have been documented by law enforcement or medical records, this evidence can be even more persuasive for the trier of fact. Knowing that the batterer was previously arrested for choking and threatening to kill his partner can help the trier of fact understand why the victim acted in self-defense. Knowing that the batterer has a history of violence against his partner can help the trier of fact recognize that he is the predominant aggressor even if the victim used force in the present case.

F. *Note the presence of current or prior protection orders.*

If the victim has or has had a protection order, she has already proved to a court of law that her batterer poses or posed a physical threat to her. This evidence can help a trier of fact to identify the batterer as the predominant aggressor and can explain the victim's use of force in self-defense.

G. *Compare the severity of the injuries and any discrepancies in size or the ability to inflict injury between the parties.*

Different types of injuries are typically inflicted when one party is acting in self-defense. For example, a woman who has been pinned down on the floor or backed up against a wall may scratch or bite at the batterer's chest, arms, and face in her attempts to escape. The presence of these types of injuries on the batterer indicates that he was probably the predominant aggressor. Bruising to the back of the forearms (as might be caused if a person has her arms up covering

her face to deflect a blow) is a good indicator that the other party is the predominant aggressor.

A discrepancy in size or strength might help explain why a woman might grab an object to throw at her batterer while her batterer uses his bare hands.

H. *Note which party called the police. Explain what this means within the context of the relationship.*

Sometimes batterers call the police, especially if they have sustained visible injuries. They may do this ruin their partner's credibility with law enforcement or to deter her from calling law enforcement in the future.

I. *Note the presence of children and how this might affect the victim's behavior.*

If children are present, the victim might act with force to protect them.

J. *Explain the behavior or statements of children who may have had contact with law enforcement or other authorities after witnessing the incident.*

Children may also make statements that minimize the violence and protect the batterer parent out of fear. Children may also wish to protect their batterer parent if he has systematically undermined the abused parent's ability to parent or has repeatedly belittled the abused parent.⁶

K. *Explain why neighbors, friends, or family members may not have previously been aware of the violence.*

Many batterers take extraordinary steps to hide their abuse from neighbors, friends, and family. They may act violently only when alone with their partners behind closed doors. They may carefully hit their partners on parts of the body covered by clothing. Many batterers can be charming when they want to be. A victim may not wish to tell neighbors, friends, or family about the abuse out of a sense of shame

⁶ For more details, see *supra* article, "Testifying About the Effects of Domestic Violence on Children."

or out of fear of reprisal from the batterer. Just because others were not aware of the abuse does not mean that it did not happen.