

South Carolina

NOVEMBER/DECEMBER 1990

LAWYER

When Are Lawyers'
Gifts to Judges
Improper?



Defending the Battered Woman

By Jack B. Swerling

The defense of a battered woman case offers an interesting challenge to the lawyer. While such a defense presents all the ingredients of a classic self-defense case, it also furnishes the opportunity to supplement the self-defense case with additional probative testimony on the defendant's (as well as the victim's) state of mind at the time of the fatal incident. Evidence of this sort is not often available, or not as apparent, in the traditional self-defense case.

In *State v. Davis*, 317 S.E.2d 452 (1984), the South Carolina Supreme Court held that the following should be instructed in self defense cases:

Self-defense is a complete defense. If established, you must find the defendant not guilty. There are four elements required by law to establish self-defense in this case. First the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence,

firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. If, however, the defendant was on his own premises he had no duty to retreat before acting in self-defense. These are the elements of self-defense. [*State v. Davis* at 453.]

In any self-defense case, the state of mind of the defendant is a relevant and important issue which must be explored pre-trial and presented at trial. In *State v. Hill*, 339 S.E.2d 121 (1986), the South Carolina Supreme Court recognized this vital concept and

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held that expert testimony regarding the battered woman syndrome is a proper subject for expert testimony because "the testimony is relevant to the issue of self-defense and highly probative of the defendant's state of mind at the time of the incident." *State v. Hill* at 122.

The discussion that follows hopefully will aid the criminal

practitioner in the preparation and trial of the battered woman case.

The First Interview

During the first interview, obtain information regarding the actual events that led up to the fatal incident. Place particular emphasis on:

- the defendant's perceptions and actions and
- the victim's actions and words immediately preceding the event.

In the battered woman case, it is very important to develop a history with the defendant of what her relationship with the victim has been. Explore the history of the marriage and relationship to the fullest extent. Determine whether there were prior altercations. If there were prior altercations, determine:

- Who were the witnesses?
- Was a report made to the police?
- Was a warrant signed?
- Were there any family court proceedings?
- Was there any treatment by a doctor or hospital?
- Were any photographs taken?
- Were the arguments or altercations witnessed by anyone, or were the results of the altercations witnessed by anyone?

Have the client relate any counseling that was received. Has she or the victim ever been seen by a psychologist or psychiatrist regarding their domestic problems? Develop the background of the defendant. Obtain her work history, her educational

background and her relationship with her children. Questions regarding her dependency on the victim can be extremely relevant.

If there were serious altercations before the fatal event, have the client explain in her own words why she did not leave the victim at that time and why she did not pursue either a warrant or a family court adjudication.

Obtain the following information regarding the victim:

- his education,
- his work background,
- his relationship with his family and friends,
- his use of alcohol and/or drugs,
- his reputation for violence or turbulence, and
- information regarding his childhood to determine whether he was an abused or battered child.

Obtain the names and addresses of the victim's family, friends, neighbors and co-workers, as well as information about his "hangouts" and other persons who can help supplement the above information.

Finally, obtain from the defendant the names and addresses of everyone who could possibly shed some light on the marriage or the personality of either the defendant or the victim. These persons should include but not be limited to neighbors, friends, relatives, co-workers, counselors, physicians, psychologists, psychiatrists, law enforcement personnel, family court personnel and lawyers.

The Battered Woman's Syndrome

Counsel should immediately seek the services of an expert who

has had experience working with battered women. Over the last 15 years there have been numerous studies of the battered woman and the experts have developed a set of characteristics known as the battered woman syndrome.

Some key questions that a solicitor will pursue at trial are: why a woman would stay with an abusive husband; why she would take out warrants and drop them; why she would not report physical abuse to the proper authorities; and why she would instigate family court actions and dismiss them or not pursue them.

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Other questions which present a problem are whether the defendant's perceptions at the time of the fatal incident were real or imagined, whether the threat was imminent and whether the danger was real or imagined.

Of course, lay testimony can establish and answer many of these questions. For example, the defendant may not have a good self-image of herself; she may be insecure, may have loved the victim and accepted his plea of forgiveness or his promise that "he'd do better" in the future. She may have feared financial insecurity for herself or her children; may have felt the system might not work for her or protect her; or simply may have been overwhelmed by the fear of being alone and abandoned. The defen-

dant and her witnesses may present testimony of the reality of danger and her perceptions and may even have evidence to corroborate her immediate fear of death or serious bodily harm.

Expert Witnesses

While lay testimony and documentation are critical in this type of case, someone must explain to the jury that what the defendant feels or what she does is typical of similarly situated women. And someone must offer an explanation as to why she did or did not do a particular act. This is where the expert comes into the picture.

Through a series of interviews and tests, the psychologist can determine whether the defendant meets the criteria for the battered woman syndrome. If she does, the psychologist can then offer a logical, reasonable and empirical explanation for the defendant's actions or perceptions.

The author has worked with several psychologists who are learned in this area and make excellent witnesses. They are Dr. Diane Follingstad of Columbia and Drs. Lois Veronen and Dean Kilpatrick of the Medical University of South Carolina in Charleston.

Investigation

The investigation of a battered woman case must focus not only on the events surrounding the fatal incident but also on the prior difficulties between the parties. The latter can be extremely important in convincing the jury to lose sympathy for the victim and to sympathize and understand the actions of the defendant.

Some suggested areas to concentrate on are:

- Interview neighbors regarding hostilities between the defendant and the victim. Pay particular attention to the witnesses who may have viewed an assault and the result of an assault. *State v. Smith*, 208 S.E.2d 1533 (S.C. 1974).

- Interview friends and relatives of the parties. Many of them have probably witnessed arguments, physical aggression or the results of any physical aggression. Be sure to pin down the time element as it relates to the fatal incident. *State v. McGee*, 193 S.E. 303 (S.C. 1937).

- Interview co-workers of the defendant and the victim to see if any of them may have witnessed prior altercations or the results thereof. When interviewing co-workers of the victim, find out whether he ever talked about his altercations with the defendant or boasted about his domination and/or assaults on the defendant. *State v. Stockman*, 64 S.E. 596 (S.C. 1909).

- Explore the victim's character and reputation for turbulence and violence. This is relevant to show who was probably the aggressor at the time of the incident and/or what were the states of mind of the victim and defendant at the time. *State v. Boyd*, 119 S.E. 839 (S.C. 1923). *State v. Hill*, 123 S.E. 817 (S.C. 1924).

- Ascertain whether there were any communicated or uncommunicated threats made by the victim toward the defendant. This information is also relevant as to who was probably the aggressor and what were the parties' states of mind. *State v. Mason*, 56 S.E.2d 90 (S.C. 1949), *State v. Griffin*, 285 S.E.2d 631 (S.C. 1981).

- Obtain all police records, incident reports, warrants and orders relating to any warrants taken out by the defendant against the victim. Interview the reporting or arresting officer in preparation for presentation in court. Have all the documents certified.

- Obtain all medical records relating to injuries of the defendant. Many records will be admissible as business records to corroborate that the incident took place on a particular date and time, but interview the personnel involved for potential testimony as to bruises, marks or other evidence of the assault. Much of what is contained in the records would be hearsay, and live testimony is essential.

- Interview all members of the household; they will be able to give the best history of turbulence and violence. The victim may have assaulted other household members on other occasions. *Smith*, supra.

- Develop character witnesses for the defendant who can testify not only about her good reputation for truth and veracity but

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also about her good reputation for peace and tranquillity. Evidence of good character may in itself create a reasonable doubt. *State v. Green*, 294 S.E.2d 335 (S.C. 1982).

- Determine whether the victim had any alcohol or drugs in his blood. Prepare the pathologists or the SLED chemist to testify about the effects of alcohol and/or drugs

on a person. See Spitz and Fisher, *Medicolegal Investigation of Death* (2nd edition), for a good text to prepare such a cross-examination.

- Interview every witness who saw the incident or events leading up to the incident. Be alert to statements that are admissible under the res gestae. The strategy should be to develop as much testimony as possible that the defendant was passive and did not want to quarrel, while showing that the victim was the aggressor and was looking for trouble. *State v. Miller*, 53 S.E. 426 (S.C. 1906).

- Develop testimony showing the defendant's educational background, work experience and family relationships to show her dependence on the victim with a view toward explaining her failure to leave or her willingness to drop charges in the past.

- Interview counselors at Sister-care or similar agencies that may have counseled or housed the defendant.

- Obtain certified copies of all family court proceedings and interview the defendant's lawyer to show the history of the defendant's attempts to have a peaceful marriage.

- Interview psychologists and psychiatrists or marriage counselors who have had contact with the parties.

Trial of the Case

The battered woman case is an example of a case in which counsel should, if possible, tell the jury that the defendant committed the fatal act but did so in self-defense. Counsel should also emphasize to the jury that there was a history of violence by the victim and that the defendant committed the

fatal act out of necessity and fear. Ask the jury to listen to all the evidence or lack of evidence from the standpoint of what a reasonable person would have concluded at the time of the fatal act.

Of course, do not lay out the defense if it is possible that the state cannot carry its burden of proof or if there is a substantial flaw in the state's case. Do not promise a specific defense or testimony by the defendant unless you are sure you can and will present such defense/testimony.

During the state's case, use the cross-examination to highlight facts favorable to the case rather than to rehash testimony of the state. Examine the witnesses as to prior difficulties, prior threats, aggressive acts, intoxication and similar negative factors to create reasonable doubt or at the least to cast disfavor on the victim, his reputation or his actions.

During the defense case, present the issues in a logical sequence. Present the defendant's testimony after a great deal of preparation. Her presence and demeanor are critical. She must convey her fears and her apprehensions at the time of the fatal incident, tying together her present fear and apprehension with her past experiences. She also must explain the events in a way that conveys to the jury that she acted as any reasonable woman would have done under the same or similar circumstances.

Present the corroborating witnesses, the documents, evidence of prior acts or threats and all other relevant issues that relate to state of mind, who was the aggressor and the reasonableness of defendant's perceptions at the time of the incident.

During closing, counsel must be able to bring the jury as close as

possible to the defendant's situation before and up to the incident. Always keep in mind that that standard is what a reasonable woman would have believed at the time of the incident. Discuss with the jury the battered woman syndrome as a means of explaining her actions, but always keep in mind that the thrust of the case is self-defense and not a defense that the defendant was battered.

In discussing self-defense, point out not only the four elements of self-defense but also any other

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relevant issues relating to self-defense, such as appearances, words accompanied by hostile acts, prior difficulties, reputation, threats, absence of a duty to retreat in the home and other descriptive charges.

The Charge

Submit written charges. Refer to the defendant as a woman and request that the court use "woman" instead of "man." Also request that the court refer to any statements by the defendant as "statements," not confessions.

Other suggested charges are:

- Threat of death or serious bodily harm. *State v. Davis*, supra.
- Words accompanied by hostile acts may establish self-defense.

State v. Fuller, 377 S.E.2d 328 (S.C. 1989)

- Prior difficulties. *State v. Clinkscates*, 99 S.E.2d 663 (S.C. 1957).

- Size, age, weight. *State v. Hendrix*, 244 S.E.2d 503 (S.C. 1978).

- Deceased's reputation. *State v. Franklin*, 226 S.E.2d 896 (S.C. 1976).

- Uncommunicated threats. *State v. Griffin*, supra.

- Intoxication of deceased. *State v. Hendrix*. 244 S.E.2d 503 (S.C. 1978)

- No duty to retreat at home. *State v. Sales*, 328 S.E.2d 619 (S.C. 1985).

- Firing of more than one shot. *State v. Hendrix*, supra.

- Defendant need not wait until victim gets the drop on her. *State v. Rash*, 188 S.E. 435 (S.C. 1936).

- Appearances. *State v. Fuller*, supra. *State v. Hill*, supra. *State v. Davis*, supra.

- Defendant's good character. *State v. Green*, supra.

Conclusion

More than any other type of case dealing with self defense, the battered woman syndrome presents an opportunity to explore many relevant issues in the parties' background and to show how those issues relate to the fatal encounter. Use of self defense with the battered woman syndrome has been very successful in recent times, particularly because there now exist studies relating to the syndrome and because many jurors now recognize the existence of this conduct and refuse to condone it.

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