

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio ,	:	Supreme Court Case No. 09-1977
	:	
Plaintiff-Appellee,	:	On Appeal from
	:	The Lawrence County Court of
v.	:	Appeals, Fourth Appellate District
	:	
Megan Goff,	:	Court of Appeals
	:	Case No. 2007 CA 17
	:	
Defendant-Appellant.	:	

**BRIEF ON THE MERITS
OF DEFENDANT-APPELLANT MEGAN GOFF**

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STATEMENT OF CASE

The Lawrence County Grand Jury indicted Megan Goff ("Ms. Goff") on March 28, 2006. The Indictment charged Ms. Goff with one count of aggravated murder with a firearm specification in connection with the death of her husband, William Goff ("Goff"). The fifteen day trial was tried to the bench.

Ms. Goff raised a defense of self-defense to the charges because Goff, who began to date Ms. Goff when she was a child, threatened deadly force against her and their children after subjecting Ms. Goff to years of abuse. (Tr. 2206.) Prior to trial, the State, knowing that Ms. Goff intended to present evidence that she was a battered woman and expert testimony regarding Battered Woman Syndrome ("BWS"), asked the trial court to order that Ms. Goff be subjected to a psychiatric examination conducted by the State's expert. Defense counsel strenuously objected, but the trial court¹ granted the State's request:

[I]f you have an expert [sic] and want to bring that expert in [sic]. If you don't want to that's fine, then I would not order the examination on behalf of the State. It has been stated by counsel for the Defendant that they are going to bring that in and the State would have a chance to go ahead and conduct their own with the defendant which would come in for that purpose and that purpose only.

(Pretrial Transcript, May 17, 2006 (App. at A-98); *see also* Judgment Entries (App. at A-88, A-156).) The prosecutor, J.B. Collier, then recused himself after sitting in on one of two compelled examinations the State's expert, Dr. Phillip Resnick, conducted on Ms. Goff. Mr. Collier's name was subsequently added to the State's witness list.

At trial, defense counsel again objected to Dr. Resnick's proposed testimony. (Tr. 3128-31.) Judge Crow, who admitted he did not know the law regarding the propriety of compelled exams in criminal cases, compared this matter to a civil case, and allowed the State's expert to testify to

¹ Judge Crow, a visiting judge from Meigs County, presided over the trial, and Judge Walton, who recused himself on or about October 30, 2006, ruled on many of the pretrial proceedings. There is nothing on the record as to why Judge Walton recused himself.

matters beyond the scope of expert testimony, to Ms. Goff's credibility, to motive and, ultimately, to guilt, in violation of R.C. § 2945.371(J), R.C. § 2901.06, the Ohio Rules of Evidence, and Ms. Goff's state and federal privileges against self-incrimination. The day after Dr. Resnick testified, immediately after the completion of the State's final closing argument, and without any further review of the evidence or of the law, Judge Crow found Ms. Goff guilty of aggravated murder with a firearm specification and subsequently sentenced her to 33 years to life, all without knowing the state of the law in this matter. (See Sentencing & Judgment Entry (App. at A-85).)

Ms. Goff appealed her conviction to the Fourth District Court of Appeals, which affirmed that conviction on September 14, 2009. In affirming her conviction, the court of appeals held that a compelled psychiatric examination implicated Ms. Goff's Fifth Amendment right against self-incrimination, but mistakenly found that she had impliedly waived this right—without limitation. *State v. Goff* (Ohio Ct. App. 4th Dist. Sept. 14, 2009), No. 07CA17, 2009 WL 2986190, *4–5, 2009-Ohio-4914, ¶¶ 19–21 (App. at A-3).

STATEMENT OF FACTS

He made her call him "Dad." (Tr. 1705.) She was 15 and he was 40. (Tr. 1737.) By the time she was 17 years old, he was having sex with her. (Tr. 1737.) They married when she graduated from high school, and for the next 7 years he abused her. (Tr. 1779, 1786.)

He told her she was fat and ugly. (Tr. 2907.) He made her take cold showers before intercourse; he liked for her to be cold, made her lie on her back with her eyes closed, and she was not allowed to move. (Tr. 1771, 1854–55.) He told her not to touch him during sex. (Tr. 1737.) She was required to stand naked in front of her husband as he would critique her body. (Tr. 1737, 2907.) He would take a flashlight and examine her vagina telling her how "distasteful" and

"hideous" it was to him. (Tr. 2907.) When she was just a teenager, he instructed her to leave the bathroom blinds at her parent's house open so that he could watch her shower. (Tr. 1711.)

Goff repeatedly abused, humiliated, controlled, taunted and threatened to kill Ms. Goff. The emotional abuse eventually evolved into physical abuse. On March 18, 2006, Ms. Goff shot and killed her husband because he told her he was going to kill her and the children. (Tr. 2046, 2073, 2207; and Transcript of Recorded Phone Conversation, March 3, 2006 (App. at A-127).) In the moments before she shot Goff, he told her that she was a "dead woman" and that he knew where the children were. (Tr. 2295.) After shooting Goff, Ms. Goff called 911. She was so terrified of this man that for the next ten minutes she screamed in fear that her husband, whom she had just shot, was going to kill her:

Dispatch: Okay Megan. Turn your back to him.
Goff: Oh my God.
Dispatch: Megan?
Goff: Oh my God.
Dispatch: Megan? Megan? Listen to me.
Goff: Oh, God, what if he gets up and gets me.
Dispatch: Megan? Listen to me.
Goff: What if he kills me. I can't not look at him. I can't. No.
No, he'll kill me. He'll kill me . . . Oh my God.
Dispatch: Megan? Megan? quit screaming.
Goff: He's gonna kill me if he gets up. He's gonna kill me, and they can't get in the door.

(911 Tape, State's trial court Exhibit 63; Transcript of 911 Call, March 18, 2006 (App. at A-127, A133-A-134).)

She could not take her eyes off of him and she continued to scream that he was going to kill her and the children: "What if he kills me No, he'll kill me. No. [sic] he'll kill me . . . Oh my God [sic] He's gonna kill me if he gets up. He's gonna kill me, and they can't get in the door." (Transcript of 911 Call (App. at A-134).) "The guns are by him. . . . He told me he was gonna kill me. He's gonna kill me if he gets up. . . . he said was going to kill the

babies.” (Transcript of 911 Call (App. at A-136–A-140).) She told the dispatcher over and over that Goff told her that he was going “to kill [the] babies.”

The central issue at trial was whether Ms. Goff, given the years of abuse during her marriage, suffered from Battered Woman Syndrome (“BWS”) and shot Goff in self-defense. Dr. Bobby Miller, the defense expert, testified that he had never heard anything like the screams that he heard on the recording of the 911 call. (Tr. 2952.) After evaluating Ms. Goff and listening to the 911 tape, Dr. Miller found her behavior was consistent with BWS. He found she had reason to believe and reasonably believed that she, and her children, were in imminent danger of death or serious physical injury. (Tr. 2831, 2940–41.)

Ms. Goff testified at length to a long and torturous history of emotional abuse by Goff that escalated into physical abuse. When Ms. Goff did not do what he ordered her to do, he would threaten her with a gun. (Tr. 1877–78.) He would also hold a gun across the bed and tell her that he was not responsible for his actions if she woke him up at night. (Tr. 1801.) For Ms. Goff, what seemed like an intolerable existence became the norm.

Ms. Goff testified that “usually I could say I was sorry, or just be quiet, and he would say okay, but things were making him mad that I hadn’t even made noise and he was getting mad and saying I had.” (Tr. 1991.) By 2004, she felt she was not allowed to go outside of the house for anything. (Tr. 1931.) There were times when he shoved her down to the floor and held a gun to her head, and would ask her how high she thought the blood would go once he shot her. (Tr. 2037.) She testified that she “worked really, really hard at doing exactly what I thought would calm him down,” but nothing that had worked in the past worked anymore. (Tr. 1992.)

In December of 2005, the abuse escalated, the pattern changed, and Goff began telling Ms. Goff that he was going to kill her and the children. (Tr. 1990, 2074, 2088.) On January 18, 2006,

Goff pushed his daughter and became physical with Ms. Goff. (Tr. 2102–03.) During this same incident, he kicked his son, who was recovering from abdominal surgery. (Tr. 2122.)

Ms. Goff believed that Goff crossed the line on January 18, 2006. (Tr. 2122.) She filed a complaint against Goff for domestic violence. (Tr. 834.) Deputy Collins, who responded to the domestic violence complaint, removed sixty-three guns from the residence, and testified that Ms. Goff was very fearful about her children's safety. (Tr. 845, 856, 857.)

After January 18, 2006, Ms. Goff moved from shelter to shelter, fearing that Goff would find her. Ms. Goff tried to do everything that she could to keep her children safe, but the evidence showed, and Ms. Goff justifiably believed, that Goff was tracking her whereabouts. (Tr. 2204–05, 3099, 3102.)

On March 17, 2006, Ms. Goff received threatening telephone calls from Goff. (Tr. 2207.) He told her that he was going to kill her and the children on Monday, March 20. (Tr. 2207.) This was a significant date in their relationship: not only was it Ms. Goff's mother's birthday, it was the date that Ms. Goff and Goff first had intercourse. (Tr. 1753, 2244.)

On March 18, 2006, Ms. Goff returned to the marital residence. She believed it was her responsibility to talk Goff out of hurting the children. (Tr. 2286.) She testified, "I knew him. I love him. I knew if he could just see me, he would calm down. I just needed to see his face so that I knew what words to say and what, how to say them so that he would calm down." (Tr. 2265.)

Goff told her, "you know you're a dead woman I'm going to kill you and I'm going to kill your kids." (Tr. 2292, 2294–95.) He moved his arm around and she thought he was going to pull something out. (Tr. 2297.) She yelled, "let me out," and he kept repeating that she was a dead woman and that their kids would also be dead. (Tr. 2298.) Ms. Goff testified that she saw the look on his face and, believing that he would kill her and the children, she shot Goff.

Prior to trial, the State requested that Ms. Goff be compelled to submit to a psychological examination conducted by the State's expert, Dr. Resnick. The defense objected to the compelled examination and to Dr. Resnick's testimony. (Pretrial Transcript, May 17, 2006 (App. at A-99-A-100); Tr. 3128–31, 3135–36.) The defense argued that (1) the court never should have ordered the compelled examination; and (2) Dr. Resnick should not be permitted to testify because he could not reach an opinion to a reasonable degree of medical certainty. *Id.* The defense argued that the compelled examination of Ms. Goff was “unprecedented in Ohio Jurisprudence or anywhere else that I can find.” (Tr. 3128.)

Nevertheless, the trial court permitted Dr. Resnick to interview Ms. Goff for almost eight hours. The State then requested that Dr. Resnick be permitted to conduct a follow-up interview and that the prosecutor be permitted to be present, which defense counsel objected to. The trial court granted the State's request by again improperly analogizing the State's request to a civil lawsuit.²

During the nearly eight hours of interviews, the State's expert interrogated Ms. Goff by confronting her with the State's evidence. He then testified to what Ms. Goff said during the interviews and what he believed were inconsistencies between Ms. Goff's account of the events and

² Specifically, Judge Crow stated:

Again psychiatrist/psychologist, psychologist patients are under 4732.19, whether is a psychologist anyway it refers back to the same rules as 2317.02 B with is a physician patient privacy. Basically when you start reading that stuff it is communications by a patient in relation to the physician or psychologist/psychiatrist, etc. M.D., D.O. his advice. In this situation the interview evaluation is not being done for treatment. Whether it is your expert or the State's expert it's not being done for treatment it's being done in preparation for testimony in Court. **An analogy would be to a civil suit.** Then again the reason, I'm assuming this has all been done is Mr. Stillpass has made known to the Court and to, I believe the prosecution. He intends to use battered woman syndrome. This is an affirmative matter. This would be very similar to a person being in an automobile wreck and going in for a IEP. You know people can appear, defense counsel or Plaintiff's can appear at the IEP. Can't ask questions of them. Can't ask questions. You can be there and listen if you want to and take notes about how long the person inquired. You can do ask of that sort of stuff. It's not a deposition. So I am going to grant the Motion to allow the State to be present. The same would be true, on your expert. You can be there when your expert examines her.

(Pretrial Transcript, Oct. 18, 2006 (emphasis added) (App. at A-108-A-110).)

the State's evidence. (Tr. 3176–77.) The State admitted in closing argument that Dr. Resnick was a fact investigator for the State clothed in expert attire. (Tr. 3450.) The trial court then found Ms. Goff guilty of aggravated murder with a firearm specification, relying on the content of Dr. Resnick's improper testimony in doing so. (Tr. 3460–61.)

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

First Proposition of Law: It is a violation of a defendant's right against self-incrimination under the Fifth Amendment of the United States Constitution and Article I, Section 10 of the Ohio Constitution to compel her to submit to a psychological examination, conducted by the State's expert, in response to the defendant raising a defense of self-defense supported by evidence of Battered Woman Syndrome.

Ordering a defendant to submit to a psychological examination conducted by the State's expert, when the State may use the statements the defendant makes during the examination against her at trial, violates her state and federal privileges against self-incrimination.

The Ohio Constitution provides that "[no] person shall be compelled, in any criminal case, to be a witness against himself." Article I, Section 10 (App. at A-149). This provision of the Ohio Constitution echoes the right against self-incrimination guaranteed by the Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment. *Malloy v. Hogan* (1964), 378 U.S. 1, 6. "The essence of this basic constitutional principle is the requirement that the State . . . produce the evidence against [the defendant] by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." *Culombe v. Connecticut* (1961), 367 U.S. 568, 581–82. This constitutional protection not only prohibits the government from compelling a defendant to testify against himself at trial, "but also privileges [the defendant] not to answer official questions put to him in any other proceeding civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz v. Turley* (1973), 414 U.S. 70, 77.

A violation of the defendant's privilege against self-incrimination occurs when the government elicits compelled, testimonial, and incriminating statements from the defendant. *United States v. Hubbell* (2000), 530 U.S. 27, 34–36. In Ms. Goff's case, the trial court, over defense counsel's vigorous objection, ordered Ms. Goff to submit to a psychiatric examination conducted by the State's handpicked expert, Dr. Resnick, and answer any questions Dr. Resnick posed. Thus, Ms. Goff was compelled to disclose the contents of her mind to the State—that is, she was compelled to provide testimonial statements to the State. *See id.* at 34, 34 n.8; *see also Estelle v. Smith* (1981), 451 U.S. 454, 464 (holding that a psychiatrist's diagnosis, based in part on a defendant's statements about the details of the crime, was testimonial). The State and Dr. Resnick, over objection, then used those compelled, testimonial statements to incriminate Ms. Goff at trial:

A. [By Resnick] In this case, there were many documents, in the range of over forty (40) documents, police reports, and so forth, I had a chance to review before I conducted a personal examination with Ms. Goff I spent seven (7) hours forty (40) minutes with her in an extended interview, and then I had an additional phone call later for eighteen (18) minutes

(Tr. 3147.)

Q. [By the State] And did you then, you also talked with her about the time frame around the killing?

A. Yes, I did that in detail.

A. Okay. And when talked with her [sic], did you find any inconsistencies of note that you gave consideration to in determining whether you could have an opinion regarding why she killed her husband?

A. Yes. What I did in great detail get [sic] her spontaneous account of what happened, and then if there were inconsistencies with what she had told police earlier, I **confronted** her with those to try and clarify issues, and I can tell you the specific inconsistencies if that's what you're asking.

(Tr. 3151–52 (emphasis added).)

Q. And go ahead and tell us about those inconsistencies, please.

A. All right. Well, first of all, there is some dispute between her versions of events and other versions of events. For example, she told me that Mr. Goff had threatened to kill her and the children on multiple occasions. Mr. Goff, when interviewed by the police on January 18th, denied that he had threatened her. Ms.

Goff reported to me that on March 17th Mr. Goff explicitly threatened to kill her during a 6:00 P.M. phone call. I asked, I said, "Are you sure that might've been the earlier call?" She said that she was certain that he had explicitly threatened to kill her and the children at the 6:00 P.M. phone call. There were witnesses to that 6:00 P.M. phone call who reported that Mr. Goff did not make any threats. Additional inconsistencies had to do with statements she gave the police on March 18th compared to the events she told me on August 18th. The first, there were two (2) of these inconsistencies. The first was that she said that in the statement to the police she did not indicate that her intention was to miss and only scare her husband by not shooting to hit him. In the account she gave to me, she said that the first two (2) shots she fired her goal was to scare him and not to hit his body. In reality, all fifteen (15) shots she fired based on autopsy did strike her husband. Final inconsistency had to do with the statement she gave to the police on March 18th. In that time she said that she fired when her husband turned around toward the window after the first shot. In the account she gave me, she said that after the first shot her husband was walking toward her as an explanation for why she continued to shoot.

* * *

Q. And also in reference to her report to you, in addition to that inconsistency of going ahead with the moving up on the porch, the statement that she made to you that there was the long gun incident and heard the safe tumbling, was it your understanding that that was not contained in her statement to the police on the night of the murder as well?

A. That's correct. She did not mention that to the police.

Q. She also mentioned in your report, did she not, that he grabbed her arm and pulled her in the house?

A. That is the version she gave me, and that also was different from the police reports where she said she walked in.

(Tr. 3154–59.) Dr. Resnick continued his testimony by stating that the critical issue was Ms. Goff's believability, which he noted only the court could decide. (*See, e.g.*, Tr. 3243.) Notwithstanding Dr. Resnick's recognition of the limits of his testimony, he repeatedly testified as to the alleged factual inconsistencies he discovered during the compelled examinations to impugn Mr. Goff's credibility.

In an effort to further undermine her credibility, Dr. Resnick recounted additional factual statements Ms. Goff provided during the compelled examination, testifying, for example, that Ms. Goff told him she lied to her grandmother about where she was going the day of the shooting. (Tr. 3157.) Dr. Resnick also emphasized that Ms. Goff's account of events was largely uncorroborated, thereby taking on the role of a prosecutor during closing argument rather than a psychiatrist

providing an expert opinion regarding BWS. (Tr. 3165; 3176–77.) Plainly then, Dr. Resnick used Ms. Goff's testimonial statements from the compelled examination to attempt to project to the judge his belief that Ms. Goff was guilty. Therefore, the court's order compelling Ms. Goff to provide testimonial, incriminating statements to the State, as well as Dr. Resnick's consequent testimony, violated Ms. Goff's federal and state privileges against self-incrimination.

The United States Supreme Court's holding in *Estelle v. Smith* (1981), 451 U.S. 454, supports this conclusion. In *Smith*, a capital murder case, the trial court ordered the defendant to submit to a pretrial competency examination. *Id.* at 456–57. The court found the defendant competent to stand trial, and the exam was not discussed during the guilt phase of the proceedings. *Id.* at 458. During the penalty phase, however, the court permitted the psychiatrist who had conducted the examination to opine that the defendant posed a risk of future dangerousness—one of three findings the jury was required to make for a sentence of death to be imposed. *Id.* at 459. The jury then found that a sentence of death was appropriate. *Id.* at 460.

The U.S. Supreme Court held that the psychiatrist's testimony violated the defendant's right against self-incrimination. *Id.* at 474. Specifically, “when [at trial the psychiatrist] went beyond simply reporting to the court on the issue of competence and testified for the prosecution . . . on the crucial issue of respondent’s future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting.” *Id.* at 467. Thus, the Court held that the psychiatrist's testimony violated the Fifth Amendment because “the State used as evidence against Respondent the substance of the disclosures during the pretrial psychiatric examination.” *Id.* at 464.

In Ms. Goff's case, then, just as in *Smith*, the State used the substance of the disclosures Ms. Goff made during the compelled psychiatric examination against her at trial. Indeed, “[t]he Fifth

Amendment interest at stake here is arguably greater than in *Estelle*, for here the psychiatrist recounted statements made by the appellant rather than only his medical conclusions about the defendant[. . .].” *United States v. Chitty* (2d Cir. 1985), 760 F.2d 425, 430-431. Dr. Resnick's testimony is even more egregious than that of the experts in *Smith* and *Chitty* because Dr. Resnick did not even provide a medical opinion based on Ms. Goff's statements. Instead, he testified as to the specific statements that Ms. Goff had made during the compelled examination, demonstrated how those statements were not consistent with the State's evidence against her, and speculated as to Ms. Goff's motivation for shooting Goff. (*See supra*, at pp. 8–9.) Therefore, Ms. Goff's state and federal privileges against self-incrimination were even more clearly violated than were the defendants' privileges against self-incrimination in *Smith* and *Chitty*.

To avoid the inevitable result of the foregoing analysis, the State suggested, and the Fourth District Court of Appeals agreed, that Ms. Goff impliedly waived—without limitation—her privileges against self-incrimination, thereby giving the State *carte blanche* to interrogate Ms. Goff and use the statements she made during that interrogation against her at trial. *State v. Goff* (Ohio Ct. App. 4th Dist. Sept. 14, 2009), No. 07CA17, 2009 WL 2986190, *4–5, 2009-Ohio-4914, ¶¶ 19–21. The Fourth District recognized an implied waiver because Ms. Goff interposed a defense of self-defense supported by her own expert's BWS testimony. *Id.* at ¶¶ 22–26.

There are numerous problems with the Fourth District's opinion. First, as an initial step to justify its holding, the court of appeals cited language in a few federal opinions to support the proposition that “when a defendant asserts an insanity defense or raises his competency to stand trial, the court may order him to submit to a compelled psychiatric examination.” *Id.* at ¶ 26. Neither this Court nor the U.S. Supreme Court, however, has ever issued such a holding. The closest either court

has come to stating such a rule was in *Buchanan v. Kentucky*, where the U.S. Supreme Court held that:

if a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution.

Buchanan v. Kentucky (1987), 483 U.S. 402, 422–23. Even accepting the Fourth District's expansion of this and like holdings as proper, the Fourth District was forced to expand upon these holdings even further to affirm Ms. Goff's conviction, holding that "a fair corollary to these cases is that when a defendant places his mental state at issue in a criminal trial and introduces his own expert to testify as to his mental state, then fairness dictates that the State have an opportunity to rebut that testimony through the use of its own expert." *Goff*, 2009-Ohio-4914, ¶ 26.

The Fourth District's expansive reading of federal case law to affirm Ms. Goff's conviction is not persuasive because: (1) interposing a defense of self-defense supported by expert BWS testimony is not comparable to asserting an insanity defense or raising a competency issue; and (2) even if a defendant does impliedly waive her rights against self-incrimination by interposing a defense of self-defense supported by expert BWS evidence, that waiver does not give the State a license to interrogate the defendant regarding the facts of the alleged crime and use her statements from that interrogation against her at trial to establish guilt.

I. A Defense of Self-Defense Supported by Expert BWS Testimony Is Not Comparable to an Insanity Defense or an Issue of Competency

Interposing a defense of self-defense supported by expert BWS testimony is not comparable to asserting an insanity defense or raising a competency issue.

First, regarding competency, a defendant plainly does not put her ability to understand the nature of the proceedings at issue when she raises a defense of self-defense supported by BWS. BWS is therefore not analogous to a competency issue.

Nor is the defense of self-defense supported by BWS comparable to a defense of insanity. Numerous courts and commentators have discussed why BWS is not a psychopathology. For example, the California Supreme Court has observed that the term, "battered women's syndrome," is a misnomer because it conveys unwarranted "pathological connotations which suggest that battered women suffer from some sort of sickness." *People v. Humphrey* (Cal. 1996), 921 P.2d 1,7 n.3. It is therefore more appropriate to refer BWS as "battering and its effects." *Id.* Other courts and commentators have made similar observations. *See, e.g., United States v. Bell* (N.D. Ill. 1994), 855 F. Supp. 239, 240 (stating that BWS is a defense unrelated to a defendant's mental capacity); *United States v. Williams* (E.D.N.C. 1995), 163 F.R.D. 249, 250 (citing *Bell* with approval); Sue Osthoff & Holly Maguigan, *Explaining Without Pathologizing: Testimony on Battering and Its Effects*, in *Current Controversies on Family Violence*, 225–33 (Donileen R. Loseke *et. al.* eds., 2d ed. 2005) (1993) (explaining that BWS is not a "pathology, incapacity, or lack of reason"); *People v. Brown* (Cal. 2004), 94 P.3d 574, 578 (noting that "victims of domestic violence do not typically suffer from a pathological condition.").

The foregoing cases and commentaries make clear that expert testimony regarding BWS does not describe a psychopathology. Instead, BWS testimony explains the reasonableness of a domestic abuse victim's reactions to his or her abuser's behavior, which reactions might be counterintuitive to the layperson who has himself or herself not experienced domestic abuse. *See, e.g., Humphrey*, 921 P.2d at 7–8.

A defense of insanity is also distinguishable from BWS because insanity is a defense of excuse—it posits that the defendant could not form a culpable mental state. *State v. Daws* (Ohio App. 1st Dist. 1994), 104 Ohio App. 3d 448, 467. As such, the defendant's *mens rea* is put directly at issue. *Id.* In contrast, self-defense is a theory of justification—it posits that the defendant was justified in fearing for life or limb and acted accordingly. *Id.* The import of expert BWS testimony introduced in support of self-defense is therefore to educate the fact finder that a battered person's reactions to her batterer's threats may differ from a non-battered person's reactions to the same threats, not to negative *mens rea*. Thus, expert BWS testimony demonstrates that the reasonableness of a BWS defendant's reactions to her batterer's threats must be analyzed by comparing her reactions to how other BWS victims—not members of the general populace—would react to the same threats. A defense of insanity and a defense of self-defense supported by BWS are therefore wholly different.

Practical considerations also counsel that BWS expert testimony should not be treated as an analogue to expert testimony regarding insanity. Establishing an insanity defense requires proof that the defendant suffers from a mental disease or defect that caused the defendant to be unable to understand the wrongfulness of his conduct. *See* R.C. § 2901.01(A)(14). Because only a doctor can diagnose a mental disease or defect, expert testimony is therefore required to establish an insanity defense. Establishing a defense of self-defense does not necessarily require any expert testimony. Moreover, the State does not require the same individualized medical assessment to rebut an expert's testimony regarding BWS or other phenomena that may implicate a defendant's state of mind, as it does to rebut expert insanity testimony. As the Sixth Circuit has observed:

an insanity defense will necessarily put in issue a very specific question regarding the defendant's mental condition at the time of the offense, and will therefore require that the government be permitted to examine the defendant on request. By contrast, the introduction of expert testimony regarding a mental condition, disease, or defect does

not particularly suggest the need for an examination of the defendant, let alone require it.

United States v. Davis (6th Cir. 1996), 93 F.3d 1286, 1292–93. Instead, to rebut expert testimony that does not relate to insanity or competence, the government should pursue other options:

[t]he government can prepare to meet expert defense evidence in a variety of ways, including the retention of a government expert to attend at trial and assist the government in cross-examination, and review of evidence relied upon by the defense expert. Thus, the need for advance notice of expert evidence does not imply a court-ordered examination of the defendant is intended or appropriate.

Id. at 1294. Therefore, unlike a case of insanity, the State is not put at a disadvantage if it does not have the opportunity to examine the defendant when she raises a defense of self-defense supported by expert BWS testimony.

Because the defense of self-defense supported by BWS is not analogous to an insanity defense or an issue of competency and because the State has an array of other means to rebut a defendant's expert BWS testimony, the Fourth District's use of insanity and competency cases to support its finding that Ms. Goff impliedly waived her privileges against self-incrimination was misplaced. Instead, a defendant does not waive her privileges against self-incrimination when she interposes a defense of self-defense supported by BWS. Therefore, ordering a defendant to submit to a psychological examination conducted by the State's expert, when the State may use the statements the defendant makes during the examination against her at trial, violates her state and federal privileges against self-incrimination.

II. If a Defendant Does Impliedly Waive Her Rights Against Self-Incrimination by Interposing a Defense of Self-Defense Supported by Expert BWS Evidence, that Waiver Is Limited

Even if this Court were to hold that a defendant does waive her privileges against self-incrimination when she raises a defense of self-defense supported by BWS, the scope of that waiver cannot be unlimited, as the Fourth District necessarily held given the nature of Dr. Resnick's

testimony. Instead, any such waiver must be narrowly tailored to protect the defendant's privilege against self-incrimination as to the factual statements bearing on guilt that she makes during the examination. Indeed, the Ohio General Assembly has recognized that, in the context of compelled insanity and competency examinations, a defendant's privileges against self-incrimination must be protected by prohibiting the State's expert from testifying as to statements the defendant made during the examination that bear on guilt. R.C. § 2945.371(J) (emphasis added); *see also* Appellant's Second Proposition of Law, *infra* at p. 21, for a detailed discussion of how Dr. Resnick's testimony violated R.C. § 2945.371(J).

Courts that have considered the scope of a defendant's waiver of her privilege against self-incrimination in insanity and competency cases have similarly found that limits must be placed on either the compelled examination, the testimony resulting therefrom, or both, to avoid a constitutional violation.

In *Traywicks v. State*, (Ok. Ct. Crim. App. 1996), 927 P.2d 1062, for example, the defendant was convicted of second degree murder. *Id.* at 1063. In that case, the defendant had raised "mental defect/alcoholism" as a defense and introduced expert testimony in support of that defense. *Id.* Pretrial, the trial court had ordered that the defendant submit to a pretrial psychiatric examination conducted by the State's expert. *See id.* During the examination, the defendant refused to answer any questions the State's expert posed regarding the factual circumstances of the crime. *See id.* While the defendant did not challenge the testimony of the State's expert on appeal, he did challenge the prosecutor's questions that highlighted his refusal to answer the questions of the State's expert. *Id.* at 1063-64.

In reviewing the defendant's conviction, the Court of Criminal Appeals of Oklahoma found no error in ordering the defendant to submit to a compelled psychiatric examination because he had

raised an insanity defense. *Id.* at 1065. However, merely raising a mental status defense did not grant the state "*carte blanche* in examining the defendant." *Id.* (emphasis is original). Instead,

while the defendant may be compelled to answer questions about his mental health, a constitutional violation may occur if the defendant is compelled to reveal details of the crime itself to the State's mental health expert. This distinction makes sense. The State needs the mental health evidence to rebut the insanity defense, and it seems logical that raising that defense waives the defendant's right to silence as to those mental health issues. However, evidence of the crime itself is a distinct and different question from the issue of mental illness. Accordingly, the defendant retains the right to assert his Fifth Amendment privilege as to the details of the crime. Of course, the defendant could waive his privilege to remain silent as to the details of the crime, but that waiver would have to be done knowingly and voluntarily after the administration of *Miranda* warnings.

Id. Thus, the court held that the State violated the defendant's privilege against self-incrimination by questioning the defendant regarding his refusal to answer the State's expert's questions about the alleged murder. *Id.*

The Oregon Supreme Court has similarly found that the questions a State's expert may ask during a psychiatric examination compelled in response to an insanity defense must be limited to protect the defendant's privilege against self-incrimination. *Shepard v. Bowe* (Or. 1968), 442 P.2d 238, 240–41. In *Shepard*, after the defendant raised a defense of insanity to a charge of failing to stop at the scene of an accident, the State requested a compelled psychiatric examination. *Id.* at 239. The trial court granted the State's request, and in response, the defendant filed a mandamus action, requesting that the order compelling the exam be vacated. *Id.* The Oregon Supreme Court granted the defendant's mandamus petition, finding that "the only way in which the constitutional right of the defendant not to be compelled to testify against himself can be adequately preserved is to hold that the defendant cannot be required to answer" questions regarding the defendant's "conduct at or immediately near the time of the commission of the alleged crime." *Id.* at 241, 239. The Oregon Supreme Court therefore ordered the trial court to vacate its order compelling the defendant to

answer the questions the State's expert posed regarding the "accident or conduct at or immediately near the time of the commission of the alleged crime," as well as the trial court's order prohibiting defense counsel from advising his client not to answer questions the State's expert posed. *Id.* at 241.

The Oregon Supreme Court also explained that prohibiting the State's expert from questioning the defendant about the facts related to the alleged crime was the only measure that could adequately protect the defendant's privilege against self-incrimination. *Id.* It found that the defendant's "right against self-incrimination [would not be] adequately protected by instructing the jury that in determining the issue of guilt they cannot consider any incriminating statement the witness may have made to the psychiatrist." *Id.* It also noted that simply prohibiting the introduction of any incriminating statements at trial was not a sufficient prophylactic measure because the incriminating statements the defendant provided during the compelled examination could nevertheless "provide a lead to other [incriminating] evidence." *Id.*

Finally, in *State v. Jackson*, (W. Va. 1982), 298 S.E.2d 866, the defendant interposed an insanity defense after being charged with first degree murder. *Id.* at 868-70. The trial court granted the State's request for a compelled psychiatric examination. *Id.* At trial, the State called its expert to rebut the defendant's insanity defense. *Id.* at 870. However, the State's expert also "revealed statements by [the defendant] about events leading up to the crime." *Id.* The West Virginia Supreme Court held that the State was entitled to a compelled examination because the defendant raised an insanity defense. *Id.* at 871. However, it also found that the trial court must impose safeguards to protect the defendant's privilege against self-incrimination. *Id.* Specifically, it held that:

It is possible to compel a defendant to be examined by a psychiatrist to evaluate his insanity defense, without abrogating his Fifth Amendment privilege against self-incrimination. While some courts have required *Miranda* warnings, we feel safeguards other than *Miranda* protections can adequately protect a defendant

and also provide the state an opportunity to get its own evidence about mental condition.

There should be an *in camera* hearing before the government psychiatrist testifies, to excise any portions of his report and proposed testimony that include incriminating statements. A psychiatrist can testify to the bases of his medical opinion, but without reference to a defendant's specific statements about his criminal offense. This *in camera* hearing should obviate the need for an instruction limiting a jury's consideration of a psychiatrist's testimony to facts or opinions on the issue of insanity (probably a useless act when a medical person has testified to a defendant's revelation to him of incriminating facts). Should there be any question about any such revelation to the medical witness, inadvertently mentioned to the jury, then, of course, a limiting instruction should be given.

Id. at 871–72 (internal citations and footnotes omitted).

Several other courts have reached similar conclusions. *See, e.g., United States v. Reifsteck*, 535 F.2d 1030, 1034 (8th Cir. 1976) (holding that no Fifth Amendment violation occurred in a compelled insanity exam case because government's experts "did not testify to any incriminating statements made by defendant during her [court-ordered examinations]. The testimony was limited to their clinical impression of her mental condition at the time of the offense."); *United States v. Haworth* (D.N.M. 1996), 942 F. Supp. 1406, 1408–09 (holding that, in the context of defendants introducing expert mental health testimony during the penalty phase of a capital murder trial, "the Court is mindful that the independent examination sought by the Government has the potential for treading on the Defendants' Fifth Amendment rights, and the Court will, therefore, impose strict limitations on the examination procedure employed."); *United States v. McMahan* (6th Cir. April 26, 2005), 129 Fed. Appx. 924, 930, 2005 WL 953835, *4–5 (holding that the trial court properly protected the defendant's rights against self-incrimination by prohibiting the admission at trial of any incriminating statements the defendant made during a compelled psychological examination conducted in response to the defendant interposing a defense of diminished capacity); *State v. Bush* (W. Va. 1994), 442 S.E.2d 437, 439 (holding that a psychiatrist may not testify regarding "any

specific statements a defendant made regarding the criminal offense" during a psychological examination compelled in response to the defendant raising a mental condition defense).

The foregoing cases make clear that, even if this Court finds that a compelled examination might be proper when a defendant interposes a defense of self-defense supported by BWS, the defendant's privileges against self-incrimination must still be protected by either placing limits on the examination, the testimony resulting therefrom, or both.

In Ms. Goff's case, the trial court placed no limits either on Dr. Resnick's nearly eight hour interrogation of Ms. Goff or on the scope of his trial testimony. As a result, Dr. Resnick delved into areas of Ms. Goff's mind that he was constitutionality (and statutorily) prohibited from delving, as recognized by defense counsel:

I was present for the interview, Your Honor. When we got to the point where we were talking about the events of [the day of the shooting], I **objected** at that point to the continuation of the interview. Unfortunately, it went forward.

(Tr. 3128–31 (emphasis added).)

Then, at trial, rather than testify as to whether he believed Ms. Goff to be a battered woman, Dr. Resnick recounted all of the statements Ms. Goff made during his interrogation of her and then compared the statements she made to the other evidence gathered by the prosecution in an effort to prove her guilt. (*See supra*, at pp. 8–9.) He thereby abandoned his role of a psychiatric expert and took on the role of a prosecutor. Dr. Resnick's testimony therefore violated Ms. Goff's privileges against self-incrimination.

Second Proposition of Law: It is a violation of R.C. § 2945.371(J) and a defendant's right to a fair trial and the due process of law under the Ohio and United States Constitutions, to permit the State's psychiatric expert to expound on inconsistencies between the statements the State's expert elicits from a defendant during a compelled psychological examination and the defendant's prior statements and other evidence gathered by the prosecution.

When the General Assembly enacted R.C. § 2901.06 and this Court decided *State v. Koss* (1990), 49 Ohio St.3d 213, no one could have predicted that a law that was so clearly written could be manipulated, overextended, and misinterpreted in such a way as to deny the defendant a right to due process and a fair trial. However, that is what happened in this case.

In this case, not only did the trial court grant an examination that was not authorized by statute, *see infra* Proposition III, and was a violation of Ms. Goff's privileges against self-incrimination, *see supra* Proposition I, but the court allowed Dr. Resnick to testify as to Ms. Goff's guilt. Such testimony is clearly prohibited by the statutory and constitutional protections of R.C. § 2945.371(J):

No statement that a defendant makes in an evaluation or hearing under . . . this section relating to the defendant's competence to stand trial or to the defendant's mental condition at the time of the offense charged shall be used against the defendant on the issue of guilt in any criminal action or proceeding, but, in a criminal action or proceeding, the prosecutor or defense counsel may call as a witness any person who evaluated the defendant or prepared a report pursuant to a referral under this section.

R.C. § 2945.371(J) (emphasis added).

This Court has repeatedly held that an expert cannot testify as to the statements the defendant made during a compelled examination:

A defendant's statements made in the course of a court-ordered psychological examination may be used to refute his assertion of mental incapacity, but may not be used to show that he committed the acts constituting the offense.

State v. Cooley (1989), 46 Ohio St. 3d 20, syllabus ¶ 2, *rev'd on other grounds*, 88 Ohio St. 3d 89.

This Court echoed *Cooley's* holding in *State v. Franklin* (2002), 97 Ohio St. 3d 1. In *Franklin*, the defendant entered a plea of not guilty by reason of insanity and claimed to be incompetent to stand trial. *Id.* at 3. The defendant argued that the jury should be able to consider the statements he made to his psychologist for the purpose of determining his guilt. *Id.* at 15–16. The

defendant wanted the jury to consider the fact that he told his psychologist he killed his uncle because his uncle accused him of being gay. *Id.* at 15. Provided the jury was permitted to consider that statement, it could have reduced the defendant's offense to voluntary manslaughter. In determining the issue of defendant's guilt, the trial court instructed the jury that it could not consider any of the statements the defendant made to the doctors. *Id.* at 43. The Ohio Supreme Court found that, pursuant to R.C. § 2945.371(J), the trial court was correct in instructing the jury that it could only consider the statements the defendant made to the psychologists as they related to the issue of sanity, but not as to guilt. *Id.* at 43.

The Second District Court of Appeals has similarly held that Ohio's statutory scheme prohibits statements the defendant utters during a psychological examination from being used to prove or disprove guilt, but allows the professional to testify regarding insanity issues. *State v. Reed* (Ohio Ct. App. 2d Dist. 2001), 2001 WL 815026, *6, 2001-Ohio-1537. In *Reed*, the defendant wanted to introduce statements she made to a psychologist because the statements supported her theory of the case. *Id.* at *6. Citing to R.C. § 2945.371(J), the court refused and held that:

The prohibition in the statute is necessary because although the statements made to an examiner by the defendant are hearsay, **damaging** statements would otherwise be admissible under Evid.R. 804(B)(3), statement against interest, if the statute did not exist.

Id. (emphasis added).

The United States Supreme Court's holding in *Porter v. McKaskle* (1984), 466 U.S. 984, supports the conclusion that statements a defendant makes during an examination cannot be used against him. In *Porter*, defense counsel was concerned about his client's competency to stand trial and requested that the court order a psychiatric examination of the defendant. Defense counsel also requested that the results of the examination be admissible only for assessing the defendant's competency and that they not be admitted during the penalty phase of the trial. *Id.* at 985. The trial

judge indicated he would grant the request for the exam only if the material disclosed was admitted into the record and either side could utilize it for any purpose. *Id.*

The Court in citing to *Smith*, 451 U.S. 454, held that statements made by a defendant in the course of a court-ordered competency exam cannot be used against him at trial. *Id.* at 986. Furthermore, "[a] trial judge may not put a defendant to the choice of forgoing either his right to a competency exam or his right to limit the admissibility of statements he makes during such an exam," *Id.*; cf. *Simmons v. United States* (1968), 390 U.S. 377.

This Court has repeatedly recognized that a balance needs to be maintained between the State meeting its burden of proof and protecting the constitutional rights of the defendant. See *State v. Haines* (2006), 112 Ohio St.3d 393, 2006-Ohio-6711; and *State v. Wilcox* (1982), 70 Ohio St.2d 182. In *Wilcox*, the Court held that a defendant is not permitted to offer expert testimony, unrelated to the insanity defense, to show that the defendant lacked the mental capacity to form the specific mental state required for a particular crime or degree of crime. *Id.* at syllabus, ¶ 2. Expert testimony that opines on the defendant's *mens rea* or expresses a lay opinion is inadmissible. *Id.*; *State v. Slagle* (1992), 65 Ohio St.3d 597, 607; and Ohio R. Evid. 702(A).

Although the Court's holding in *Haines* was specific to the facts set forth in that case, it too is consistent with the intent set forth in R.C. § 2945.371(J) and the Court's precedent:

The rule in most jurisdictions is that general testimony regarding battered-woman syndrome may aid a jury in evaluating evidence and that if the expert expresses no opinion as to whether the victim suffers from battered-woman syndrome or **does not opine on which of her conflicting statements is more credible**, such testimony does not interfere with or impinge upon the jury's role in determining the credibility of witnesses.

Id. at 404 (emphasis added). Most important, the Court recognized that in order to provide a defendant with due process and the right to a fair trial, certain limitations need to be placed on expert testimony: an expert is not permitted to testify as to whether the complainant is truthful and whether

the defendant was a batterer. *Id.* To do otherwise, would be to allow the expert to testify as to guilt. Thus, under the foregoing authorities, an expert cannot testify as to the facts, as to credibility, or give an opinion on guilt.

Had the safeguards provided in R.C. § 2945.371(J) and the Fifth Amendment been in place in the instant case, Dr. Resnick's testimony would have been limited to: "I have no opinion as to whether or not Ms. Goff was a battered woman." We can only assume that such testimony would not have provided the basis for a conviction given the unequivocal defense testimony that Ms. Goff was a battered woman.

I. Dr. Resnick was an agent for the State. He testified to what he perceived as inconsistencies between Ms. Goff's prior statements and what she had told him in an effort to demonstrate a lack of credibility, and therefore guilt in violation of R.C. § 2945.371(J).

From the beginning of his testimony, Dr. Resnick testified to nothing more than inconsistencies and speculation as to why Ms. Goff shot Goff. He was asked the following:

[D]id you find any inconsistencies of note that you gave consideration to in determining whether you could have an opinion regarding why she killed her husband?

(Tr. 3152.) For the next seven pages, Dr. Resnick testified how he had gone into great detail with Ms. Goff in an effort to try to elicit inconsistencies. (*See supra*, pp. 8-9, for an excerpt of Dr. Resnick's testimony.)

Dr. Resnick then gave over 10 pages of testimony wherein he recounted Ms. Goff's statements bearing on guilt made during the compelled exam:

The first possibility is, and I put this first because I gave it greater weight, but still not to reasonable medical certainty. That is that Mrs. Goff may have acted in anger because the moment she fired she said her husband was laughing at her and telling her that she lacked the guts to shoot him. Specifically, she said in her statement to the police that her husband said, "You know you won't shoot me. You won't shoot me. You don't have the guts. So I lifted the gun up and he was laughing in my face,

telling me he was going to kill the kids and that's when I pulled the first time and then it wouldn't pull again."

(Tr. 3171-89.)

On re-direct, the State elicited the following:

Q: And, Doctor, again, a lot of questions have been asked on cross examination. Would you tell the Court again what, summarize what you base your opinion that you couldn't reach an opinion to a reasonable degree of medical certainty about the fear if the imminent harm or the Battered Woman Syndrome? Could you just summarize the basis for your opinion again?

A: Yeah. The critical issue is the believability of Mrs. Goff herself. Secondly, there is just, we really have only her version of it, coupled with the potential contrary information that she said she was intensely fearful, yet put herself in harms way, just left me not feeling I could reach a firm conclusion either way.

(Tr. 3244.)

The prosecutor continued to ask Dr. Resnick what he believed Ms. Goff's state of mind was and what her intent was the night of the shooting:

Q: The statement by her, the original intent was to talk to her husband on the porch she said, and then he was there. So she had to decide to do something else. Her statement was, her first thought was if she went in there and she would just let him kill her. In fact, she said in the call she said, "Take me", and that she would go and get killed. Then her logic was he would be arrested and couldn't bother the children. Do you recall that?

A: She said that, yes.

Q: Okay. Did you find anything problematical about the fact that she said that was her intent, but she loaded two (2) semi-automatic pistols and took them with her to get killed?

A: Yes. She told me that she had no intention at all of shooting her husband, and that she took the guns only like to scare him if she needed to. But in deed [sic], bringing that kind of killing power with her . . .

Stillpass: [Ms. Goff's Counsel] Objection, Your Honor.

Court: What is the basis?

Stillpass: Your Honor, he's saying what is in her mind at the time and I don't think that's, I don't think he's got the basis to . . .

Court: I don't think that's what he is saying. Go ahead.

(Tr. 3177.)

Dr. Resnick devoted the majority of his testimony to impeaching Ms. Goff's credibility, and speculating on her motive and state of mind. (Tr. 3147–55; 3176–77.) Dr. Resnick impermissibly cross-examined Ms. Goff prior to trial and then testified to what he believed were inconsistencies to infer to the trial court that she was not credible. He then repeatedly told the court that if Ms. Goff was not credible, then she was not battered, and, therefore, she was guilty:

Q: [State]: So it would be fair to say that the credibility or truthfulness of the alleged victim in this situation is very important?

A: [Dr. Resnick]: That's right. I would say that the whole concept of whether she is a battered woman depends upon whether His Honor in this case finds her credible, that's correct.

(Tr. 3167–68.) At the end of Dr. Resnick's testimony, the prosecutor asked:

Q: [State]: And, Doctor, a lot of questions here asked on cross examination. Would you tell the Court again what, summarize what you base your opinion that you couldn't reach an opinion to a reasonable degree of medical certainty about the fear of imminent harm or the Battered Woman Syndrome? Could you just summarize the basis for that opinion again?

A: [Dr. Resnick]: Yeah. The critical issue is the believability of Ms. Goff herself.

(Tr. 3244.)

In its closing argument, the State acknowledged what Dr. Resnick's role was—he was the State's investigator clothed in "expert" attire:

We gave Resnick everything we had. In fact, I think the other man had like nine (9) or ten (10) items listed in his report that he consulted. Forty-four (44). We gave him witness statements, we gave him everything. In fact, he mentions the witness statements on this call. He didn't say who they were, but he mentioned a witness statement. **Yeah, he probably asked because he knew there was a witness to that.** He delves into it a little more. He asked her specifically on page 15, "Did he threaten

you at 6:01 on the 17th? " She said, "Yeah, he threatened me and the kids." That's not true. That's important. How can you believe anything?

(Tr. 3450 (emphasis added).)

If experts were permitted to interrogate and to cross-examine a defendant, a victim, or a witness prior to trial, and then testify to perceived inconsistencies as to credibility and guilt, there would be no need for a finder of fact. Unfortunately, this is precisely what happened in Ms. Goff's case. The court proceedings were a process in name only. As Justice Lanzinger recognized in her dissent in *Haines*, an expert yields a "particular power" over the minds of jurors, and it is easy for an expert to overstep the bounds. *Haines*, 2006-Ohio-6711, ¶ 69. In the present case, Dr. Resnick yielded incredible power; he was permitted to ask the State's questions of Ms. Goff prior to trial. The State was given an unfair advantage of being able to "depose" Ms. Goff through Dr. Resnick in order to prepare for trial.

Dr. Resnick was permitted to go beyond what one would consider a psychological examination. Dr. Resnick took guilt based information and discussed it with the prosecutor prior to trial, giving the State an unfair advantage during its cross-examination of Ms. Goff. In fact, the State, needing additional information, not only requested that the court permit Dr. Resnick to ask Ms. Goff additional questions in a telephone follow up session, but requested that the prosecutor be permitted to sit in during the questioning. The supposed expert evaluation became more like a deposition to prepare for cross-examination—something that is not provided in the Ohio Rules of Criminal Procedure.

Dr. Resnick never provided an expert opinion as to whether Ms. Goff was a battered woman or whether she exhibited a BWS reaction. Instead, he "**confronted** her with [with her prior statements]" and explained to the court "the specific inconsistencies" between those prior statements

and her statements to him. (Tr. 3147–55 (emphasis added).) This is clearly prohibited under R.C. § 2945.371(J). He was not an expert—he was at times an inquisitor and at others, a prosecutor.

Dr. Resnick's testimony violated R.C. § 2945.371(J), and the court of appeals reliance on *State v. Hancock* (2006), 108 Ohio St. 3d 57, 2006-Ohio-160, to hold otherwise was misguided. See *Goff*, 2009-Ohio-4914, ¶ 56–61. In *Hancock*, not only did the defendant raise an insanity defense, but his counsel expressly conceded there was overwhelming evidence of guilt. *Hancock*, 2006-Ohio-160, ¶ 66. In the present case, unlike *Hancock*, the issue was not whether Ms. Goff shot Goff or if she was insane at the time of the incident, it was whether she was a battered woman who suffered from BWS. The court of appeals took the position that given that Ms. Goff testified to an "overwhelming majority of factual statements contained in Dr. Resnick's report," there was no violation. *Goff*, 2009-Ohio-4914, ¶ 61. But, it was not the statements in-and-of-themselves that were the problem, it was the manner in which Dr. Resnick used the statements to attempt to incriminate Ms. Goff. He told the trial court that he believed her statements were not consistent with the State's evidence to attempt to establish Ms. Goff's factual guilt. (Tr. 3154–59.)

Dr. Resnick used Ms. Goff's statements to testify to what he perceived as inconsistencies in order to project to the trial court that she was not credible, was not a battered woman, and, therefore, that she was guilty. This testimony was more than merely recounting Ms. Goff's statements. This testimony was an expert becoming an agent for the State, deposing, and interrogating a defendant before trial, all under the guise of conducting an "evaluation." This same expert then reported to the State his findings prior to trial, and the State, having additional questions for Ms. Goff, scheduled a follow-up telephone evaluation. The State was given unfair advantage to prepare cross-examination, and the expert was permitted to testify as to perceived inconsistencies bearing on credibility and, ultimately, guilt.

II. Dr. Resnick testified beyond the scope of an expert in violation of R.C. § 2945.371(J), R.C. § 2901.06(B), the Ohio Rules of Evidence, and *State v. Koss* (1990), 49 Ohio St. 3d 213.

This Court has recognized that limits need to be placed on expert testimony. An expert cannot "opine on which of [a witness's] conflicting statements is more credible," or testify as to their opinion regarding the ultimate issue in the case:

Such testimony went beyond the providing of a context for a witness's testimony into the area of determining credibility. The testimony also went to the very question that the jury was asked to answer – whether Haines committed domestic violence against Bohley – and answered it.

Haines, 112 Ohio St.3d at 404.

This Court has recognized the influence an expert can yield over the finder of fact and has been adamant in proclaiming that experts cannot testify as to credibility: it is "egregious, prejudicial and constitutes reversible error" when an expert is permitted to express an opinion regarding credibility. *State v. Boston* (1989), 46 Ohio St.3d108, 129. "In our system of justice it is the fact finder, not the so-called expert or lay witnesses, who bears the burden of assessing the credibility and veracity of witnesses." *Id.* at 128; *see also State v. Moreland* (1990), 50 Ohio St.3d 58, 62. *Boston* and *Moreland* prohibit an expert from testifying that a witness told the truth about a specific situation or that the witness meets some indicia or criteria that signifies that the witness is truthful.

Dr. Resnick opined that Ms. Goff may have possibly "acted in anger [in killing Goff] because the moment she fired she said that her husband was laughing at her" (Tr. 3172.) This is not an expert opinion. It is the purview of the trier of fact to decide issues of credibility, not the purview of the expert. *State v. Djuric* (Ohio Ct. App. 8th Dist. Feb. 1, 2007), No. 87745, 2007 WL 274373, *7, 2007-Ohio-413, ¶ 41. The defense repeatedly objected to the lay opinions expressed by Dr. Resnick:

Q. [State]: In fact, the possible motive, which we're not required in a murder case to show a motive anyway, the possible motives [for the killing of Goff] are ad infinitum, . . . correct[, Dr. Resnick]?

[Mr. Stillpass]: Your Honor, I'm going to object to any possibilities here. . . .

[Court]: You can ask him about it.

Q. [State]: So the explanations you give . . . would be other motives or reasons?

A. [Resnick]: Correct.

(Tr. 3134–36; 3171.)

Stating that one might kill because one is angry does not “assist the trier of fact to understand the evidence or to determine a fact in issue.” *State v. D'Ambrosio* (1993), 67 Ohio St. 3d 185, 191. This is not the type of expert testimony that the General Assembly or *Koss* sanctioned.

The court of appeals believed that having the expert witness echo the words that the fact finder was to decide credibility was enough. *Goff*, 2009-Ohio-4914, ¶ 54.

Here, the trial court did not improperly allow Dr. Resnick to comment on Goff's credibility. At no point during his testimony did Dr. Resnick give any opinion regarding whether Goff was truthful. Instead, he merely related to the court that he was unable to ascertain her truthfulness, which rendered him unable to reach an opinion within a reasonable degree of medical certainty whether Goff suffered from the battered woman syndrome. Dr. Resnick noted in his testimony that the court would retain the ultimate responsibility to determine Goff's truthfulness.

Id. at ¶54. Under this holding, an expert with a wink and a nod can testify that the defendant is lying, and therefore guilty, so long as the expert states that the issue of credibility is to be decided by the judge.

Dr. Resnick was permitted to testify as to credibility, state of mind, and motive in order to convey to the court what the State wanted him to convey—that Ms. Goff was guilty. He told the court that Ms. Goff had “an ax to grind at this point,” and “that is, the more obnoxious and sadistic he [Goff] is, the more justified her conduct.” (Tr. 3188.) This is not expert testimony, is not the type of testimony contemplated by the General Assembly when it enacted R.C. § 2901.06, and is not

expert testimony as defined in the Ohio Rule of Evidence 702. In fact, this is the type of testimony that is strictly prohibited by the Ohio Rules of Evidence and R.C. § 2945.371(J).

Third Proposition of Law: R.C. Section 2945.371(A) does not authorize, and a court does not have inherent authority to compel a psychological examination of the defendant when the defendant has raised the defense of self-defense, supported by BWS expert testimony, and to order an exam to the contrary is a violation of a defendant's right to due process of law and a fair trial.

For the past 20 years Ohio has recognized Battered Woman's Syndrome, both judicially, *State v. Koss* (1990), 49 Ohio St. 3d 213, and legislatively, R.C. § 2901.06, as part of the law of self-defense in appropriate cases. R.C. § 2901.06(B) provides:

If a person is charged with an offense involving the use of force against another, and the person, as a defense to the offense charged, raises the affirmative defense of self-defense, the person may introduce expert testimony of the "battered woman syndrome" and expert testimony that the person suffered from that syndrome as evidence to establish the requisite belief of an imminent danger of death or great bodily harm that is necessary, as an element of the affirmative defense, to justify the person's use of the force in question. The introduction of any expert testimony under this division shall be in accordance with the Ohio Rules of Evidence.

Neither this statutory provision nor the *Koss* case authorizes a compelled psychological exam by the State to rebut defense testimony concerning BWS.

As far as we can tell, the only time a criminal defendant in Ohio may be compelled to undergo a psychological examination over his objection is when that defendant raises a defense of insanity or if a legitimate issue is raised as to whether the defendant is competent to stand trial. Those situations are covered by R.C. § 2945.371(A), which provides:

If the issue of a person's competence to stand trial is raised or if a defendant enters a plea of not guilty by reason of insanity, the court may order one or more evaluations of the defendant's present mental condition or, in the case of a plea of not guilty by reason of insanity, of the defendant's mental condition at the time of the offense charged.

This section does not authorize a psychological exam whenever a defendant chooses to interpose

a self-defense claim bolstered by BWS. While the examiner appointed under R.C. § 2945.371(B) is admonished to consider the applicability of BWS when determining whether the defendant is legally insane, R.C. § 2945.371(F) does not independently authorize a psychological examination. Rather, in our view, it preserves for the severely mentally ill defendant the possibility of being found not guilty based on a valid claim of self-defense even if the defendant was legally not responsible for her conduct.

A person who is so mentally ill that she satisfies the legal definition of insanity should nevertheless not be committed as a criminally insane person if in fact she did not commit a crime. Ohio has ample civil commitment procedures to provide care for those who are severely mentally ill but have not committed a criminal offense. If such a person used physical force against another in a way that the law recognizes as justified, then that person should not be committed as a criminally insane person. We submit that R.C. § 2945.371(F) allows for a civil disposition of the accused as opposed to a criminal disposition if the court determines that the force used by the legally insane person was legally justified. In the present case, Ms. Goff never claimed legal insanity so this provision is irrelevant.

The Fourth District's reliance on *State v. Manning* (Ohio Ct. App. 9th Dist. 1991), 74 Ohio App 3d 19, to find authority to order the compelled examination was misplaced. In *Manning*, the defendant failed to produce her expert's report in a timely fashion and risked being unable to present any expert testimony. In exchange for a waiver of the missed deadline, the defense agreed to submit to a State requested psychiatric examination. *Id.* at 24. Later, the defense changed its mind and objected to the psychiatric exam on Fifth Amendment grounds, but the trial court ruled that any such objections had already been waived by the defense. *Id.* Nor was the testimony offered in *Manning* in any way similar to that offered against Ms. Goff. According to the appellate court, the defense

expert opined that Ms. Manning was in imminent fear when she killed her husband and the State's expert opined that she was not. *Id.* This testimony was far different than that offered by the State in Ms. Goff's trial, where the State's expert could not express an opinion about Ms. Goff's mental state at the time of the alleged crime but was allowed to recount his nearly eight hours of interviews with her and then compare the statements she made during the interviews with every other statement made by Ms. Goff or the other State witnesses during the course of the investigation.

Additionally, the authorities relied upon by the *Manning* court do not support its conclusion that a court may compel an unwilling defendant to undergo a psychiatric exam to maintain a defense of self-defense supported by BWS. The three cases cited by the *Manning* court, *Buchanan v. Kentucky* (1987), 483 U.S. 402, *Isley v. Dugger* (11th Cir. 1989), 877 F.2d 47, and *Silagy v. Peters* (7th Cir. 1990), 905 F.2d 986, all involved the insanity defense. In *Buchanan*, the State and the defense jointly moved for a psychiatric exam, and only one exam was conducted. The report of the psychiatrist in that case:

set forth his general observations about the mental state of petitioner but did not describe *any* statements by petitioner dealing with the crime for which he was charged. The introduction of such a report for this limited rebuttal purpose does not constitute a Fifth Amendment violation.

Id. at 423. In *Isley*, the Eleventh Circuit allowed a psychiatrist to use a statement made by the defendant that he had tried to keep the victim from screaming in order to explain his reason for believing that the defendant knew right from wrong. The *Isley* court went on to find any error harmless. Finally, in *Silagy* the court allowed testimony by the state's psychiatrist as to the defendant's general mental condition as consistent with *Buchanan*, even though the claim was never fully presented by the defendant on appeal.

The courts that have examined the issue of whether a defendant can be compelled to submit to an involuntary psychiatric exam in order to assert non-insanity defenses supported by BWS have

rejected such a compelled examination. *United States v Marengi*, (D. Me. 1995) 893 F. Supp. 85; *United States v. Williams*, (E.D.N.C. 1995), 163 F.R.D. 249. In *Marengi* the defendant sought to admit expert testimony about BWS in support of her defense of duress, which, like self-defense, requires an imminent fear of death or great bodily harm. The Government, upon learning of the defense strategy, moved to compel the defendant to submit to a psychiatric examination. After finding no statutory authority to compel a psychiatric exam other than in cases of legal insanity or incompetence to stand trial, the court stated that it was:

loathe to submit the defendant to a psychiatric examination against her will in the absence of express statutory authority or administrative authority and without evidence that such an examination would serve any purpose. The fact that such an examination will assist the Government, which has the greater burden of proof on the *mens rea* issue, does not provide a basis for this Court to help “even the playing field.” The statutes and rules establish the proper procedure for allocating burdens, rights and obligations in federal criminal proceedings, and this Court sees no reason to stray from applying the sense and prudence of such rules and laws here.

Id. at 98.

Of course, in Ohio, the defendant bears the burden of establishing the affirmative defense of self-defense by a preponderance of the evidence. R.C. § 2901.05. In *Williams*, the court reached the same conclusion as the *Marengi* court and denied the government’s motion for a compelled psychiatric exam in a murder prosecution when the defendant indicated that she would be employing BWS as part of her self-defense claim. *Williams*, 163 F.R.D. 249; *see also United States v. Towns*, (W.D.N.Y. 1998) 19 F. Supp. 2d 64 (denying compelled mental exam when defendant intended to use expert testimony in support of a claim that his mental illness negated *mens rea*.); *United States v. Bell* (N.D. Ill. 1994), 855 F. Supp. 239 (denying compelled mental exam when defendant intended to use expert testimony in support of a claimed defense of duress).

Finally, the Court of Appeals relied on dicta from *United States v. Davis* (6th Cir. 1996), 93 F.3d 1286, in finding that a court has inherent authority to order a compelled psychiatric

examination. In *Davis*, the defendant agreed to submit to a non-custodial psychiatric exam but appealed the district court's order committing her to a 45 day involuntary commitment for the purpose conducting the examination. In first finding that absent a plea of not guilty by reason of insanity or a record supporting current inability to stand trial a trial judge had no statutory authority to order a psychiatric examination, the court, without considering the constitutional implications, allowed that in some circumstances a compelled, non-custodial exam might be ordered. Nevertheless, as noted in Proposition of Law I, the court cautioned that "the introduction of expert testimony regarding a mental condition, disease, or defect does not particularly suggest the need for an examination of the defendant, let alone require it." *Id.* at 1292–93. Instead, to rebut expert testimony that does not relate to insanity or incompetence, the Sixth Circuit noted that the government should pursue other options, such as having a government expert attend at trial and assist the government in cross-examination. *Id.* at 1294. It seems most unlikely that the *Davis* court would have allowed the compelled eight hour examination of Ms. Goff followed by the use of her statements to Dr. Resnick to provide evidence of guilt.

A holding that a court has the inherent authority to compel a psychiatric examination of an unwilling defendant or an unwilling witness is unnecessary as pointed out by the *Davis* court and creates unwise policy. In the case of an unwilling defendant, the Fifth Amendment and the limitations on the use of such an examination provided by *Smith, supra*, by *Buchanan, supra*, and by R.C. § 2945.371(J) severely limit its use in appropriate cases—limitations that were not imposed here. Moreover, in the past defendants have sought compelled psychiatric examinations of unwilling complaining victims, and a rule giving discretion to a trial court to order such exams would impair the prosecution of many cases as victims would be less likely to come forward if they knew that their mental health history would be part of the defense arsenal. In *Government of the Virgin Islands v.*

Scuito (3d. Cir. 1980), 623 F.2d. 869, the defense sought the compelled psychiatric examination of an alleged rape victim who was the main government witness against the defendant. In affirming the denial of the requested examination by the district court, the Third Circuit quoted *United States v. Benn* (3d. Cir. 1973), 476 F. 2d 1127, a case denying a compelled psychiatric examination of a mentally retarded sexual assault victim, to the effect:

[A] psychiatric examination may seriously impinge on a witness' right to privacy; the trauma that attends the role of complainant to sex charges is sharply increased by the indignity of a psychiatric examination; the examination itself could serve as a tool of harassment; and the impact of all these circumstances may well deter the victim of such a crime from lodging any complaint at all.

Id. at 875 (quoting *Benn*, 476 F. 2d at 1131). Creating a broad inherent power in trial courts to order compelled psychiatric examinations will lead to numerous requests for such examinations, as indicated above, and is unnecessary to insure the State or a defendant a fair trial.

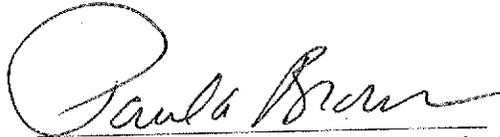
The Fourth District Court of Appeals started off in the right direction when it recognized that "a compelled psychiatric examination may violate the privilege against self-incrimination." It failed to stay true to this principle when it sanctioned a compelled eight hour examination that is not authorized by Ohio law and should not be sanctioned by this Court. Ms. Goff had a clear statutory right to present expert BWS testimony in support of her claim that she acted in self-defense. R.C. § 2901.06. Nowhere in this statute is Ms. Goff's right to present expert testimony conditioned on her waiver of her Fifth Amendment right. The State was wrong in seeking the compelled psychiatric examination, the trial court was wrong in forcing her to choose between her statutory right to expert testimony and her constitutional right to be free from compulsory examination, and the Fourth District was wrong in approving this process. These errors were enormously compounded when the protections afforded a criminal defendant who is lawfully subjected to a psychiatric examination under R.C. § 2945.371(A) by R.C. § 2945.371(J) were not employed in this case. Dr. Resnick was

wrongly allowed to recount the statements Ms. Goff made during his eight hour interview with her even though he was unable to form an expert opinion as to whether she exhibited BWS reactions. There can be no doubt that this recitation, along with his analysis of the other prosecution evidence, contributed to the guilty verdict returned by the court. (See Tr. 3460.) The conviction must therefore be reversed.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the judgment of the Fourth District Court of Appeals and remand this matter for a new trial.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Notice of Appeal was sent by U.S. mail to counsel for Appellee, Robert C. Anderson, Lawrence County Prosecutor's Office, One Veterans Square, First Floor, Ironton, Ohio 45638, on this the 24th day of May, 2010.

A handwritten signature in cursive script, appearing to read "Paula Brown", written over a horizontal line.

Paula Brown