

# ***THE MINNESOTA LAWYER***

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## **MN Court of Appeals Allows Testimony on Battered-Woman Syndrome**

By Michelle Lore

A District Court judge properly allowed an expert on battered-woman syndrome to testify at the assault trial of the defendant even though neither the state nor the defense directly attacked the alleged victim's credibility, the Court of Appeals has ruled.

The victim had told the police, a paramedic and a nurse that the defendant had beaten and sexually assaulted her. She recanted her testimony at trial, however, and the state sought to introduce evidence of the common characteristics of battered-woman syndrome, including recantation of a report of abuse.

The defendant argued that the prosecution may only present expert testimony on battered-woman syndrome in its case-in-chief if the defense first attacks the victim's credibility, which it did not do in this case.

A Dakota County District Court judge disagreed and admitted the testimony.

The Court of Appeals affirmed.

"[S]ubstantial caselaw supports our conclusion that where the alleged victim's testimony is at issue, the district court may admit testimony on battered-woman syndrome, during the prosecution's case-in-chief, even if neither party directly attacks the victim's credibility," wrote Judge Thomas J. Kalitowski.

The 15-page decision is *State of Minnesota v. Vance*.

Dakota County Attorney James C. Backstrom told Minnesota Lawyer that the decision is significant for several reasons.

"It's extremely important to be able to explain to jurors through expert witness testimony on battered-woman syndrome why victims often recant testimony and minimize the defendant's conduct," he said. "Jurors don't always understand why a victim in a violent domestic relationship doesn't flee the situation. That's why expert testimony is very important and we are very pleased with this decision."

Backstrom added that the assault in this case was very brutal. "This was a man who needed to be brought to justice. This expert helped us do just that," he said.

Assistant State Public Defender Bridget Kearns, who represented the defendant on appeal, could not be reached for comment on the decision.

### Brutal beating

Defendant Elton Perez Vance and the victim in the case began an on-and-off relationship in 1996. The defendant is the father of the victim's children.

On Feb. 2, 2003, the victim called 911 and reported that the defendant had been beating her all day at her apartment. Three Eagan police officers responded. While one secured the defendant's location, two spoke with the victim, who, they later testified, had been severely beaten around the face and neck.

While the defendant was being arrested, a paramedic talked with the victim. One of the police officers also talked with the victim again. She was then transported to a local hospital where a nurse with the Sexual Assault Forensic Examination program examined her.

The following day, the police again interviewed the victim and noted her numerous injuries. Consistent with what she had already told the police, the paramedic and the nurse, the victim relayed the events of the previous day, explaining that the defendant had begun drinking on the night of Feb. 1 and then proceeded to beat her up by punching and choking her. She explained that the defendant forced her to perform oral sex on him several times and forced her to have vaginal intercourse with him several times. The victim stated that these assaults took place in the living room until the children woke up and then in a back bedroom. She further stated that the defendant burned her with a cigarette numerous times, cut her hair with a knife, urinated on her and refused to allow her to get dressed or use the bathroom.

The defendant was charged with second-degree assault, third-degree criminal sexual conduct and three counts of first-degree criminal sexual conduct. Prior to trial, however, it became evident that the victim was no longer willing to cooperate in the prosecution of the defendant and a subpoena was served on her to compel her testimony at trial. When she failed to appear, she was arrested and held as a necessary witness.

At trial, the victim's testimony differed substantially from what she had recounted to the police, the paramedic and the nurse. She testified that she couldn't remember the details of the fight and that she and the defendant had consensual relations on the day in question.

Also at trial, the state presented evidence that in violation of a court order, the defendant had called the victim more than 100 times from jail and that he had demanded that she change her earlier statements.

After hearing all of the testimony, the District Court judge granted the state's motion to present expert testimony on battered-woman's syndrome. The court instructed the jury

that the testimony was being received for the limited purpose of allowing them to hear evidence on the syndrome, that admission of the testimony did not mean the victim actually suffered from the syndrome or that it even existed and that those were fact questions for the jury to decide.

The witness, a clinical psychologist and expert on the syndrome, testified about its common characteristics, including minimization or denial of the abuse, depression, recantation of reports of abuse and fear of retaliation. The expert also described the reasons a person may stay in a violent relationship.

The jury found the defendant guilty on all five counts. The judge sentenced him to 288 months, a double upward departure, for first-degree criminal sexual conduct and a concurrent 21-month sentence for the assault conviction. The defendant appealed.

#### Expert admitted

Kalitowski began by addressing the defendant's argument that it was error to admit the expert witness testimony on battered-woman syndrome.

The Minnesota Supreme Court first addressed whether and to what extent the prosecution could present expert testimony on battered-woman syndrome in the 1997 decision of *State v. Grecinger*. There the court stated that the prosecution's use of expert testimony on the syndrome is admissible under Minn. R. Evid. 702 if it helps the jury understand behavior that might otherwise undermine the victim's credibility.

The defendant argued that under *Grecinger* and Minn. R. Evid. 608(a), the prosecution may only present expert testimony on battered-woman syndrome in its case-in-chief if the defendant first attacks the victim's credibility. The Court of Appeals disagreed.

In *Grecinger*, the defense attacked an assault victim's credibility in its opening statement and during cross-examination. The District Court judge allowed the prosecution to present in its case-in-chief expert testimony on battered-woman syndrome to explain why the victim had waited nearly three years after the defendant had assaulted her to pursue prosecution, recanted statements she made after the assault, and returned to the relationship afterwards. The high court concluded that the evidence was properly admitted because by the time it was presented, the victim's credibility "was already at issue."

Using a similar rationale, the Court of Appeals concluded that expert evidence of battered-woman syndrome was properly admitted here.

"[T]he district court properly admitted expert testimony on battered-woman syndrome during the prosecution's case-in-chief because by the time it was presented, the victim's credibility was already at issue," wrote Kalitowski.

The court explained that at trial, the jury heard the testimony of the three police officers who had responded to the 911 call, the paramedic who had talked with the victim after the incident, and the nurse who examined the victim at the hospital. The witnesses described the victim's injuries, including multiple abrasions and bruises on her face, neck, chest, sides and back, swollen lips, severe facial swelling, cigarette burns and a chunk of missing hair. Photographs taken by police and admitted into evidence also showed the injuries. Moreover, Kalitowski continued, the nurse testified that the results of the findings of her examination were consistent with the victim's report of sexual assault.

At trial, however, the victim recanted her earlier account of the incident, testifying that all sex with the defendant was consensual and that she could not recall the details of their fight.

“The prosecution did not impeach the victim with her earlier statements to the police and health professionals. Nor did the defense attempt to impeach the victim, which is not surprising given that the victim's testimony was largely favorable to [the defendant],” Kalitowski wrote. “But even though neither the prosecution nor the defense attempted to directly impeach the victim, we conclude that the victim's credibility was at issue by the time the prosecution presented the battered-woman syndrome testimony.”

Therefore, the court concluded that the District Court judge properly admitted this testimony during the prosecution's case-in-chief.

Kalitowski went on to note that the decision is supported by the Court of Appeals' recent decision in *State v. Plantin*, as well as the 8th U.S. Circuit Court of Appeals' decision in *Arcoren v. United States*.

Thus, substantial caselaw supports the court's determination that the evidence was properly admitted, Kalitowski observed.

#### Departure debated

Kalitowski turned then to the defendant's challenge of the District Court judge's upward durational departure.

The trial judge sentenced the defendant to twice what the sentencing guidelines call for in a case of first-degree criminal sexual conduct. In support of the departure, the judge found that the defendant:

- held the victim captive for a significant period of time;
- treated the victim with particular cruelty;
- penetrated the victim in several ways;
- committed the offenses in the victim's home and thereby stayed beyond his invitation and violated her trust in him; and
- committed the offenses in the presence of children.

After the appeal was briefed, however, the U.S. Supreme Court issued *Blakely v. Washington*, holding that an upward departure under the state of Washington's determinate sentencing scheme violated the defendant's Sixth Amendment right to a jury trial.

The Court of Appeals concluded that the interests of justice did not warrant addressing *Blakely* for the first time on appeal without briefing on the issue. Therefore, the court remanded to the District Court for a consideration of the application, if any, of *Blakely*, to the defendant's sentence.

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