

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO,

PLAINTIFF-APPELLEE,

VS.

CASE NO 09-1977

MEGAN GOFF,

DEFENDANT-APPELLANT.

ON APPEAL FROM THE
LAWRENCE COUNTY COURT
COURT OF APPEALS,
FOURTH APPELLATE DISTRICT

COURT OF APPEALS
CASE NO. 2007 AP 07 0039

BRIEF ON THE MERITS OF PLAINTIFF-APPELLEE, STATE OF OHIO

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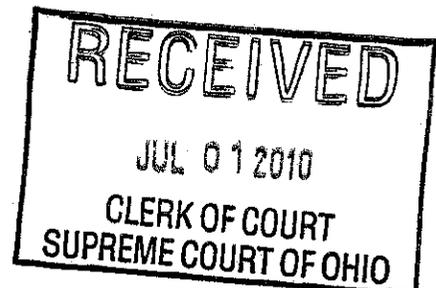
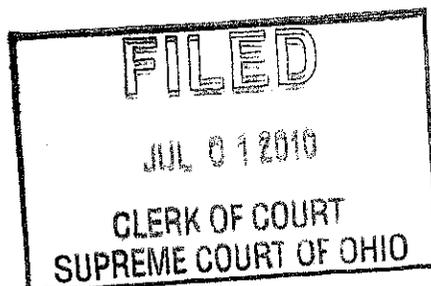


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STATEMENT OF THE CASE

On March 28, 2006, Defendant-Appellant Megan Goff was indicted by the Lawrence County Grand Jury. The indictment charged Appellant with one count of aggravated murder with a firearm specification in connection with the death of her husband, William Goff.

Prior to trial, Appellee, having been advised by Appellant's attorneys she intended to present evidence, including the testimony of a psychiatrist, that she was a battered woman and regarding battered woman syndrome ("BWS"), filed a motion asking the trial court to order that Appellant be compelled to submit to a psychiatric evaluation conducted by a forensic psychiatrist of the State's choosing. Defendant objected, but the trial court granted Appellee's request, and Appellant was required to be examined by Dr. Phillip Resnick, a nationally renowned forensic psychiatrist.

The trial of the case in Lawrence County Common Pleas Court commenced on April 30, 2007. The matter was originally scheduled to be a jury trial, but just prior to the commencement of the case, Appellant waived her right to a jury trial. As a result of the jury waiver, the case was tried as a bench trial to Judge Frederick Crow, a visiting judge from Meigs County.

At trial, during Appellant's case, she offered her own testimony and the testimony of Dr. Bobby Miller, to support her position that she suffered from BWS. During his testimony, as in his report that was admitted into evidence, Dr. Miller opined that Appellant was a battered woman. In its *rebuttal* case, Appellee offered the testimony of Dr. Resnick, who concluded that he could not reach an opinion to a reasonable degree of psychiatric certainty that Appellant either was or was not a BWS victim.

Attorney Marty Stillpass and Robert C. Delawder represented Appellant as trial counsel and Robert C. Anderson, a Lawrence County Assistant Prosecuting Attorney, represented the Appellee. Lawrence County Prosecutor J. B. Collier, Jr. was trial counsel for Appellee until February, 2007, when Assistant Prosecutor Anderson was assigned to the case by Mr. Collier. Contrary to the unsupported claim of the Appellant in her statement of the case, Mr. Collier's

replacement as trial counsel by Anderson had absolutely nothing to do with the fact that Mr. Collier was present (defense counsel was also present) for the interview and examination of Appellant by Dr. Phillip Resnick. Collier's departure from the case was due to both professional and personal reasons totally unrelated to the Resnick interview.

The trial ended on May 18, 2007, after twelve court days. The defense case required approximately nine days, almost all of which related to the alleged behavior of the victim during the parties' marriage until their separation on January 18, 2006, as well as the activities of Appellant and contacts between the victim and Appellant from January 18, 2006 until the victim was killed on March 18, 2006.

On May 18, 2007, counsel for the parties made their closing arguments, at the conclusion of which Judge Crow rendered a decision from the bench finding Appellant guilty beyond a reasonable doubt of aggravated murder and of the gun specification. On May 30, 2007, a sentencing hearing was held and Appellant was sentenced to three years in the appropriate penal institution as a penalty for conviction of the firearm specification, which was ordered to be served prior to the commencement of the sentence for the conviction of aggravated murder. The Court further sentenced Appellant as punishment for the aggravated murder to a term of life imprisonment in the appropriate penal institution, with parole eligibility after serving thirty full years. The Judgment Entry journalizing the sentence was filed on June 15, 2007. Appellant filed her timely notice of appeal from the judgment and sentence of the trial court to the Fourth District Court of Appeals.

By decision and judgment entry dated September 14, 2009, the Court of Appeals overruled all nine of Appellant's assignments of error and affirmed her conviction. In the course of affirming the trial court, the Court of Appeals held that it did not violate Appellant's right against self-incrimination under the United States Constitution or the Ohio Constitution when the court compelled Appellant to submit to the State's psychiatric examination.

Appellant subsequently filed her notice of appeal in the Ohio Supreme Court, and on

January 27, 2010, an entry was filed accepting the appeal on Proposition of Law Nos. I, II, and III.

STATEMENT OF FACTS

It is undisputed that the victim, William Goff, was killed on March 18, 2006, at his home in Hamilton Township, Lawrence County, Ohio, as a result of Appellant's shooting him fifteen times in the area of the chest and head. (Testimony of Larry Dehus, Tr. 1561 and testimony of Bonita Ward, Tr. 262.)

Within three hours from the time she killed her husband, Appellant gave two statements to Detective Aaron Bollinger of the Lawrence County Sheriff's Office, both of which were admitted into evidence as State's Exhibit 2 (tape recording of the first statement), State's Exhibit 2-A (transcript of the first statement), State's Exhibit 26 (taped statement of second statement), and State's Exhibit 26-A (transcript of the second statement). The first statement of Appellant was provided to Detective Bollinger prior to his entering the house to view the crime scene, and the second statement was subsequent to his inspecting the inside of the house.

In both of her statements, Appellant claims that the victim had spoken with her by telephone the day before the shooting and stated "he was going to kill us (she and the children) on Monday. He said he didn't care where I went he'd find me Monday and kill me." (pg.4, ex. 2). Appellant also stated in her first statement that she decided to return to the home to let Bill Goff kill her (pg. 9); that he had always told her to carry two guns because one might jam; (pg. 10); that just before she entered her grandmother's vehicle to proceed to the victim's house, she put the two handguns in the car; that she parked her vehicle in her father's driveway under a carport (pg. 13); that before exiting the vehicle she loaded both guns and put one in each pocket (pg. 14-15); that when she knocked on the door Bill Goff opened the door, told her to come into

the house and allegedly laughed at her after she pulled one of the guns out, stating she would not kill him, at which time she began shooting (pg. 16). When asked if she saw her husband with a gun she responded "No. No. He had something on his side, on the side of his pants and I don't, I didn't look very close, I don't know what it was. I don't know, it was an old leather case I think." (pg. 18). It is undisputed that the "something" on the side of the victim was a cell phone clipped to his bibbed overalls (see State's exhibits 9-14, which are photo's of the body). The cell phone itself was admitted into evidence as State's Exhibit 64.

When the house was searched by personnel from the Sheriff's Department, the only weapons found were a replica gun, Sam Colt gun and holster, and a box of gun parts (State's Exhibits 78, 90 and 79) all of which were inoperable for use as a weapon. There was no evidence in the case, therefore, that Bill Goff had any kind of operable gun or other weapon on his person or anywhere in his house on the evening of his death. In spite of the fact that William Goff had no weapon and Appellant admitted that she knew he was unarmed, she asserted to Detective Bollinger that "he just laughed at me when he saw me with a gun like he knew he was going to kill me first and I didn't know what to do. I really wasn't going to shoot him, I just thought he would let me out the door."

The second statement of Appellant was given to Detective Bollinger after he had gone into the home and viewed the crime scene. At page two of Exhibit 26-A, Appellant admits that "the first shot he was standing with his back to the door and he *had his hand on the doorknob.*" (emphasis added) She further acknowledged that "I think he raised his hands up towards his face so I guess it must have hit up kind of high-ish because he didn't go down, he kind of went, his

arms went up I think. And he turned and he stepped so he was then *facing the double window there. He turned over into that corner.*" (emphasis added) Appellant also reiterated that Mr. Goff was facing the front two windows after the first shot and she stated "like he was standing, like I could have opened the door at that point." (pg.3 ex. 26-A).

After indicating that she didn't know if he had a gun on him at the time (pg. 5), Detective Bollinger suggested to Appellant that "probably what you're talking about, I think it's on like his right pants pocket." And Appellant agreed "that's probably where it was." And Bollinger suggested "and he has a cell phone carrier there, to which Appellant replied "okay. I don't know what it was." Bollinger then followed with "and he has the cell phone in it. You know what I mean?" And Appellant replied "okay. But he had something there that was making me nervous." (pg. 5-6). She also unequivocally confirmed that she did not see a gun when Bollinger asked "but at no point in time did you see a gun?" To which she replied "no. But he did say...." (pg. 12)

Appellant also stated that "I guess my mind went into some weird different mode and I stepped out and I started to walk out around the corner and I thought no, he's going to kill me before I get in the house if I don't do it this way. So I thought I would get the gun loaded." (pg. 11). She had just obtained the second gun the day before the shooting. (pg. 13).

At the conclusion of the second statement, at page 20, Bollinger stated "we'll go ahead and end the tape now, and without a question being asked, Appellant volunteered the following: "the thing I just want to say I guess I want to get across is my mind set is he told me one gun won't kill someone. He told me never start firing a gun and then stop. He told me if a gun jams

you have to un-jam it and keep shooting until all those, he has played that in my head and told me that for nine years. And that's where I'm coming from with all this."

During her testimony at trial, Appellant spoke of her marriage to William Goff and his alleged conduct up until the separation on January 18, 2006. Although largely, if not entirely, uncorroborated, she stated that her husband did such things as threatened her life every day of the marriage, killed pets in a gruesome way in front of the children and defecated in his trousers. Neither her mother, Karen Gearhart, or her grandmother, Jeannie Gearhart, with both of whom she had a close relationship, were ever told of these alleged activities of the victim at any time during all the years of the marriage. Pat Schilling, Don Fraley, Jesse Holcomb, Mona Holcomb, and James Turner, all of which knew and were very familiar with Appellant and the victim, testified that they had no knowledge of anything that would corroborate Appellant's testimony, and in fact, they all testified when they were in the presence of Appellant and the victim that it appeared the Appellant was the dominating party in their marriage. These witnesses depicted William Goff as a mild mannered, peace loving individual who would go out of his way to do anything that he could to help another person.

A large part of Appellant's testimony was also dedicated to the claim that from January 18, 2006, when the parties separated, until March 18, 2006, when the victim was killed, she was being "chased" by her husband. Appellant's own testimony, coupled with phone records that were admitted into evidence, did not confirm her assertion that she was afraid of the victim and that he was trying to come after her.

It is undisputed that there was an incident that occurred at the marital residence on

January 18, 2006, which led to Appellant's filing a sheriff's department report and the ultimate arrest that day of the victim on the charge of domestic violence. The filing of the charge against the victim and his arrest were based upon the statement of Appellant and the fact that sixty-three guns were confiscated from the residence. The sixty three guns were displayed to the trial judge during Appellant's case, and as Deputy Collins testified, more than fifty of the guns were retrieved from a gun safe which Megan Goff opened for authorities. There was testimony from several of the state's witnesses that Mr. Goff was an amateur gunsmith and a collector of guns.

When Appellant gave her statement regarding the domestic incident, she indicated she had, in fact, videotaped what had occurred. She ultimately delivered that tape to the Lawrence County Prosecutor's Office. The tape was played during the trial and admitted into evidence as State's Exhibit 83. It was re-played during Appellant's testimony, and she narrated what she believed was occurring on the tape. After the prosecutor's office viewed the tape, the charge of domestic violence against William Goff was not further pursued by the state.

Fifty-nine days elapsed between the parties' separation and William Goff's death on March 18, 2006. It is undisputed that the parties were never in each other's presence during those fifty-nine days. There were three dates (February 25, March 4, and March 17, 2006), on which telephone conversations occurred between the victim and Appellant. There were no telephone calls on March 18th, the date of William Goff's death. Telephone records of the victim and defendant were admitted into evidence as Defendant's Exhibit's 219 and 220 and State's Exhibits 85, 86, and 87.

On February 25, 2006 Appellant filed a police report with the Mason County, West

Virginia Sheriff claiming that William Goff called her telephone number, which was 606-620-4127, but she did not answer. Telephone records submitted into evidence indicated that at 10:57 A.M. Appellant's home telephone (606-620-4127) called William Goff's home telephone number, 740-532-2824. Telephone records then indicate that at 11:11 A.M. William Goff's cellular telephone, 606-831-2824, called Megan Goff's home telephone number. Both the 10:57 A.M. call and the 11:11 A.M. call lasted one minute (or less). The victim's call to Appellant, therefore, *followed* a call to him from Megan Goff's home, which he did not answer but which would have appeared on his caller identification.

The next call was on March 4, 2006, when Appellant called the victim with a pre-paid phone card and the telephone number of the pre-paid card was reflected on the victim's home telephone record as 404-461-9978. The conversation lasted eighty-six minutes and Appellant recorded a portion of the phone conversation, a tape of which was admitted into evidence as Defendant's Exhibit 204, and the transcript of which was admitted as Defendant's Exhibit 205.

The final telephone contact between the party's occurred on March 17, 2006. At 4:01 P.M. the victim was at his job at Duke Energy and received a call on his cellular telephone number 606-831-2824 from telephone number 404-461-9978 (the same telephone card number which was used by Megan Goff to call the victim on March 4, 2006). The call lasted seven minutes and on the same minute it ended there was a call at 4:08 P.M. from Duke Energy telephone number 740-534-0820 to Appellant's cellular telephone number 740-525-9824, which was five minutes in length. Attorney Derrick Fisher's testimony was that William Goff called him (Mark McCown, Fisher's law partner, was out of the office) and spoke to Fisher about

speaking with Megan Goff and in reference to the protection order against him that was a part of the January 18, 2006 domestic violence charge.

At 6:01 P.M. the victim called from Duke Energy's telephone number 740-534-0820 to Appellant's cellular telephone 740-525-9824 and the conversation lasted thirty three minutes. The victim's co-workers, Bill Sunderland and Roger Lovett, testified on rebuttal for the State that the victim requested them to be present during the 6:01 telephone conversation so he would have witnesses to confirm he was not saying anything that would violate the protection order. Both Sunderland and Lovett testified that Mr. Goff never made any kind of threatening remark, and in fact, was nothing other than kind and patient, even though Appellant repeatedly was pressing the victim to meet with her. Sunderland and Lovett testified that throughout the conversation William Goff emphasized that he could not meet with her due to the protection order.

Pat Schilling testified that he received a call from the victim in the early evening of March 17th and Mr. Goff indicated a concern that he (Mr. Goff) should not go to his home because Megan Goff may come to the home and it could be considered a violation of the protection order by him. Pat Schilling agreed to allow the victim to come to his house, which he did, and they hid Goff's vehicle in the garage so that Megan Goff would not see it if she came by Schilling's house.

Schilling testified that Bill Goff received two calls on his cellular phone during the time he was at Schilling's house. Telephone records indicate that Megan Goff's cellular telephone called the victim's cellular telephone at 9:01 and at 9:04 P.M. William Goff stepped outside of the house for most of the conversations and Mr. Schilling was not in a position to hear very much

of what was said by the victim. Sometime later that evening Schilling and Bill Goff drove in Schilling's vehicle to Goff's home to make sure that Megan Goff was not there. When they had determined that she was not there, they returned to Schilling's house and William Goff drove home in his vehicle and nothing else occurred over the night of March 17th /March 18th between the parties. There were no calls between the parties on March 18th. Appellant killed Bill Goff in the entrance area of his home between 6:00 P.M. and 7:00 P.M. on March 18th by shooting him 15 times in the head and upper body.

Thus, there were only three dates on which telephone conversations occurred during the fifty nine days of separation. On each of these dates, Megan Goff *initiated* the first (or only) call. There were simply no facts elicited from the evidence at trial that would remotely indicate that William Goff was chasing Megan Goff during these two months. Megan Goff testified that during the 6:01 P.M. call on March 17th the victim threatened her and the children, stated he knew all the places she had recently been and that he would shoot her and the children on Monday, March 20th. Sunderland and Lovett, who were specifically requested to listen to Bill Goff's end of the conversation, confirm absolutely none of Appellant's testimony regarding this call.

For an even more detailed account of each witness's trial testimony, the court is referred to the Appendix to the Fourth District Court of Appeals' decision (p. 57).

ARGUMENT IN OPPOSITION TO PROPOSITIONS OF LAW

Appellant's 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.

The question of whether a criminal defendant can be compelled to submit to the State's psychiatric examination when she gives notice of her intention to argue the battered woman syndrome at trial was addressed and answered by the 9th District Court of Appeals in the case of *State v. Manning* (Ohio App 9, Dist. 1991), 74 Ohio App. 3d 19. In fact, *Manning* is the only case directly on point that has been decided in Ohio or any other jurisdiction regarding the issue raised by the First Proposition of Law. In *Manning*, the defendant allegedly shot and killed her husband while he was asleep. It became apparent in pre-trial proceedings that the defendant would contend at trial that she was a victim of battered woman syndrome. She was first examined by a psychiatrist of her counsel's choice and when the report of her psychiatrist was not provided to the prosecutor, the State objected to its admission at trial. Manning's attorney then stated to the court that an independent examination by a state psychiatrist would be acceptable if the date for filing the overdue defense psychiatric report could be continued, to which the Court agreed.

A few days later Manning's attorney reversed his position and filed a brief claiming that an examination of Appellant by the State's psychiatrist would violate her constitutional guarantee against self-incrimination. The trial court rejected that argument and ruled in favor of the State.

On appeal, the Court of Appeals of Lorraine County held that "when a defendant introduces psychiatric evidence and places her state of mind directly at issue, as here, she can be

compelled to submit to an independent examination by a state psychiatrist." (emphasis added) Quoting from another court decision, the court further opined that "it is unfair and improper to allow a defendant to introduce favorable psychological testimony and then prevent the prosecution from resorting to the most effective and in most instances the only means of rebuttal: other psychological testimony. The principle also rests on the need to prevent fraudulent mental defenses."

In her brief, Appellant misconstrues the basis for the *Manning* decision by incorrectly arguing that the court's decision in that case rested on the defendant's consent to the State's psychiatric examination. While at the trial court level, Manning's attorney first agreed to the independent examination by the state psychiatrist and then switched positions and argued it would violate her right against self incrimination, the Court of Appeals decision was not based in any way upon the issue of consent. The Court of Appeals did not hold that when a defendant consents to a psychiatric examination, then the State can conduct one, but instead held that "when a defendant introduces psychiatric evidence and places her state of mind directly at issue, she can be compelled to submit to the examination".

The decision in *Manning* simply makes no reference whatsoever to any alleged consent by the defendant to undergo the psychiatric examination. A defendant's consent or lack thereof is irrelevant to the holding that he or she will be compelled to undergo the psychiatric examination if and when she introduces psychiatric evidence in respect to her state of mind, which, in this case, is evidence of battered woman syndrome.

In her brief submitted to the Court of Appeals and in the brief filed in this court,

Appellant attacks the *Manning* decision in claiming that it is (1) no longer valid because R.C. 2945.371(J) superseded it, (2) failed to analyze the Ohio statutes that address compelled psychiatric evaluations, and (3) is factually distinguishable from the instant case. Appellee refers this court to the Court of Appeals rebuttal to and disposal of each of Appellant's contentions. (See Court of Appeals decision, beginning on page 13).

Appellant directs the court's attention to several cases that either are inapplicable to or clearly distinguishable from *Manning* and the case at bar. Although she contends that the United State Supreme Court's holding in *Estelle v. Smith* (1981) 451 U.S. 454, supports her position, the premise upon which *Estelle* was decided is distinctly different than this case. In *Estelle*, prior to the trial, a psychiatrist interviewed the defendant and concluded he was competent to stand trial. After his conviction, the State then offered testimony from the psychiatrist in its *case in chief* during the penalty phase of the capital murder case. In the present case, the State did not offer any psychiatric evidence in its case in chief, but instead Dr. Resnick testified only in rebuttal after the Appellant had raised battered woman syndrome, including the testimony of her psychiatrist, Dr. Bobby Miller.

The *Estelle* court recognized this important distinction when it stated the following:

"nor was the interview analogous to a sanity examination occasioned by a defendant's plea of not guilty by reason of insanity at the time of his offense. When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist. Respondent, however, introduced no psychiatric evidence, or had he indicated he might do so. Instead, the State offered information obtained from the Court-ordered competency examination as affirmative evidence to persuade the jury to return a sentence of death."

Thus, the *Estelle* decision stands for the principle that the Fifth Amendment right against self incrimination is violated only when the State offers its psychiatric testimony in its case in chief and there is no indication that the defendant will offer any psychiatric evaluation of his own, but does not stand for the proposition, as Appellant argues, that a criminal defendant cannot be required or compelled to submit to the State's psychiatric examination if the issue of the Defendant's state of mind will be raised at trial by the defendant. Therefore, the holding in *Manning* is in no way inconsistent with the holding in *Estelle*.

Appellee submits that the significance of the distinction drawn by the *Estelle* court regarding when and under what circumstances compelled psychiatric testimony is permitted cannot be overstated. It is clear from *Estelle* and *Manning*, and Appellee concedes, that the State would violate a defendant's right against self-incrimination if its psychiatrist was permitted to testify as to a compelled psychiatric examination of defendant during its *case in chief*. However, it is just as clear that a defendant's right against self-incrimination is not violated when she offers testimony of her psychiatric expert in respect to her "state of mind," such as BWS, which "opens the door" and allows the State to present the testimony of its psychiatrist that evaluated defendant in *rebuttal*.

The critical importance of the *Estelle* distinction is underscored and accentuated by the conspicuous silence of Appellant with respect to it. Appellee respectfully suggests that Appellant's failure to address this important distinction should allow the court to conclude that she cannot do so without having to concede that *Estelle* actually supports Appellee's position, not hers.

After considering the holdings in *Manning* and *Estelle*, as well as *Buchanan v. Kentucky* (1987), 483 U.S. 402, and *Powell v. Texas* (1989), 492 U.S. 680, the Court of Appeals stated the following at page 12 of its decision:

"Under the foregoing authorities, 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. We believe 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.”

“Here, Goff put her mental state at issue by raising battered woman syndrome as a part of her defense. She retained a psychiatrist to evaluate her for the syndrome and to present testimony regarding the syndrome at her trial. Under these circumstances, Goff’s use of psychiatric testimony waived her privilege against self-incrimination. The State would have had ‘overwhelming difficulty’ rebutting her expert’s conclusion that she suffered from the battered woman syndrome without a chance for its own expert to evaluate Goff for the syndrome. Therefore, we find that the compelled psychiatric examination did not violate Goff’s privilege against self-incrimination.”

Appellant’s first criticism of the Fourth District’s above mentioned holding is her assertion that interposing a defense of self-defense supported by expert BWS testimony is not comparable to asserting an insanity defense or raising a competency issue. While there are certainly differences between BWS and insanity and competency, they are also alike in that all three involve the psyche or state of mind of an individual, which allows, if not requires, expert psychiatric evaluation and testimony.

Appellant is contradicting herself when she states that “establishing a defense of self-defense does not necessarily require any expert testimony.” While that may or may not be true, Appellant did offer the testimony of an expert in her defense, who concluded that she was a victim of BWS. The clear contradiction is that while she chose to avail herself of psychiatric evidence, she appears to argue that it really was not necessary, and therefore, the State should not be allowed to respond in rebuttal with its psychiatric evidence. Appellant simply cannot have it both ways. Once she offered her expert testimony, as the Court of Appeals ruled, it would be unfair for the State not to have the opportunity to have Appellant evaluated by a psychiatrist who would testify only in rebuttal.

Moreover, contrary to Appellant’s claim, the very statute that authorizes battered woman testimony as to one element of self-defense also clearly contemplates and authorizes expert testimony in respect to BWS and whether a defendant suffered from that syndrome. R.C. 2901.06 provides that:

(A) The General Assembly hereby declares that it recognizes both of the following, in relation to the “battered woman syndrome:”

(I) That the syndrome currently is matter of commonly accepted scientific knowledge;

(II) That the subject matter and details of the syndrome are *not* within the general understanding or experience of a person who is a member of the general populous and are not within the field of common knowledge.

(B) 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.” (emphasis added)

Therefore, the legislature unequivocally declared that BWS was a matter “not within the field of common knowledge” and consequently, expert testimony with regard to it is appropriate.

Appellant next contends that even if a defendant does impliedly waive her right 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. R.C. 2945.371(J) “permits a defendant’s statements during a court-ordered mental evaluation to be used against him on the issue of the defendant’s mental condition, but prohibits their use to prove the defendant’s factual guilt. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, citing *State v. Cooney* (1989), 46 Ohio St.3d 20, 31-32. In *Hancock*, this court considered whether a prosecution expert’s testimony regarding the factual statements a criminal defendant made during a mental examination violated R.C. 2945.371(J). This honorable court rejected the defendant’s argument in *Hancock*, finding that his admission to the psychiatrist “was relevant to the insanity defense” and additionally determined that the doctor’s testimony did not prejudice the defendant because other evidence overwhelmingly proved that the defendant had done just what he admitted to the doctor, that is, “he tied (the victim) up and strangled him.”

Similarly, in the case at bar, when Dr. Resnick testified there was overwhelming evidence already admitted to establish that after 59 days of separation, Appellant arrived, uninvited, at the door of the victim. She knocked on the door, the victim opened the door, and Appellant shot the victim, who was unarmed, 15 times in the head and chest area. In fact, all of the foregoing facts were undisputed. Therefore, it is ridiculous for Appellant to claim that the rebuttal testimony of Dr. Resnick was offered on the issue of guilt.

Instead, Dr. Resnick, a nationally renowned forensic psychiatrist, conducted a thorough interview with the Appellant and prepared a report of over 40 pages that was ultimately admitted in evidence during his testimony. His reference to many inconsistent factual statements of Appellant was for the purpose of explaining to the court why he was not able to reach a conclusion as to whether or not Appellant was the victim of BWS. Cases cited by Appellant from other states are not applicable to this case, as this court's decision in *Hancock* and R.C. 2945.371(J) are controlling.

Appellant's 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.

Appellant begins her argument in respect to the Second Proposition of Law by reiterating her claim that the trial court improperly allowed Dr. Resnick to testify as to her guilt. As already outlined in this brief, when Dr. Resnick testified on rebuttal the undisputed facts related to the killing of her husband by Appellant had been established. It was not necessary for the State to offer, and the State did not offer, Resnick's testimony on the issue of guilt. His testimony was needed to rebut Dr. Miller's opinion of BWS. After explaining the many inconsistencies of Appellant in her two interviews with Dr. Resnick, he related to the court the "possible" reasons she shot her husband but could not with a reasonable degree of certainty find that she was or was not subject to BWS. When the court reads the report and testimony of Resnick, Appellee

submits that it will be abundantly clear that the matters testified to by him were properly admitted.

Appellant also claims that Dr. Resnick was an agent of the State and in that capacity testified to what he perceived as inconsistencies between Appellant's prior statements and what she had told to him in an effort to demonstrate a lack of credibility, and therefore guilt in violation of R.C. Section 2945.371. However, Appellee urges this court to adopt the conclusion of the Court of Appeals, which ruled that "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 with 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."

Although retained by the State as its expert, after conducting the interviews with Appellant and reading all of the case materials, Resnick's opinion was that he simply could not say one way or the other whether Megan Goff was a victim of battered woman syndrome. When Dr. Resnick testified to the various statements Appellant made to him, including inconsistencies, as well as several possible explanations for why Appellant shot her husband, he was providing a background and reasoning for not being able to reach a conclusion that she was suffering from BWS. Since he could not conclude that she was a battered woman, Dr. Resnick was doing no more than offering alternative explanations for the shooting other than BWS.

Contrary to Appellant's claim that it was Resnick's intent to show her as being incredible, in the final paragraph of his report, he prefaces his conclusions by stating, "It is my opinion that if Ms. Goff's allegations of events is correct...", which illustrates he was not taking a position with the court as to the ultimate credibility of the Appellant. Similarly, in his testimony he did not give an opinion as to the credibility of Appellant when he stated, "I would say that the whole concept of whether she is a battered woman depends on whether his honor in this case finds her

credible...”(Tr. 3168). By making the foregoing statement to the court, Resnick was demonstrating his understanding that it was the court, not he, who was to determine the credibility of the Appellant.

The weakness of Appellant’s argument on the merits in respect to the Second Proposition of Law is also illustrated by statements made on page 27 of her brief, which are entirely speculative and nowhere to be found in the record of this case, as follows:

“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.”

While there was a second interview, at which both the prosecutor and defense counsel were present, the other assertions in the foregoing paragraph are not only irrelevant, but cannot be considered by the court since they are simply unsubstantiated opinions of Appellant.

At page 28 of her brief, Appellant asserts that the Court of Appeals’ reliance on *Hancock, supra*, was misguided. She states that in *Hancock*, “not only did the defendant raise an insanity defense, but his counsel expressly conceded there was overwhelming evidence of guilt.” Since overwhelming evidence of Appellant’s guilt was undisputed in the case at bar, Appellee suggests that it is beyond understanding how Appellant can contend that the Court of Appeals was “misguided.”

Even Appellant concedes that “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.” Appellant then apparently attempts to subjectively enter the mind of Dr. Resnick as to his intention when she states in her brief, “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...Dr. Resnick used Ms. Goff’s statements to testify to what he perceived as inconsistencies in order to project to the court that she was not credible, was not a battered

woman, and, therefore that she was guilty.” (Appellant’s brief, p. 28). These foregoing allegations of Appellant are mere speculation by her and are totally unsupported by the record of Resnick’s testimony and his admitted report.

Appellant’s final contention in support of her Second Proposition of Law is that Dr. Resnick testified beyond the scope of an expert in violation of R.C. Section 2945.371(J), R.C. Section 2901.06(B), the Ohio Rules of Evidence, and *State v. Koss* (1990), 49 Ohio St.3d 213. She argues that an expert cannot opine on which of a witness’s conflicting statements is more credible and contends it was not proper for Dr. Resnick to state that Appellant “possibly” acted in anger. In fact, even though Resnick testified regarding inconsistencies of Appellant, as has been previously pointed out, he never offered an opinion on her credibility or opined on which of her inconsistent statements was believable. As already mentioned, his testimony in respect to the inconsistencies was clearly for the purpose of explaining to the court why he could not render an opinion on the BWS issue. In addition, when he used the word “possibly,” he was only doing so in order to explain to the court that since there were several possibilities, he could not render an opinion to a reasonable degree of psychiatric certainty.

Although she suggests that Resnick testified beyond the scope of an expert in violation of the Ohio Rules of Evidence, Appellant offers no specific reasoning in support. In fact, Evid. R. 705 authorizes an expert to testify as to his reasons for his opinion based upon the facts. Evid. R. 705 states that “the expert may testify in terms of opinion or inference and give the expert’s reasons therefore after disclosure of the underlying facts or data...” Finally, since the Resnick testimony was not offered on the issue of guilt, it did not violate R.C. Section 2945.371(J).

Appellant’s 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.

Appellant attempts to persuade the court that there is no statutory authorization for a court to order a compelled psychological examination of a defendant in a BWS case. The Court of

Appeals disagreed, and Appellee asks this court to adopt the logic of the Court of Appeals when it stated the following at page 14 of its decision:

“Although R.C. 2945.371(A) does not specifically authorize a mental evaluation in a case in which the defendant raises the battered woman syndrome in support of a theory of self-defense, the statute appears to contemplate that a court may order an evaluation to determine a defendant’s mental condition at the time of the offense charged and specifically authorizes the examiner to consider whether, in an offense involving the use of force against another, the defendant suffered from the battered woman syndrome. See R.C. 2945.371(E) and (F). Thus, a defendant who raises the battered woman syndrome puts her mental state at issue and is subject to a compelled psychiatric examination.”

Appellant next contends that the Fourth District’s reliance on *Manning, supra*, was misplaced. However, as the Court of Appeals found, nothing in the *Manning* court’s decision indicates that it based its decision upon the particular circumstances of the crime or that the *Manning* court relied upon the defendant’s initial consent to the evaluation when reaching its decision. Appellee reiterates that the holding in *Manning* was that “when a defendant introduces psychiatric evidence and places her state of mind directly at issue, she can be *compelled* to submit to an independent examination by a State psychiatrist.” (emphasis added)

Appellant also offers the case of *United States vs. Marenghi* (D. Me. 1995), 893 F. Supp. 85. Appellee would first point out that a case from the Federal District Court in the State of Maine should not to be given greater precedential weight than the *Manning* decision, which was decided by the Ohio Court of Appeals. Moreover, the *Marenghi* holding involved the interpretation of Fed. R. Crim. P. 12.2(c), which, of course, is inapplicable to the case at bar. Additionally, the *Marenghi* court stated it would not submit defendant to a psychiatric examination against her will in the absence of express statutory or administrative authority. However, in Ohio we have express case law authority in the *Manning* decision that permits a court to order the evaluation, as well as statutory authority in R.C. 2945.371(F).

Appellant refers in her brief to the case of *United States v. Davis* (6 Cir. 1996), 93 F.3d 1286, which, as was the case in *Marenghi*, interpreted the federal rule and statute, not state law in Ohio. In any event, the *Davis* court concluded that “while neither Rule 12.2(c) nor 18 U.S.C.

Section 4241 and 4242 authorize a district court to order a pretrial examination of a defendant concerning his or her mental state at the time of the offense, the statutes and rule do not displace *extant inherent authority* to order a reasonable, non-custodial examination of defendant under appropriate circumstances. The extent of this authority, of course, must be determined on a case by case basis.” (emphasis added) Thus, the *Davis* court did not foreclose under federal law a court’s inherent authority to order a compelled psychiatric examination requested by the State regarding the state of mind of a defendant. Also, it is noteworthy that the *Davis* court acknowledged in its decision that *Estelle, supra*, also intimates that a defendant can be required to submit to a sanity examination *and presumably some other forms of mental examination*, when his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he (she) interjected into the case.” (emphasis added)

Finally, as noted by the Court of Appeals, all of the federal court cases relied upon by Appellant to support her argument that the trial court lacked authority to order her to submit to a compelled examination were interpreting the pre-2002 amendment version of Fed. R. Crim. P. 12.2 when deciding that a court could not compel a criminal defendant to submit to a psychiatric evaluation in a case other than one involving an insanity defense or one in which the defendant raises his competency to stand trial. The 2002 amendment broadened the rule to specifically authorize compelled psychiatric evaluations when the defendant “intends to introduce expert evidence relating to...any other mental condition of the defendant bearing on...the issue of guilt.” See Fed. R. Crim. P. 12.2(b) and (c)(1)(B). According to the Court of Appeals decision, the 2002 Advisory notes specifically state that the rule was amended, in part, to clarify “that a court may order a mental examination for a defendant who has indicated an intention to raise a defense of mental condition bearing on the issue of guilt.” See *United States v. Taylor* (E.D. Tenn. Feb. 15, 2008), No. 1:04-CR-160. At the time the cases Appellant cites were decided, the rule did not contain this same provision. Instead, the rule provided that “in an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to an

examination pursuant to 18 U.S.C. 4241 or 4242.”

CONCLUSION

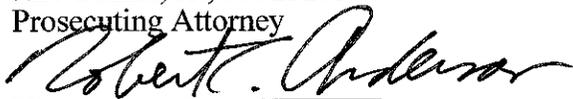
Based upon all of the foregoing, Appellee respectfully requests that this court overrule each of the Propositions of Law of Appellant and affirm the judgment of the Fourth District Court of Appeals.

Even if this court would sustain and adopt any or all of the Propositions of Law, Appellant would still not be entitled to a reversal of her conviction. Since the only defense offered by Appellant at trial was self-defense, she was required to prove by a preponderance of the evidence that: (1) she was not at fault in creating the situation that gave rise to the altercation; (2) she had a bona fide belief that she was in imminent danger of harm and that her only means of escape from such danger was by the use of force; and (3) she did not violate any duty to retreat or avoid the danger. *State v. Williford* (1990), 49 Ohio St.3d 247, 249.

Although she attempted to prove that she was a battered woman, which only relates to the second of the three elements required to prove self-defense, she offered absolutely no evidence that she was not at fault in creating the situation giving rise to the altercation or that she did not violate any duty to retreat or avoid the danger. (See Court of Appeals decision, beginning at page 46)

Assuming, *arguendo*, that this honorable court were to rule that the trial court wrongly compelled Appellant to submit to an examination by the State’s psychiatrist, such error was harmless due to her failure to argue and prove that she was not at fault in creating the situation and that she did not violate the duty to retreat or avoid danger. This case is simply and obviously not one of self-defense; therefore, the absence of the Resnick evaluation and testimony would not have changed Appellant’s conviction of aggravated murder.

J.B. Collier, Jr., #0025279
Prosecuting Attorney



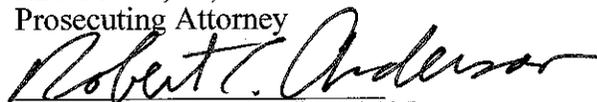
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PROOF OF SERVICE

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