

IN THE CIRCUIT COURT OF CAPE GIRARDEAU COUNTY, MISSOURI

STATE OF MISSOURI,)	
)	
Plaintiff,)	
)	Case No. 08G9-CR01255-01
)	
)	Div. II
BRIAN ROBERT EBNER,)	
)	
Defendant.)	

STATE’S TRIAL BRIEF ON EXPERT TESTIMONY
REGARDING DOMESTIC VIOLENCE BEHAVIOR

ANY OBJECTION BY DEFENDANT TO THE ADMISSION INTO EVIDENCE EXPERT TESTIMONY REGARDING BEHAVIORS COMMON TO VICTIMS OF DOMESTIC VIOLENCE (SUCH AS A FAILURE TO IMMEDIATELY LEAVE A VIOLENT RELATIONSHIP, A DELAY IN REPORTING AN ASSAULT, THE WIDE SPECTRAM VICTIMS OF DOMESTIC VIOLENCE COME FROM, OR A RECANTATION OR REFUSAL TO TESTIFY) SHOULD BE DENIED BY THE COURT BECAUSE THE TESTIMONY IS RELEVANT AND BECAUSE THE WITNESS, DUE TO EXPERIENCE AND TRAINING IN THE AREA OF DOMESTIC VIOLENCE, IS QUALIFIED TO GIVE EXPERT TESTIMONY UPON THESE MATTERS, AND THE TESTIMONY IS ABOUT BEHAVIORS COMMON TO VICTIMS OF DOMESTIC VIOLENCE THAT ARE BEYOND THE EXPERIENCE AND KNOWLEDGE OF LAY JURORS AND WOULD BE HELPFUL TO THE JURY.

THE EVIDENCE TO BE OFFERED

The State plans to introduce into evidence certain testimony of Kathryn Blevens, a nurse practitioner with the Network Against Sexual Violence who has extensive experience in working with victims of domestic violence, and Detective Debi Oliver, a detective who also has extensive experience in working with domestic violence victims, pertaining to certain behaviors common to victims of domestic violence, including such things as failing to leave a violent relationship, a

delay in reporting an assault, and the wide socioeconomic background these victims can have.

THE LAW

The test for admissibility of expert testimony in Missouri has been articulated in slightly different ways. Some cases state that expert opinion testimony is admitted when the jurors themselves are not capable, for want of experience or knowledge of the subject, of drawing conclusions from the facts proven. *State v. Calvert*, 879 S.W.2d 546 (Mo. App. W.D. 1994) (admitting expert's testimony about behaviors of child sexual assault victims). Other cases say that expert testimony need simply be "helpful" to the jury in order to be received:

The essential test of the admissibility of expert testimony is whether such testimony will be helpful to the jury . . . A guiding principle in applying this test is that the expert testimony is proper if the subject is one with which lay jurors are not likely to be conversant . . . On the other hand, if the subject is one of everyday experience . . . then opinion testimony is properly rejected.

State v. Gola, 870 S.W.2d 861, 864 (Mo. App. W.D. 1993). Other cases articulate the test as whether the expert's knowledge from education or experience will aid the trier of fact." *State v. Campbell*, 143 S.W.3d 695, 702 (Mo. App. W.D. 2004); *State v. Seddens*, 878 S.W.2d 89, 92 (Mo. App. E.D. 1994). The settings in which expert testimony can be helpful to a jury are virtually unlimited. *State v. Malone*, 951 S.W.2d 725 (Mo. App. W.D. 1997) (police officer with expertise in drug cases allowed to testify about how to make cocaine, how to use cocaine base, the effects of cocaine on users, and the addictiveness of cocaine and crack); *State v. Seddens*, 878 S.W.2d 89 (Mo. App. E.D. 1994) (police officer who attended 14 days of training about gangs and who interviewed 60 gang members allowed to give expert testimony about the practices, symbols, terminology and history of street gangs); *State v. Gola*, 870 S.W.2d 861 (Mo. App. W.D. 1994) (police officer with experience working undercover drug cases allowed to testify

about pricing, street value, composition and packaging of crack cocaine on the streets of Kansas City); *State v. Marks*, 721 S.W.2d 51, 55 (Mo. App. W.D. 1986) (police officer allowed to testify on subject of gypsy tricks); *State v. Saussele*, 265 S.W.2d 290 (Mo. banc 1954) (expert testimony about methods and terminology of betting on horse races). A witness may be qualified as an expert when he “possesses peculiar knowledge, wisdom or skill regarding the subject of inquiry, acquired by study, investigation, observation, practice or experience.” *Bynote v. National Super Markets, Inc.*, 891 S.W.2d 117, 125 (Mo. banc 1995). A witness may be qualified to testify as an expert “although his knowledge may have been gained by practical experience rather than by scientific study or formal training.” *State v. Seddens*, 878 S.W.2d 89, 92 (Mo. App. E.D. 1994). The qualification of an expert is a matter resting primarily in the sound discretion of the trial court. *Id.*

Although no Missouri appellate court has yet offered extended analysis upon the appropriateness of expert testimony as to common behaviors of adult domestic violence victims, one Missouri appellate case found the issue so clear that it affirmed a conviction where such expert testimony had been received in a one paragraph opinion, noting that “an extended opinion would have no precedential value.” *State v. Newell*, 258 S.W.3d 825 (Mo. App. W.D. 2008).

Significantly, Missouri courts have admitted virtually identical expert testimony regarding the behaviors of child sexual abuse victims. As articulated by the Court of Appeals:

Expert testimony is admissible when it is clear that the jurors themselves are not able to draw correct conclusions from the facts proved because they lack experience or knowledge of the subject matter . . .

While an expert witness is not allowed to proffer an opinion regarding a particular witness’s credibility, general profile evidence of the behavior of child sexual abuse victims can be a proper topic of expert testimony . . . General profile evidence has been accepted to explain victim behavior that might appear unusual to a lay juror who is unfamiliar with the behavioral characteristics of child victims of sexual abuse . . . In this case, Ms. Wise testified that it is common for sexually

abused children to delay in reporting the incidents and to recant their allegations. This testimony was admissible to help explain the victim's behavior so the jury may better evaluate and weigh the victim's testimony.

State v. Calvert, 879 S.W.2d 546, 549 (Mo. App. W.D. 1994). See also *State v. Silvey*, 894 S.W.2d 662 (Mo. banc 1995) (expert testified that victim "exhibited several behavioral indicators consistent with" a sexually abused child); *State v. Matthews*, 37 S.W.3d 847 (Mo. App. S.D. 2001) (expert testified about typical behaviors of child abuse victim such as "fears, phobias, depression, somatic complaints, eating problems, inability to trust, and guilt or shame."); *State v. Bowler*, 892 S.W.2d 717 (Mo. App. E.D. 1994) (expert testified that a victim's "delay in reporting" child abuse is "not unusual").

Missouri has also ruled admissible expert testimony about battered spouses on behalf of defendants asserting self-defense in battered spouse syndrome cases. Section 563.033, RSMo. 2000; *State v. Pisciotta*, 968 S.W.2d 185 (Mo. App. W.D. 1998). The reasoning used for its admissibility is its helpfulness to the jury in understanding the otherwise peculiar behavior of a woman who has stayed in an abusive relationship so long:

Such evidence is admissible because it explains what might be inexplicable otherwise – why a woman perceives the necessity of using lethal force in a situation where it seems a "reasonable person" would have chosen to leave the abusive relationship.

Pisciotta, at 189. Thus, the same type of expert testimony has already been received in Missouri in this slightly different context.

At least 27 states have admitted or discussed with favor the use of expert testimony on battered women as a part of the State's case during the prosecution of domestic assault cases. H. Morley Swingle, Angel M. Woodruff, Julie A. Hunter, "Unhappy Families: Prosecuting and Defending Domestic Violence Cases," 58 *J. Mo. Bar* 220, 225 (2002). See also Paula Finley

Mangrum, “Reconceptualizing Battered Women Syndrome Evidence: Prosecution Use of Expert Testimony on Battering,” 19 *B.C. Third World L. J.* 593 (1999); Audrey Rogers, “Prosecutorial Use of Expert Testimony in Domestic Violence Cases: From Recantation to Refusal to Testify,” 8 *Colum. J. Gender L.* 67 (1998). These cases recognize that behaviors of a victim such as failure to leave a violent relationship, a delay in reporting an assault, or a recantation or refusal to testify, might seem bizarre and peculiar to a jury absent expert testimony. *People v. Gadlin*, 92 Cal. Rptr. 2d 890 (Cal. App. 2000) (recantation; cycle of violence; reconciliation with abuser); *State v. Lafferty*, 9 P.3d 1132 (Colo. App. 1999) (recantation; cycle of violence; remaining in a violent relationship); *Commonwealth v. Goetzendanner*, 679 N.E.2d 240 (Mass. App. 1997) (recantation; vacillating behavior of victim toward defendant); *Scugoza v. State*, 949 S.W.2d 360 (Tex. App. 1997) (recantation; cycle of violence); *State v. Clark*, 926 P.2d 194 (Haw. 1996) (recantation); *State v. Searles*, 680 A.2d 612 (N.H. 1996) (minimization of injuries); *People v. Ellis*, 650 N.Y.S.2d 503 (recantation; minimization); *State v. Cababag*, 850 P.2d 716 (Haw. App. 1993) (recantation, self-blame; minimization of assault); *State v. Borelli*, 629 A.2d 1105 (Conn. 1993) (recantation; cycle of violence; learned helplessness); *Arcoren v. U.S.*, 929 F.2d 1235 (8th Cir. 1991) (recantation; cycle of violence); *State v. Frost*, 577 A.2d 1282 (N.J. Super Ct. App. Div. 1990) (delay in reporting; remaining in abusive relationship). While an expert may not “vouch” for the truthfulness of a particular witness (*see State v. Williams*, 858 S.W.2d 796 (Mo. App. E.D. 1996) (expert testimony that children lie about sexual abuse only 3% of time improper as vouching for the victim’s credibility), testimony about these common behavioral characteristics has been overwhelmingly ruled admissible.

The experience and training qualifying the witness as an expert can vary in type and scope. The qualifications can come from being an employee of a women’s shelter, a domestic

abuse counselor, a psychologist, a physician or even a law enforcement officer with extensive experience in the field. *See People v. Gadlin*, 92 Cal. Rptr. 2d 890 (Cal. App. 2000) (licensed clinical social worker); *Commonwealth v. Goetzendanner*, 679 N.E.2d 240 (Mass. App. 1997) (executive director for prevention of domestic violence office); *State v. Clark*, 926 P.2d 194 (Haw. 1996) (safe house director); *State v. Borelli*, 629 A.2d 1105 (Conn. 1993) (sociologist); *Arcoren v. U.S.*, 929 F.2d 1235 (8th Cir. 1991) (psychologist); *State v. Frost*, 577 A.2d 1282 (N.J. Super Ct. App. Div. 1990) (director of clinical services at women’s resource and survival center); Cheryl Hanna, “No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions,” 109 Harv. L. Rev. 1849, 1905 (1996) (police officer); *State v. Calvert*, 879 S.W.2d 546 (Mo. App. W.D. 1994) (witness gained expertise as a detective at the Sheriff’s Department and as a DFS worker); *State v. Dixon*, 244 S.W.3d 472 (Tex. App. 2007) (police officer with no college education whose experience was acquired working with domestic violence victims was allowed to give testimony about propensity of victims to return to the family member who abused them).

FACTS

In the present case, the qualifications of the expert witnesses are as follows:

(1) Kathryn Blevins is a nurse practitioner with the Network Against Sexual Violence. She has been a nurse since 1969 and has been a Women’s Health Care Nurse Practitioner since 1990. She has extensive training in working with victims of domestic violence and has over twenty years of experience in doing so. She has worked

with hundreds of domestic violence victims.

(2) Debi Oliver is both a licensed nurse and a detective. She has many years of experience working with domestic violence victims, both in the hospital setting as a nurse and in the investigative setting as a detective. She has worked with hundreds of domestic violence victims.

These experts will be asked to testify about the following common behaviors:

- (1) Whether it is common for a domestic violence victim to NOT leave the abusive relationship the very first time she is assaulted;
- (2) What is common and typical in regard to how long a domestic violence victim will fail to leave an abusive relationship;
- (3) Whether domestic violence cuts across all socioeconomic backgrounds and all sorts of occupations;
- (4) Whether a person's occupation prevents that person from becoming a domestic violence victim.

The expert will not be asked to comment upon the truthfulness or believability of this particular victim, to give an opinion as to whether or not abuse occurred in the instant

case, to give an opinion about the percentage of victims that are truthful, or to offer any testimony predicting future violence by the defendant.

CONCLUSION

For the reasons stated above, the Court should overrule any objection the defense makes to the admission of the testimony of the expert witnesses in this case.

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