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BATTERED WOMAN'S SYNDROME: TRIAL TACTICS

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Now that the battered woman syndrome (BWS) has gained recognition in Tennessee, the "defense" can serve as another tool to defend women accused of crime. Having been through a few of these trials, I have been asked to offer some suggestions which might be of assistance in this type of case. Of course, as in everything else, we build upon each other's experiences, and my efforts are due in large measure to the work done by many other lawyers.

First, the BWS is not limited to only homicide cases. It can be used to support duress where the woman asserts she committed a criminal act because she was forced to do so by her boyfriend and/or spouse. See In Re Romero, 52 CR. L. R. 1161 (Cal., 11/2/92). This article will deal with BWS in its traditional context where a woman is charged with killing her mate.

A.

I know that BWS works. Most recently, my partner, John Hollins, Jr., and I represented a woman in Rutherford County who had been convicted of murder. We were successful in gaining a new trial because her first attorney was ineffective for failing to raise the BWS issue. State vs. Zimmerman, 823 S.W.2d 220 (Tenn. Crim. App. 1991). Following a remand, we tried the case, put on BWS and our client was convicted of the lesser offense of criminally negligent homicide and was placed on probation. BWS was a significant factor in getting a very different result based on identical facts.

In preparing a BWS case for trial the earliest stages are probably most important. It is critical that you gather as much evidence as possible before it is lost forever. Typically, the woman will have called the police after killing her abuser. These calls are recorded, but are routinely erased after 30 days or so. You need to get these tapes secured immediately because they often contain the voice of your hysterical client which shows her state of mind immediately after the act.

Photographs of your client are very important. Sometimes the police will take a photograph of your client at the scene, but, bruises do not really show until a day or two later, and so follow-up photographs should be made. If your client was arrested right after the event a mug shot might show bruises. Try to take photographs of the inside of the house. Look in the refrigerator because the woman may have had little, if any, food for herself or her children because the abuser has kept such tight control of the money in the house.

The abuser is usually a heavy drinker and was probably intoxicated at the time of his death. Be certain a blood test was run on the deceased to establish this fact. Visit the local bars and take a picture of the deceased with you to ascertain prior drinking habits. In our case, the abuser wrote checks to the liquor store and we produced over a hundred checks showing purchases of alcohol.

It is critical that you establish early in the game any prior instances of abuse which are witnessed by other persons. Neighbors and relatives may have seen bruises. Obviously, if your client called the police on prior occasions you need to get those records as well. Hospital records are critical even if your client claimed that her previous injuries were due to "falls" down the stairs or other "accidents". Battered women typically make up all sorts of excuses for their prior injuries to keep other people from knowing the true source.

The faster you get this information the better. Once the District Attorney has visited with these folks, they will not remember anything. A rapid investigation into the background of the abuser is critical.

Obviously, most of your information will come from your client. Interviewing your client will be challenging because of her terrible confusion. Your client, even though she killed her abuser, is in mourning for him. She was dependent upon him completely when he was alive and feels a terrible sense of loss at his death. To say that she feels "guilty" is an understatement. I have found that the women may attempt to transfer her dependency to her lawyer. You need to

death. To say that she feels guilty is an understatement. I have found that the woman may attempt to transfer her dependency to her lawyer. You need to convince your client that she must become dependent upon herself and that this was not her fault. A stronger client will make a stronger witness when you go to trial.

My strong suggestion is that you never handle one of these cases alone. There is simply too much to do and spending a great deal of time with your client is an absolute necessity.

Once you have started the initial investigation it is imperative to associate some expert. This is necessary because your client needs psychological counseling, and, of course, your expert will be testifying at trial. The more information your expert can obtain the better he or she will be.

I recommend Dr. Diana McCoy in Knoxville (688-1303) or Dr. Victor O'Bryan in Nashville (321-0150). I am sure that there are other qualified people, but be certain that your expert has done some work in this area. If your client is indigent, file a motion with the trial court asking for expert services. You cannot go to trial without an expert. One court has even gone so far as to hold that a lawyer is incompetent who fails to develop such proof in appropriate cases. See Commonwealth vs. Stonehouse, 555 A.2d 772 (Penn. 1989)(plurality opinion).

B.

Once your investigation is underway and you have obtained an expert it is critical that you immerse yourself in the case law. Recent cases collecting authorities include State vs. Williams, 787 S.W.2d 308 (Mo. App. 1990) and State vs. Koss, 551 N.E.2d 970 (Ohio 1990). My favorite case is Fielder vs. State, 756 S.W.2d 309 (Tex. Crim. App. 1989). These cases establish that BWS is almost universally accepted, not as a "defense", but as part of the doctrine of self-defense so as to establish the belief of the woman that she was in danger of death or bodily injury.

BWS has three stages. See the extensive discussion in State vs. Furlough, 797 S.W.2d 631 (Tenn. Crim. App. 1990). Essentially, there is the "tension building" phase where the man harasses the woman and convinces her that she is worthless and makes her dependent upon him. The second stage is the physical abuse itself which can take many forms. As the abusive relationship continues, the abuse escalates. I have found that the man usually starts with a hit to the arm or face, but as he becomes more proficient he starts to injure the woman in places where others cannot see the injuries, such as her stomach or back. Not only does the woman learn how to survive abuse, the man becomes expert at inflicting injury to his mate. The final stage is known as the "reconciliation" phase. Here, the man heaps love and affection on the woman and convinces her that this is the "last time" he will do this. These three stages are repeated over and over and the woman becomes convinced that she is worthless and has no choice but to stay with the abuser.

Typically, there are children in the house and there is psychological, if not physical, violence inflicted on them as well. Obviously, if the children are old enough you will want to use them as witnesses. However, the jury will get really mad at your client because she "allowed" her children to live in this environment. You must convince the jury that she had no other choice because she felt helpless and had nowhere else to go. Not only does the woman feel psychologically isolated, typically, she is economically isolated as well.

Another important goal will be to convince the jury of the magnitude of this problem. No lesser authority than the United States Supreme Court has observed that almost four million women are the victims of severe assaults by their male partners every year. Thirty percent of female homicide victims are killed by their male partners. Planned Parenthood vs. Casey, 112 S. Ct. 2791, 2826-2831 (1992). Battered women who eventually kill their abuser in self-defense is not a recent phenomenon. See Kress vs. State, 114 S.W.2d 735 (Tenn. 1940).

C.

Eventually, you will get down to the plea bargaining stage of things. Your biggest problem will be the family of the deceased. They will think that your client is a cold, cruel murderess who deserves to be locked up forever. They simply cannot believe that their "little boy" has done anything wrong. In my experience the family of the deceased has contributed to the abuse by ignoring what they can obviously see with their own eyes. Nevertheless, they will be your biggest obstacle.

There is a strong relationship between abuse by a father being observed by the male children, who themselves abuse their spouses. Your experts can get into this if you can establish abuse by the father against his spouse which might be witnessed by the deceased son. I have not seen any case law on this issue, but perhaps the prosecutor might "open the door" when he puts the grieving family members on the witness stand.

If I think that I have a shot at a plea bargain which permits probation, I make an exception to my general rule and expose the better parts of my case to the prosecutor. Obviously, this is a dangerous thing to do which must be evaluated on a case-by-case basis. Nevertheless, you need to do everything possible to keep your client out of a murder conviction. My review of the cases from other jurisdictions establishes that murder is the most likely verdict even where a full BWS defense is presented. Obviously, acquittals or low level verdicts never show up in the reported decisions, but such cases are the exception.

Once it is clear that you are going to trial, the pre-trial motions need to be prepared. Typically, your client has given a damaging statement to the police officers who responded to her call. A suppression motion might be in order. See State vs. Gfeller, Tenn. Crim. App. July 24, 1987, at Nashville (unpublished) dealing with a confession issue. However, since your client will be testifying she will be impeached with her statement anyway, but a successful suppression motion might bring the District Attorney to the table.

Since you are going to use experts, be certain to give pre-trial notice under Rule 12.2(b), Tenn. R. Crim. P. Please note that this rule is not limited to the insanity defense but covers any expert testimony "relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of his guilt." The absence of notice will keep your experts from testifying.

Jury selection is as critical in a BWS case as any you will find. Write to the National Clearinghouse for the Defense of Battered Women, Suite 302, 195 South 9th Street, Philadelphia, Pennsylvania 19107 (215-251-0010). For a few dollars they will send you a lot of material on jury selection, which includes sample questions. This is really good stuff. You should also order "Woman's Self-Defense Cases: Theory and Practice" by Elizabeth Bochnak, published by Michie. Numerous psychological studies exist which suggest the type of juror who is more likely to acquit in a BWS case. For example, an ex-military person is a good type of juror because he or she can understand fear.

My experience, after interviewing jurors after verdict, is that men tend to go in the middle such as manslaughter. Women will be grouped at the extremes: some wanting murder and others wanting acquittal.

During jury selection it is important to ask the jurors what they know about BWS. You will be amazed at how many people have neighbors or relatives who have been abused by their spouses. Not only will this help you target favorable jurors, but you will also get all of the other jurors understanding how common a problem this really is. We were lucky in the Rutherford County case because one of the jurors had a social science background and went on for 30 minutes about all of the things she knew about BWS. Be certain to ask open ended questions to each juror and do not ask questions to the group as a whole. The prosecutor will ask the same old stupid questions, but you should take a novel, individual approach. My suggestion is to lock the jury up during the trial. Invariably, the jury will ask their spouses about the trial, thus, you have to worry about 24 different opinions rather than just 12.

D.

Opening statements are critical. Here, you must commit to your defense and tell the jury in no uncertain terms that your client will testify. Your defense is not BWS. Rather, your defense is and always will be self-defense. You must make this clear at all times. BWS is worth, at most, a click down from perhaps murder one to murder two. Self-defense is what wins the case. Even if your client killed her abuser while he was asleep, you must show that she was deathly afraid of him at the time.

When it comes time to present your defense, my suggestion is that your client be the first witness. Of course, this is exactly opposite from the way we normally try our cases, but BWS is an exception to almost every rule. There is no way that you will ever win unless your client testifies. The jury wants to hear from your client.

Your client's testimony should be a complete story or her entire life. She must relate all of the abuse. You will find that your client has been sexually abused by her spouse. She will not want to tell you this right away because of embarrassment, but you will find that this is invariably the case.

After your client testifies you need to put on the supporting witnesses such as neighbors and friends who have seen bruises and the like. If you are lucky, your client has reported abuse to the police on earlier occasions and you can put on a few officers. This is very dramatic. You should end with your doctor to tie everything together.

The advantage in this suggested order of proof is that you avoid a host of hearsay problems. The testimony of the civilian witnesses, coming after your client testifies, is "non-hearsay". You are not introducing this evidence to prove the truth of the matter asserted, but rather to corroborate your client. See the excellent

discussion in Bechtel vs. Oklahoma, _____ P.2d _____ (September 2, 1992); 1992 WL 209700. By putting your client on first, you overcome all of the hearsay problems.

Space does not permit a discussion of all of the special requests, but I will be happy to provide suggested instructions which cover some of the more important issues. In general, you want to emphasize self-defense and manslaughter every way that you can. Similarly, your closing argument should cover these issues as well. If you have a weak case, then dwell on manslaughter. If you have a strong case, then "go for the gold" and stress self-defense as hard as you can.

Lastly, be certain that you have filed a request for a "range of punishment" instruction prior to trial. In the end, juries decide this thing on how much time they think the defendant should receive. With a lot of a hard work, your client can walk out of a courtroom with you; her nightmare over at last.

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