

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.	:	

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

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FILED

JUL 30 2010

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FACTS

The State has so misrepresented the facts in this case that Appellant feels compelled to correct those misrepresentations. The State claims that Mr. J.B. Collier, the prosecutor at trial, recused himself as trial counsel due to "professional and personal" reasons. (Brief on the Merits of Plaintiff-Appellee, State of Ohio ("State's Brief"), at 1–2.) There is nothing in the record to support this position, and nothing in the record or in the State's Brief to explain why, after recusing himself from his role as lead prosecutor, Mr. Collier added his name to the State's witness list. Also, contrary to the State's representation, no one testified that Dr. Phillip Resnick was a "nationally renowned forensic expert." (State's Brief, at 1.)

The State would like this Court to believe that Ms. Goff knew her husband was unarmed, and that she shot him because he laughed at her when she pulled a gun out of her pocket—but that is not what happened. (State's Brief, at 5.) For years, Mr. Goff ("Goff") abused, controlled and humiliated Ms. Goff, and then he started threatening the children. On a taped phone conversation, he admitted he told her he was going to kill her and the children, and Ms. Goff had no reason to doubt that he would kill them all. (March 4, 2006, Ex. 9, A-111, Trial Defendant's Exhibits 204, 205.) After shooting Goff, Ms. Goff told the 911 dispatcher:

Goff: He said he was gonna shoot my babies.
Dispatch: I understand, Megan.
Goff: He was laughing about it. Oh my God.

(Transcript, Ex. 10, A-127; State's Trial Exhibit 63, Tape.)

Ms. Goff was terrified of her husband. While she was still on the 911 call, Deputy Majher came to the house:

Deputy: I'm Deputy Majher. I'm with ya.
Goff: He's gonna kill me. I can't walk by him. He'll kill me.

(Transcript, Ex. 10, A-127, State's Trial Exhibit 63, Tape.)

After being helped out of the house by the officers, Ms. Goff remained convinced that Goff would try and hurt their children: "I just don't want him to hurt the kids." (Ms. Goff's First Statement, State's Trial Exhibits 2, 2A.)

On the night of the incident, Ms. Goff saw something on the side of Goff's pants. She did not know what it was, but she knew it made her nervous. (Tr. 2601-02.) She was scared. It is immaterial after the fact whether it was a cell phone or a gun. Even if her belief was mistaken, her fear was reasonable. She saw something and he said he would kill her, and she believed him. She yelled at him to let her out of the house. (Tr. 2298.) He kept telling her that she was a dead woman and that he was going to kill her and then he was going to kill the children. (Tr. 2295.)

There were over sixty guns taken from the residence in January 2006, and many of the guns were loaded. The Deputy who removed those guns, Deputy Collins, testified that he did not know if all of the guns were out of the house and after the March incident other guns were found. (Tr. 855.) Deputy Collins testified that he found loaded handguns hidden throughout the house, and he knew there were still "quite a few still within the house." (Tr. 844.) He did not testify that "more than fifty of the guns" were retrieved from the gun safe, as the State contends. (State's Brief, at 8.) This is the same argument the State tried to make at trial, and the defense adamantly objected. (Tr. 995.)

The State also contends the five witnesses that testified in its case-in-chief as to Goff's character¹ were "very familiar" with Ms. Goff and her husband. (State's Brief, at 7.) However, when asked at trial, the witnesses testified that they did not socialize with the Goffs, and one witness admitted he had not been to the Goff's home in over seven years. (Tr. 466.)

Although the State asserts there was no evidence that Goff was chasing Ms. Goff, there was ample evidence presented that Ms. Goff's fears were justified. On January 24, 2006, Ms. Goff and

¹ Over objection, the State was permitted to introduce testimony regarding the alleged character of William Goff during its case-in-chief. See *Brief of Defendant-Appellant Megan Goff*, Court of Appeals Fourth Assignment of Error.

the children were at a woman's shelter in a remote wooded area in Kentucky. The staff saw a man fitting the description of Goff on the grounds. (Tr. 1161, 1159.) The personnel called 911, called the director, and brought everyone inside, and Ms. Goff subsequently relocated. (Tr. 1181.)

Goff wanted Ms. Goff to know that he could always find her. After his death, Ms. Goff's prescription records, which showed where and when prescriptions were filed, were found inside his truck. (Tr. 2653.) Documentation found at the house showed that Goff had written down the name of the moving company that Ms. Goff used. (Tr. 3099; Defendant's Ex. 230.) He told her the day before the incident that he knew where she and the children were staying. (First Statement, at 2 (State's Ex. 2A).)

As to testimony of Mr. Sunderland and Mr. Lovitt on rebuttal, the State is aware that counsel for Ms. Goff filed a Postconviction Petition with the trial court on March 13, 2008, and supplemented the Petition on October 1, 2009, with the statements that Mr. Sunderland and Mr. Lovitt gave to Detective Bollinger prior to trial.² The trial court has not ruled on the Postconviction Petition, but the pretrial statements of the witnesses clearly show serious discrepancies between what they told Detective Bollinger and what they testified to at trial.³ The statements should have been requested as 16(B)(1)(g) material and should have been used in the impeachment of these witnesses. Not only are the statements inconsistent with the trial testimony, the discrepancies as well as the omissions highlight the bias of the witnesses and the prejudice that flowed from trial counsel's ineffectiveness.

² Postconviction, Case No. 06-CR-33, filed March 13, 2008 and supplemented on October 1, 2009.

³ See Brief of Defendant-Appellant Megan Goff, Eighth Assignment of Error, ineffectiveness of counsel for failure to request 16(B)(1)(g) material.

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.

Beyond reiterating the arguments of the Fourth District Court of Appeal's opinion, the State's brief offers little insight into the issue of whether ordering a defendant to submit to a psychological examination conducted by the State's expert, when the State uses the statements the defendant makes during the examination against her at trial, violates her state and federal privileges against self-incrimination. While the Ohio Attorney General's Amicus Brief adds some additional arguments to the mix, none is persuasive. Therefore, this Honorable Court should accept Appellant's First Proposition of Law and reverse her conviction.

I. The Ohio and Federal Caselaw that the State and Amicus Curiae Ohio Attorney General Rely upon Do Not Overcome Appellant's Arguments

Just as in its appellate brief, the State continues to rely upon *State v. Manning* (Ohio Ct. App. 9th Dist. 1991), 74 Ohio App. 3d 19, to attempt to justify the compelled examination of Ms. Goff. *Manning*, of course, is not binding precedent on this Court. Moreover, *Manning* provided extremely limited analysis of the issue before the Court and did not provide any detail as to the content of testimony of the State's psychiatrist in that case. *Manning* simply quoted a federal case which opined that, in consideration of fairness, a compelled psychological examination of the defendant was proper because the defendant introduced expert psychological testimony regarding his amenability to rehabilitation during the penalty phase of those proceedings. *See id.* at 24 (quoting *Schneider v. Lynaugh* (5th Cir. 1988), 835 F.2d 570, 576); *see also Schneider*, 835 F.2d at 572. Thus, just like the court below, to justify its holding *Manning* relied on cases that did not involve

BWS. Furthermore, apart from the court below, no other Ohio court has cited *Manning* to justify a compelled examination of the defendant when she raises self-defense supported by BWS.

In addition, if *Manning* was ever good law, to the extent it might have been construed to permit a psychiatrist to testify as to facts bearing on guilt that the defendant revealed during the compelled examination, it was superseded by the enactment of R.C. § 2945.371(J). That statute became effective on July 1, 1997, over six years after *Manning* was decided. Compare R.C. § 2945.371 (1996) with R.C. § 2945.371(J) (1997). Ohio Rev. Code § 2945.371(J) makes clear that since 1997, the General Assembly, in consideration of a defendant's Fifth Amendment rights, has not permitted a State expert to testify as to the statements the defendant made during a compelled evaluation bearing on guilt. As Appellant described in detail in her merit brief, Dr. Resnick's testimony violated this statute in numerous ways.

Second, the State, and the Ohio Attorney General in its Amicus Brief, argue that the *Estelle v. Smith* (1981), 451 U.S. 454, a case to which Appellant cites, supports their position. *Smith* found that a Fifth Amendment violation occurred in that case when the State's psychiatrist took on the role of an agent for the State by recounting unwarned statements made in a postarrest custodial setting, just as occurred in this case. See *id.* at 467. True, the psychiatrist in *Smith* testified during the State's case in chief at the penalty phase of the proceedings rather than in rebuttal. *Id.* at 464. Neither *Smith*, however, nor any other U.S. Supreme Court case has ever held that psychiatric testimony offered by the State based upon a compelled examination of the defendant is permissible if offered to rebut the testimony of the defendant's expert. While some federal circuit courts have held as much, see, e.g., *United States v. Byers* (D.C. Cir. 1984), 740 F.2d 1104, neither the State nor the Attorney General cites to any federal case that addresses compelled examinations in the context of a defense of self-defense supported by BWS.

Third, the Ohio Attorney General posits that even though BWS is different from insanity, this Court should nonetheless expand the holdings from cases like *Byers*, which did not address BWS, to permit the State a compelled examination when a defendant introduces expert testimony in support of a defense of self-defense supported by BWS. Specifically, the Attorney General argues that because BWS is a fact, not a defense, there is no reason to distinguish between its use in support of a defense of self-defense compared to a defense of insanity. The Attorney General misses the point, however. Cases like *Byers* have held that the State is entitled to a compelled examination when a defendant raises an insanity defense. 740 F.2d at 1111. They have not held that the State is entitled to a compelled examination when a defendant raises a defense of self-defense. When BWS is used as a fact to support an insanity defense, then a compelled examination might be appropriate. When BWS is used as a fact to support a defense of self-defense, *Byers* and like cases offer no justification for the ordering of a compelled examination. Indeed, as the Attorney General itself notes, "[t]here are no special 'insanity' varieties of Battered Woman Syndrome" (Attorney General's Brief, at 8.) Thus, there is no principled reason to apply federal insanity cases to cases in which a defendant raises a defense of self-defense supported by BWS.

Finally, the Attorney General posits that the privilege against self-incrimination is more appropriately applied in the context of an insanity defense rather than self-defense supported by BWS. The Fifth Amendment, however, makes no distinction between whether a compelled statement is used to prove an element of a crime or is used to defeat an affirmative defense. It protects a defendant from incriminating herself. Forcing the defendant to provide testimony that defeats an affirmative defense is just as incriminating as forcing her to divulge statements that might prove an element of the alleged crime. Thus, the Attorney General's argument is unavailing.

In sum, the State and the Ohio Attorney General ask this Court to accept the Fourth District's expansion of the holdings in cases like *Byers* to affirm Ms. Goff's conviction. For the foregoing reasons and for the reasons stated in Appellant's merit brief, this Court should not accept their invitation to expand upon these cases to vitiate a defendant's Fifth Amendment privilege.

II. 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 Is Limited

The State offers little argument against Appellant's proposition that if this Court were to hold that 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 the ability 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. In fact, the State admits that Dr. Resnick was called not to provide an expert opinion, but to (1) explain his perception of inconsistencies between the statements Ms. Goff made during the compelled examination and prior statements she had made; (2) give the basis for his lack of an expert opinion, and (3) testify as to the "'possible' reasons she shot her husband" (State's Brief, at 18–19.) In other words, Dr. Resnick was called to (1) recount to the trial court how—during the compelled examination—he confronted Ms. Goff with the prior statements she made to police in an effort to impeach the credibility of the statements she made during the examination—not the credibility of the statements she made at trial; (2) state why he was an expert with no expert opinion; and (3) speculate as to Ms. Goff's motive in shooting her husband—which Dr. Resnick speculated could have been because he laughed at her or made her angry (Tr. 3172)—rather than provide an expert opinion regarding BWS. (State's Brief, at 18–19.)

The State has therefore acknowledged that Dr. Resnick was not called to provide an expert opinion regarding BWS, but was called to recount his interrogation of Ms. Goff—using the

statements she made during the examination against her to establish guilt—and to speculate as to motive. For the reasons stated in Appellant's merit brief, this testimony violated the Fifth Amendment and Ohio R. Evid. 701 and 702.⁴ *See, e.g., Shepard v. Bowe* (Or. 1968), 442 P.2d 238, 240–41, *Traywicks v. State*, (Ok. Ct. Crim. App. 1996), 927 P.2d 1062, 1063; *see also Vey v. State* (Ohio Ct. App. 8th Dist. 1929), 35 Ohio App. 324 (noting that if experts have no opinion, "there would be no purpose in calling the experts to merely state that they can offer no opinion on the subject of the insanity of the accused."). Thus, the State's acknowledgement in its Brief regarding Dr. Resnick's testimony does not defeat Appellant's proposition of law, but rather actually supports it.

The Ohio Attorney General appears takes a different position to justify the content of Dr. Resnick's testimony. It seems to posit that Dr. Resnick's testimony did not run afoul of the Fifth Amendment because it was offered not to provide an expert opinion, but to impeach Ms. Goff's credibility. (*See Ohio Att'y Gen. Amicus Brief*, 3–6.) The Attorney General is, of course, correct that evidence obtained in violation of the Fifth Amendment may be used to impeach the credibility of the defendant's trial testimony. That rule, however, is not applicable to this case.

First, the State has never contended that it called Dr. Resnick as a factual witness to impeach Ms. Goff's trial testimony. Indeed, in its Brief the State adamantly protests any suggestion that Dr. Resnick's testimony was offered to impeach Ms. Goff's credibility. (*See State's Brief*, at 19–20.) Instead, the State makes clear that Dr. Resnick's testimony was offered to provide "alternative explanations for the shooting other than BWS." (*State's Brief*, at 19.)

Second, Dr. Resnick did not impeach Ms. Goff's trial testimony with statements he elicited during the compelled examination. Instead, he used the statements Ms. Goff made during the

⁴ A day before rendering its verdict finding Ms. Goff guilty of aggravated murder, the trial court admitted that it did not know the law governing the admissibility of Dr. Resnick's testimony. (Tr. 3132–33.)

compelled interview to attempt to impeach statements she had previously made to police—not her trial testimony. (*See, e.g.*, Tr. 3154–59 (Dr. Resnick stating "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.")) This scenario does not fall within the rule the Attorney General cites. Moreover, the State never confronted Ms. Goff with the statements she made during the compelled examination, as would have occurred if it had intended to impeach Ms. Goff's testimony with those statements. Furthermore, even if Dr. Resnick had been called to impeach the credibility of Ms. Goff's trial testimony rather than simply recount his interrogation of her, such testimony would have been inadmissible under Ohio R. Evid. 613 and *State v. Boston* (1989), 46 Ohio St. 3d 108. *See* Ohio R. Evid. 613(B)(2) (providing that extrinsic evidence of prior inconsistent statements is not admissible if it concerns the credibility of a witness); *Boston*, 46 Ohio St. 3d at syllabus (holding that "[a]n expert may not testify as to the expert's opinion of the veracity of the statements of a child declarant.").

Third, Dr. Resnick's testimony violated Ms. Goff's Fifth Amendment rights separate and apart from the inconsistencies he perceived between the statements Ms. Goff made during the compelled examination and her statements made to police. For example, based on the statements Ms. Goff made during the compelled examination, Dr. Resnick testified that he doubted that Ms. Goff feared Goff because she initially planned to approach the home unarmed even though she knew Goff to have guns in the home.⁵ (Tr. 3157.) Thus, Dr. Resnick recounted two statements Ms. Goff made during the compelled examination which in no way contradicted her trial testimony, but which he used to attempt to show Ms. Goff was not a credible witness. Dr. Resnick also testified that Ms.

⁵ Dr. Resnick's testimony fails to consider, of course, that, in the end, Ms. Goff did decide to approach her husband armed because she did, in fact, fear for her life.

Goff revealed during the compelled examination that she lied to her grandmother about where she was going the day of the shooting, which statement did not contradict Ms. Goff's trial testimony. (Tr. 3157.) Again, this testimony does not fall within the impeachment exception to Fifth Amendment protection the Attorney General cites because it was not impeachment testimony; it was what Dr. Resnick believed was the result of his interrogation.

Fourth, even if Dr. Resnick had only provided testimony to impeach Ms. Goff's credibility—which, again, would have been inadmissible under Ohio R. Evid. 613 and *Boston*—his role at trial was wildly different than the role of a fact witness called to impeach the defendant's credibility based on inconsistent statements. Dr. Resnick was qualified as an expert in forensic psychiatry. If the purpose of Dr. Resnick's testimony was merely to impeach Ms. Goff's testimony with the statements she made during the compelled examination, he should not have been qualified as an expert. To do so allowed what the Attorney General contends are impeaching statements to be parroted from the mouth of a witness whose own credibility and importance had been bolstered through qualification as an expert. Given that Dr. Resnick was qualified as an expert in forensic psychiatry, the Attorney General's attempt to justify Dr. Resnick's testimony as permissible impeachment testimony is not persuasive.

Finally, both the State and the Attorney General protest that it would be unfair to allow Ms. Goff to present an expert if the State were not permitted a compelled examination of her. Even if the Court accepts this fairness argument as sufficient justification to disregard the Fifth Amendment, the fact remains that what happened in this case to Ms. Goff certainly was not fair. Dr. Resnick interrogated Ms. Goff for nearly eight hours, but could not form an expert opinion after this interrogation. Nevertheless, he was permitted to testify as to the basis of his lack of opinion and speculate as to why Ms. Goff might have shot her husband, all while informing the trial court why he

found Ms. Goff's statements to police and to him to be inconsistent. Under these facts, fairness dictates that Ms. Goff be granted a new trial.

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.

The State concedes that in the instant case Dr. Resnick, the State's retained psychiatrist, was allowed to speculate as to why Ms. Goff might have shot her husband, (State's Brief, at 19), even though Dr. Resnick stated in his report: "I have not reached an opinion with reasonable medical certainty about why Ms. Goff shot her husband." (Report of Dr. Resnick dated November 8, 2006 at 35, Trial Exhibit 88.). Nevertheless, he was allowed to speculate as to why she might have shot her husband over the repeated objections of the Defendant. (Tr. 3134-36; 3171.) In part the State admits that:

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.

(State's Brief, at 19 (emphasis added).)

This admission is no answer to Defendant's argument that Dr. Resnick's recounting of the State's evidence and Defendant's statements bearing on guilt during the compelled examination violated R.C. § 2945.371(J). Furthermore, in Ohio expert testimony is allowed when it "relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons." Ohio R. Evid. 702(A). In criminal cases, not even qualified experts can testify as to the mental state of the defendant other than in the context of an insanity defense. *State v. Slagle* (1992), 65 Ohio St. 3d 597, 607; *State v. Wilcox* 1982), 70 Ohio St. 2d 182. It was

error to allow Dr. Resnick to speculate as to why Ms. Goff may have shot her husband, and her conviction must be reversed.

The trial court allowed Dr. Resnick to testify as to guilt in violation of R.C § 2945.371(J). Dr. Resnick's testimony was not offered to "rebut Dr. Miller's opinion of BWS," because Dr. Resnick did not have an opinion as to whether Ms. Goff suffered from BWS. (State's Brief, at 18.) The only reason he testified was to provide the court with "'possible' reasons she shot her husband" (State's Brief, at 18):

After explaining the many inconsistencies of Appellant in her two interviews with Dr. Resnick, **he related to the court the "possible" reasons he shot her husband** but could not with a reasonable degree of certainty find that she was or was not subject to BWS.

(State's Brief, at 18 (emphasis added).)

This is not expert testimony and this type of testimony is clearly not permitted under the Ohio Rules of Evidence or Ohio caselaw.

Next, the chronology of what occurred in this case answers the State's contention that Appellant's description of Dr. Resnick's role in this case was speculation. (State's Brief, at 20.) The State gave Dr. Resnick evidence that the defense did not have, such as witness statements, and based on that evidence, Dr. Resnick, over objection, interrogated Ms. Goff:

We gave Resnick everything we had. In fact, I think the other man had 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 asked probably 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."

(Tr. 3450 (emphasis added).)

Defense counsel vigorously objected before and during trial to Dr. Resnick's interrogation and subsequent trial testimony. (Tr. 3128–36.) When Dr. Resnick questioned Ms. Goff regarding fact specific issues surrounding the incident, counsel again objected:

When Megan was required to go to Cleveland to sit for almost eight (8) hours in front of Doctor Phillip Resnick, her constitutional rights were then unquestionably overrun. She can't get them back. It's like the toothpaste is out of the tube and she can't get them back.

We object to the fact that Doctor Resnick was able to do that. I was present for the interview, Your Honor. When we got to the point where we were talking about the events of March the 18th, I objected at that point to the continuation of the interview.

(Tr. 3130-31).

After the initial interrogation, the State informed the court that Dr. Resnick had some additional questions and another examination was scheduled. (Pretrial Tr. 3, Oct. 18, 2006, Ex. 8, A-103.) The only way the State knew this was that Dr. Resnick discussed the matter with the prosecutor:

I had **talked** with Resnick. He had some follow up questions and **we were going to do the follow up**, as I say, by telephone conference call where he had some follow up questions for Ms. Goff and defense counsel objected to my being present. He's going to be present, I'm asking to be present.

(Pretrial Tr. 4, Oct. 18, 2006 (emphasis added), Ex. 8, A-103.)

The State requested that the court issue an order permitting the prosecutor to be present during the follow-up telephone examination. (State Mot. Present During Exam, Oct. 13, 2006; Pretrial Tr. 3, Oct. 18, 2006.) The trial court allowed the prosecutor's request, thereby producing another witness for the State. The prosecutor subsequently removed himself from the case and added his name to the State's witness list. (*Compare* Mot. Jan. 19, 2007, (listing J.B. Collier as the sole prosecutor on the case), *with* Mot. Feb. 6, 2007 (listing Robert C. Anderson as the sole prosecutor; Update to Discovery, Mar. 23, 2007 (listing Mr. Collier as a witness, Attachment A).)

Allowing the prosecutor to attend Ms. Goff's compelled psychiatric examination compounded the violation of her constitutional rights inherent in compelling the examination, over objection, and requires reversal of her conviction. These facts clearly support the Appellant's characterization of the compelled examination as being more akin to a deposition than a psychiatric examination.

The State next claims that Dr. Resnick did not testify beyond the scope of an expert. However, very little, if any, of the testimony Dr. Resnick provided was the type of expert testimony envisioned under Evid. R. 702. That rule provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

This rule establishes the requirement that expert testimony is admissible only if it will assist the trier of fact. An expert witness "may not express an opinion upon matters as to which a jury is capable of forming a competent conclusion." *State v. Campbell* (Ohio App. 1 Dist. 2002), 2002 WL 398029. A witnesses' knowledge must not be based on subjective belief or unsupported speculation. *Id.* at 4. An expert is not needed where the jury can understand the issues and the evidence and make their own determinations. If the subject of the testimony is within the understanding of the jury, the expert testimony is inadmissible. *State v. Koss* (1990), 49 Ohio St.3d 213, 216 (citing *Bostic v. Connor* (1988), 37 Ohio St. 3d 144).

The State cites to Ohio Rule of Evid. 705 for the proposition that Dr. Resnick was entitled to explain why he had no opinion which turned into an opinion on Ms. Goff's credibility and hence guilt. There is no purpose in calling an expert who has no opinion. *Vey v. State* (Ohio Ct. App. 8th Dist. 1929), 35 Ohio App. 324 (noting that if experts have no opinion, "there would be no purpose in calling the experts to merely state that they can offer no opinion on the subject of the insanity of the

accused.")) Dr. Resnick should not have been permitted to testify. His testimony in support of his inability to form an opinion was not relevant, was not expert testimony and Evid. R. 705 is not applicable.

Dr. Resnick's testimony, in effect, was that Ms. Goff was guilty. Ms. Goff's innocence or guilt was not an appropriate subject for expert testimony. Questions of guilt or innocence are to be determined by the trier of fact alone based on the conclusions that it draws from the evidence. *State v. McCoy* (Ohio Ct. App. 3d Dist. 1973), 33 Ohio App. 2d 261. The State misses the argument when it claims that when Dr. Resnick "testified on rebuttal the undisputed facts related to the killing of her husband by Appellant had been established." (State's Brief, at 18.) The fact that Megan shot Goff was not the issue. The issue was that Resnick took the facts and told the Court why it should not believe Megan's version of what happened, and then told the court that if she is not credible, then she did not exhibit BWS.

Finally, Dr. Resnick's testimony was a major contributing factor to the outcome of this case.

Dr. Resnick, when asked by the State to summarize the basis for his opinion, testified:

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 conclusion either way.

(Tr. 3244.)

The Court in rendering its verdict, essentially regurgitated what Dr. Resnick testified to as to credibility, and based its opinion regarding whether she was terrified or not on what on Dr. Resnick's opinion that she "put herself in harms way." (Tr. 3460.)

Ms. Goff had the right to assert the affirmative defense of self-defense. She had the right to present evidence regarding how one reacts after years of an multiple cycles of abuse. She had the right to present her defense without the State's expert, a man without an opinion, opining upon what

he perceived as inconsistencies in Ms. Goff's statements, speculating as to why he thought she shot her husband, and highlighting for the court why he thought she was guilty. Ms. Goff did not receive a fair trial and justice demands that her conviction be reversed.

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.

Section 2945.371(A) of the Revised Code allows a court to order a mental examination of a criminal defendant whenever an issue is raised as to the competency of the defendant to stand trial or when a defendant claims to be not guilty by reason of insanity. Those are the only provisions in Ohio law for the compelled mental examination of a criminal defendant. While the examination conducted to determine whether the defendant was insane at the time of the crime may consider whether or not the defendant suffered from BWS, R.C. § 2945.371(F), the plain language of R.C. § 2945.371(A) limits the power of a court to order a compelled examination to only those cases involving competency or insanity.

The State's reliance on the changes enacted to Federal Rule of Criminal Procedure is misplaced. For many years some federal circuits have recognized the defense of diminished capacity whereby a criminal defendant could offer expert psychiatric testimony to negate the mental state of the alleged crime. *United States v. Newman* (6th Cir. 1989), 889 F.2d 88, 91; *United States v. Veach* (6th Cir. 2006), 455 F. 3d 628, 631. This defense is not recognized in Ohio. *State v. Wilcox* (1982), 70 Ohio St. 2d 182. Prior to the amendment to Federal Rule of Criminal Procedure 12.2 in 2002, the federal courts were generally deemed powerless to compel a psychiatric examination to rebut a diminished capacity defense when requested by the government. *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. While federal

law has been changed to allow for a mental examination of a defendant who plans to interpose a diminished capacity defense, Ohio law has not been changed to allow for a compelled psychiatric examination of a defendant asserting a defense of self-defense supported by BWS.

Moreover, even if allowed, the defense of diminished capacity was not applicable below, as Ms. Goff never asserted an inability to form the mental state prescribed in the statute, purposely. Rather, she claimed that she was justified in killing her husband because she reasonably believed that he was an imminent threat to her and her children. She introduced expert testimony on BWS to demonstrate that her fear was both real and reasonable when comparing her to other battered women. Ohio law specifically allows her to offer this testimony. R.C. § 2901.06. Nor does R.C. § 2901.06 provide for the compelled examination of a woman asserting BWS. Certainly, if the legislature wanted to provide for a compelled examination whenever a BWS defense was asserted it could do so as the federal government did in amending Rule 12.2 of the Federal Rules of Criminal Procedure to allow for an examination when diminished capacity was asserted by a defendant. The only compelled psychiatric examinations of criminal defendants provided for in Ohio law are those found in R.C. § 2945.371(A) and that section does not apply to this case.

Nor should this Court imply a right to a compelled psychiatric examination because the federal government has decided that a compelled psychiatric examination is needed to rebut a claim of diminished capacity. Using an expert witness on BWS to explain the reasonableness of a battered woman's use of force is far different from a claim that a particular defendant lacked the capacity to form a specific mental state as the result of mental disease or defect. The defense of diminished capacity tries to equate any diminution in a defendant's mental abilities caused by mental disease or defect short of legal insanity with the *mens rea* prescribed in the crime charged, an approach that undermines the defense of insanity, *Wilcox, supra*. This requires the same kind of expertise required

to rebut a claim of legal insanity. Yet, until Rule 12.2 of the Federal Rules of Criminal Procedure was amended in 2002, the federal courts generally refused to imply a right to a compelled psychiatric examination to refute a defense of diminished capacity. *Marenghi, supra; Williams, supra*. As the assertion of a claim of self-defense by a battered woman does not require proof of a mental disease or defect, a compelled psychiatric examination should not be required in the absence of legislative authorization and then, only if information gleaned from any such examination cannot be used to prove the guilt of the defendant.

Similarly, the Attorney General's assertion that this Court should imply a right to compel a psychiatric examination whenever a defendant presents expert testimony as to BWS is inappropriate in the context of the present case. We would suggest that if such a compelled examination is desirable, it should be sanctioned either legislatively by the General Assembly or by this Court's rule making authority which also would require legislative acquiescence. Using either of these methods of implementation would enable a rule or statute that fully recognized a criminal defendant's Fifth Amendment rights by prohibiting the use of any information gleaned in such an examination in determining the guilt of the defendant. *See* R.C. § 2945.371(J). Leaving the scope and use of such an examination to the unfettered discretion of the trial judge would lead to unconstitutional results where, as here, the defendant's statements to the examiner were used to prove her guilt.

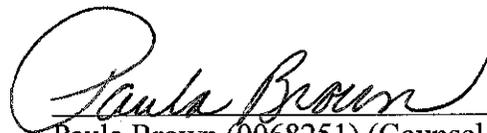
Finally, we submit that the Attorney General's reliance on *State v. Lott* (2002), 97 Ohio St. 3d 303, is misplaced. *Lott* was awaiting execution for a capital offense, having exhausted his appeals when the United States Supreme Court decided *Atkins v. Virginia* (2002), 536 U.S. 304, prohibiting on constitutional grounds the execution of mentally retarded offenders. *Lott* claimed to be mentally retarded and sought a hearing to prove his claim. This Court stayed *Lott's* imminent execution and held that in the absence of legislative guidance, *Lott, supra* at 305, the trial court

should provide Lott a hearing and decide his claim to be retarded. This Court acted in an emergency situation to protect the newly created constitutional right of Lott not to be executed if he was in fact mentally retarded. Unlike the emergency facing this Court in *Lott*, Ohio has sanctioned the use of experts by defendants claiming BWS since 1990. *State v. Koss* (1990), 49 Ohio St. 3d 213; R.C. § 2901.06. If it is important for the State to compel a psychiatric examination of every defendant claiming BWS, they have had 20 years to seek legislative approval for such an examination or to request this Court to amend the Rules of Criminal Procedure to allow for such an examination. There was no emergency here, and the conviction must be reversed.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court adopt Appellant's Propositions of Law and reverse the judgment of the Fourth District Court of Appeals, Lawrence County, Ohio.

Respectfully submitted,



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COUNSEL FOR APPELLANT

MEGAN GOFF

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 30th day of July, 2010.

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

Paula Brown

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.	:	

**APPENDICE TO THE
REPLY BRIEF ON THE MERITS
OF DEFENDANT-APPELLANT MEGAN GOFF**

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COUNSEL FOR APPELLEE, STATE OF OHIO

IN THE COURT OF COMMON PLEAS
LAWRENCE COUNTY, OHIO

7/26/07 2:37 PM 06-45

STATE OF OHIO,

PLAINTIFF,

UPDATE TO DISCOVERY
CASE NO. 06-CR-033

v.

MEGAN GOFF,

DEFENDANT.

Comes now the State of Ohio and submits this Update to Discovery as follows:

1. At the time defense counsel examined the physical evidence, certain live rounds which had been test fired and spent casings were not located, but it has now been determined that they were actually placed in the evidence envelopes with the firearms. These live rounds, and/or spent casings are available for inspection by the defense;

2. Attached hereto is BCI Investigative Report, File No. CC-44-06-01-464 and a Compact Disc associated with that report that contains documents that were retrieved from a computer belonging to the Defendant that was seized by the State;

3. Attached hereto is the investigative narrative of Det. Aaron Bollinger dated 05/26/05 regarding the red and blue canister with mortar round inside. The narrative establishes that an ATF technician determined that the mortar round was inactive and that there were no signs that the device had been tampered with. This investigative report had previously been provided in discovery to the Defendant;

4. The State confirms that the transcript of the 911 tape that has been provided previously to Defendant is the complete tape which was provided to the Prosecuting Attorney's office;

5. On March 13, 2007, Robert C. Anderson, Assistant Prosecuting Attorney, advised

Defendant's attorney, Mary Stillpass, that arrangements can be made for Defendant's designee to have access to a computer that was seized from the Defendant at the Prosecutor's office during normal business hours. There is a computer "tower" that remains in the basement of the residence of the victim which had been observed by the State and the defense. The State did not seize the computer tower and if the Defendant wishes to have her designee to have access to it, it can be accomplished at the Lawrence County Prosecutor's office. Both computers can be made available at the Prosecutor's office with reasonable advance notice from Defendant;

6. Attached hereto is a Compact Disc of photographs taken by David Marcum of the Lawrence County Prosecutor's office at the scene of the crime. These photographs were taken at the same time that a representative of the Defendant was taking photographs using a separate camera;

7. Attached hereto is a copy of a video tape of a January 18th alleged domestic violence incident involving the victim and the Defendant which was originally provided to the State by the Defendant. Although the State assumes the Defendant has the original copy in her possession, the State is nevertheless providing it hereto;

8. Attached hereto are written statements dated 03/19/06 and 03/20/06, respectively, from Deputy Brian Chaffins and Deputy Jeff Reed regarding the demeanor and comments of Defendant at the time she was booked into the Lawrence County Jail on March 18, 2006;

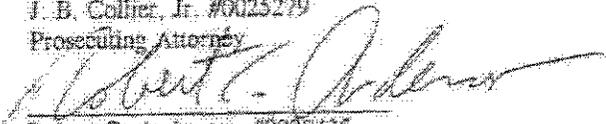
9. Attached hereto is a Property Routing report (including photograph copies) from the Lawrence County Sheriff's Department, dated 07/14/06, a BCI Investigative Report of Agent Shane Hanshaw dated 03/25/06, copies of photographs of the incense burner, and a Property Routing Sheet dated 09/07/06, and property routing sheet dated 08/17/06.

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10. Additional witnesses' names for the State are as follows: Ruth Ann DeLong, 3408 Co. Rd. 19, Kitts Hill, Ohio 45645; Deputy Brian Chaffins and Deputy Jeff Rood, Lawrence County Sheriff's Department, 115 South Fifth Street, Ironton, Ohio 45638; J. B. Collier, Jr., 411 Center Street, Ironton, Ohio 45638; ATF Special Agent Bomb Technician Michael L. Eggleston, Indianapolis, Indiana Field Office, and representatives of the telephone companies.

Respectfully submitted,

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

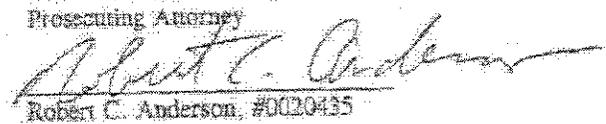

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PROOF OF SERVICE

A copy of the foregoing Update to Discovery was served upon Mr. Marty J. Stillpass, Attorney at Law, P.O. Box 297, Ironton, Ohio 45638, this 23rd day of March, 2007, by hand delivery.

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Prosecuting Attorney


Robert C. Anderson, #0020435
Assistant Prosecuting Attorney