

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANA MARIE SANDOVAL-CERON,

Defendant-Appellant.

UNPUBLISHED

August 3, 2010

No. 286985

Branch Circuit Court

LC No. 07-028710-FC

Before: STEPHENS, P.J., and GLEICHER and M.J. KELLY, JJ.

GLEICHER, J. (*dissenting*).

I respectfully dissent. In my view, the trial court abused its discretion when it refused to permit the introduction at trial of proposed expert testimony regarding a battered woman syndrome (BWS) defense. The exclusion of this evidence contravened longstanding Michigan case law concerning syndrome evidence, violated MRE 702, and denied defendant her constitutional right to pursue a self-defense theory.

Defendant stabbed the victim, Ricardo Prieto, during the waning hours of a wedding reception. Defendant and Prieto never married, but had children together and periodically cohabited. Unrebutted evidence showed that defendant and Prieto had a turbulent relationship. Prieto had physically abused defendant on multiple occasions, frequently leaving her bruised. After one beating, defendant obtained a personal protection order. In August 2006, Prieto learned that defendant's husband had sexually molested Prieto's daughter. A social worker testified that Prieto became enraged when informed of the sexual abuse. Michelle Estrada, a friend of defendant's, recalled that Prieto blamed defendant for allowing the abuse to take place. Within days, Prieto physically abused his wife by pouring beer and salt on her. After Prieto's wife told him to leave, he apparently moved back in with defendant. Prieto's wife advised defendant of his recent abusive behavior and expressed concern that he would hurt defendant.

On September 9, 2006, defendant and Prieto attended a wedding at the home of Michelle and Jesus Estrada. As defendant and Prieto sat together on the Estradas' porch after most of the other wedding guests had departed the reception, defendant and Prieto began to argue. Jesus Estrada recalled that Prieto was drunk. Prieto suddenly struck defendant in the face, and within minutes she fatally stabbed him.

Defense counsel apprised the prosecutor and the trial court that defendant intended to rely "on a combination of self defense and Battered Women's Syndrome pursuant to the Michigan

Self Defense Jury Instruction (CJI2d 7.23),” and planned to support defendant’s self-defense theory with expert testimony by Firoza VanHorn, Ph.D. The prosecutor moved in limine to exclude VanHorn’s testimony on the basis that it would violate MRE 702, because it “is not based upon sufficient facts or data in this case” and “is not the product of a reliable scientific principle and method.”

The trial court conducted an evidentiary hearing at which VanHorn offered testimony. VanHorn described the “common characteristics of battered women” identified in the literature on this subject. VanHorn explained the “cycle of violence” endured by abused women, and opined that as a result of “being battered and being loved, being battered and being loved,” a battered woman’s “perception of what is going on around” her is “skewed.” According to VanHorn, when an abused woman receives a blow, and particularly a blow to the face, “she believes that she’s in danger. She believes she’s going to die. She believes that this is it for her.” In a bench opinion, the trial court found VanHorn qualified to express opinions about BWS, and observed “that in some circumstances” it would find VanHorn’s testimony to be “the product of reliable principles and methods.” However,

in this particular case, the Court is not satisfied that the witness as she testified was able to apply the principles and methods reliably to the facts of this particular case. While she had reviewed police reports and the transcript of the preliminary examination, interviewed or had summaries of other witnesses’ testimony, that she relied particularly upon her interview with the defendant. And what the Court’s fear is that in this—with the facts of this particular case, that the proffering of Dr. VanHorn as an expert would be unfairly and improperly prejudicial or confusing to the trier of facts.

Subsequently, the trial court refused to allow the jury to hear the testimony of several witnesses familiar with defendant’s relationship with Prieto, who would have supplied details concerning episodes of physical abuse that Prieto inflicted on defendant. After these rulings, the defense opted not to present a self-defense claim.

The majority reasons that because VanHorn “failed to close the ‘analytical gap’ between her expertise on battered woman syndrome and the facts of the particular case,” the trial court did not abuse its discretion by barring her testimony. *Ante* at 6. The majority further opines, “Because the facts did not support a claim of self-defense, the proposed testimony would not have assisted the jury in understanding the evidence or in determining a fact in issue. MRE 702.” *Id.* I believe that the majority and the trial court have misapprehended the legal standard governing the admission of syndrome evidence, and that the trial court abused its discretion when it excluded VanHorn’s testimony under an incorrect legal standard. Furthermore, this error mandates a new trial because it deprived defendant of a substantial defense and undermined the reliability of the verdict.

I. ADMISSIBILITY OF SYNDROME EVIDENCE BEFORE 2004

Our Supreme Court first examined the admissibility of expert testimony concerning syndrome evidence in *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990). The evidence at issue in *Beckley* concerned “the characteristics and patterns of behavior typically exhibited by sexually abused children.” *Id.* at 697. In *Beckley* and a companion case, the defendants

challenged the admission of expert testimony describing aspects of behavior exhibited by sexually abused children on the ground that “the testimony is unreliable because it fails to meet the *Davis/Frye* test.”¹ *Id.* at 705. The *Davis/Frye* test set forth a “general acceptance” standard of admissibility:

The foundational requirement for admissibility under the *Davis/Frye* test is that the proponent of the evidence must show that the scientific principle or technique has gained such general acceptance within the scientific community as to render the technique or principle reliable. Further, general scientific acceptability must be established by disinterested scientists. The *Davis/Frye* test restricts the admissibility of relevant evidence on the basis of general scientific acceptance to ensure that a jury is not relying on unproven and ultimately unsound scientific methods. [*Id.* at 718-719 (footnote omitted).]

The plurality opinion in *Beckley* observed that, “as a general rule, the *Davis/Frye* test has not been applied to behavioral sciences,” and that “it is difficult to fit the behavioral professions within the application and definition of *Davis/Frye*.” 434 Mich at 719-720. In light of the inherent differences between “techniques and procedures based on chemical, biological, or other physical sciences as contrasted with theories and assumptions that are based on the behavioral sciences,” a plurality of the Supreme Court held that syndrome evidence may be admitted without application of the *Davis/Frye* test, “so long as the purpose of the evidence is merely to offer an explanation for certain behavior.” *Id.* at 721.

Two years after the Supreme Court decided *Beckley*, this Court considered the admissibility of battered spouse syndrome (BSS) evidence.² In *People v Wilson*, 194 Mich App 599, 602; 487 NW2d 822 (1992), the defendant contended that “the jury should consider the fact she suffered from the BSS in evaluating her self-defense claim because it relates to the question whether she reasonably believed her life was in danger.” Citing *Beckley* and applying its reasoning, this Court concluded “that in cases such as this one expert testimony regarding the BSS will give the trier of fact a ‘better understanding of the evidence or assist in determining a fact in issue.’” *Id.* at 604, quoting *Beckley*, 434 Mich at 711. The Court in *Wilson* explained that to be admissible, BSS evidence must remain within the evidentiary confines set forth in *Beckley*:

In *Beckley*, the Court found expert testimony regarding the syndrome useful to the jury because it provided the jury information with which to dispel some of the common misconceptions regarding a child’s behavior following abuse. Given this rationale for the introduction of “syndrome” testimony, the Court limited the testimony to background information or discussion of the traits or symptoms experienced by victims of the syndrome. Because an expert regarding the child sexual abuse accommodation syndrome is an expert with

¹ See *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955); *Frye v United States*, 54 App DC 46; 293 F 1013 (1923).

² Case law uses the terms battered woman syndrome and battered spouse syndrome interchangeably.

regard to the syndrome and not the victim, it is inappropriate for that expert to render an opinion regarding whether the victim actually suffers from the syndrome. However, the Court in *Beckley* held the expert could render an opinion that the victim's behavior is common to the class of child abuse victims as long as the symptoms are already established in evidence. The expert may not introduce new facts about the victim unless those facts are properly admitted under a rule other than MRE 702. *Beckley* at 726-727, 729.

We believe the same limitations should apply to experts who testify about the BSS. As with the child abuse syndrome, the BSS expert is an expert with regard to the syndrome and not the particular defendant. Thus, the expert is qualified only to render an opinion regarding the "syndrome" and the symptoms that manifest it, not whether the individual defendant suffers from the syndrome or acted pursuant to it. [*Id.* at 604-605.]

The Supreme Court revisited syndrome evidence in *People v Christel*, 449 Mich 578; 537 NW2d 194 (1995). The Supreme Court framed the question presented in *Christel* as "the admissibility of expert testimony regarding the battered woman syndrome when offered to assist the jury in understanding the complainant's testimony and actions." *Id.* at 579. In *Christel*, the Supreme Court acknowledged that a majority of five justices in *Beckley* "agreed that where syndrome evidence is merely offered to explain certain behavior, the *Davis/Frye* test for recognizing an admissible science is inapplicable." *Id.* at 590. In a footnote, the Supreme Court observed, "Defendant does not contend that the *Davis/Frye* rule should apply to battered woman evidence." *Id.* at 590 n 18. Without further discussion of the *Davis/Frye* test, the Supreme Court extended the *Beckley* holding "to expert testimony of the battered woman syndrome so that the expert may, when appropriate, explain the generalities or characteristics of the syndrome." *Id.* at 591. Notably, the Supreme Court in *Christel* specifically declined to either "express approval or disapproval" of this Court's opinion in *Wilson*, 194 Mich App 599, while nevertheless recognizing that "a majority of jurisdictions favor the admissibility of expert testimony on the issue of the battered woman syndrome when offered as a means of self-defense." *Id.* at 589.

II. ADMISSIBILITY OF SYNDROME EVIDENCE AFTER 2004

When *Beckley*, *Wilson* and *Christel* were decided, the pertinent rule of evidence governing expert testimony, MRE 702, read as follows:

If the court determines that recognized 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.

Effective January 1, 2004, our Supreme Court amended MRE 702, which currently states:

If the court determines that 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 if

(1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The three numbered criteria added to MRE 702 “require[] trial judges to act as gatekeepers who must exclude unreliable expert testimony. See *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), and *Kumho Tire Co, Ltd v Carmichael*, 526 US 137; 119 S Ct 1167; 143 L Ed 2d 238 (1999).” Staff Comment to 2004 Amendment of MRE 702. In *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 782; 685 NW2d 391 (2004), the Supreme Court elaborated that the trial court’s gatekeeper role

applies to *all stages* of expert analysis. MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data. Thus, it is insufficient for the proponent of expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology. [Emphasis in original.]

Neither this Court nor our Supreme Court has squarely addressed whether the holdings announced in *Beckley*, *Wilson* and *Christel* survived the 2004 amendment of MRE 702. In *Beckley*, 434 Mich at 721, the Supreme Court expressed that “there is a fundamental difference between techniques and procedures based on chemical, biological, or other physical sciences as contrasted with theories and assumptions that are based on the behavioral sciences.” If this statement remains valid, the rationale for refraining from applying *Davis/Frye* to syndrome evidence applies equally to the application of *Daubert/Gilbert* and the amended version of MRE 702. Absent a published decision to the contrary, I believe that *Beckley*, *Wilson* and *Christel* continue to provide controlling authority regarding the admissibility of syndrome evidence.

III. APPLICATION OF *BECKLEY*, *WILSON* AND *CHRISTEL*

Defendant sought to introduce VanHorn’s expert testimony about BWS to support a self-defense claim at trial. As in *Wilson*, 194 Mich App at 602, defendant “argues the jury should consider the fact that she suffered from the BSS in evaluating her self-defense claim because it relates to the question whether she reasonably believed her life was in danger.” In *Wilson*, this Court affirmed an interlocutory order permitting the defendant to introduce “expert testimony regarding a description of the general syndrome and that certain behavior of the defendant already in evidence is characteristic of battered spouse victims generally” *Id.* at 605. However, the Court cautioned that testimony “regarding whether the defendant suffers from the syndrome and whether the defendant’s act was the result of the syndrome” must be excluded. *Id.*

The trial court in this case concluded that VanHorn qualified as an expert in BWS, and that “in some circumstances” her testimony “would be the product of reliable principles and methods.” But the trial court excluded VanHorn’s testimony on the basis of the court’s application of MRE 702(3), a provision added in 2004, which requires that the proponent of expert testimony demonstrate that “the witness has applied the principles and methods reliably to the facts of the case.” Although the trial court’s reasons for rejecting VanHorn’s testimony on

this ground are not entirely clear, the court expressed concern about the fact that VanHorn “relied particularly upon her interview with the defendant,” and opined that “with the facts of this particular case, . . . the proffering of Dr. VanHorn as an expert would be unfairly and improperly prejudicial or confusing to the trier of facts.” The trial court failed to elucidate any specific reason for its determination that BWS evidence would unfairly or improperly prejudice the prosecutor in this case, and I can discern none. I cannot meaningfully distinguish this case from *Wilson*, 194 Mich App 599. In *Wilson*, the defendant admitted “shooting the victim while he slept, but claim[ed] she acted in self-defense following forty-eight hours of abuse and death threats and years of battery.” *Id.* at 601. This Court concluded that “expert testimony regarding the BSS will give the trier of fact a ‘better understanding of the evidence or assist in determining a fact in issue.’” *Id.* at 604, quoting *Beckley*, 434 Mich at 711.

IV. APPLICATION OF MRE 702

The majority construes the trial court’s ruling as based on MRE 702, rather than on MRE 403:

The trial court did not rule that evidence of battered woman syndrome was inherently inadmissible, or that the proposed expert lacked the knowledge, skill, or experience to qualify as an expert. Rather, the expert failed to close the ‘analytical gap’ between her expertise on battered woman syndrome and the facts of the particular case. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 783; 685 NW2d 391 (2004). [*Ante* at 6.]

By the citation to *Gilbert*, the majority presumably suggests that VanHorn improperly extrapolated from general data concerning BWS when rendering her opinions in this case.³ As explained above, I believe that *Beckley*, *Wilson* and *Christel* counsel against a strict application of MRE 702 when considering the admission of syndrome evidence. But even if MRE 702 applies in full measure to syndrome evidence, I disagree with the majority’s conclusion that an “analytical gap” separated the data regarding BWS and VanHorn’s testimony in this case.

A. GENERAL PRINCIPLES OF SELF-DEFENSE

“[T]he killing of another person in self-defense is justifiable homicide if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm.” *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990).

³ In *Gilbert*, 470 Mich at 783, the Supreme Court noted that an “analytical gap” may occur between data and an expert’s opinion, citing *General Electric Co v Joiner*, 522 US 136, 146; 118 S Ct 512; 139 L Ed 2d 508 (1997). The pertinent language in *Joiner* reads:

Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered. [*Id.*]

As a general rule, the killing of another person in self-defense by one who is free from fault is justifiable homicide if, under all the circumstances, he honestly and reasonably believes that he is in imminent danger of death or great bodily harm and that it is necessary for him to exercise deadly force. [*People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002).]

In addition to these general concepts, the Supreme Court emphasized in *Riddle* that “a person is *never* required to retreat from a sudden, fierce, and violent attack; nor is he required to retreat from an attacker who he reasonably believes is about to use a deadly weapon.” *Id.* (emphasis in original). “[A]s long as he honestly and reasonably believes that it is necessary to exercise deadly force in self-defense, the actor’s failure to retreat is never a consideration,” and “he may stand his ground and meet force with force.” *Id.* In 2006, our Legislature codified these holdings by enacting MCL 780.972, which contains the following pertinent portions:

(1) An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if either of the following applies:

(a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual.

(b) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent sexual assault of himself or herself or of another individual.

The principles outlined in *Heflin*, *Riddle* and MCL 780.972 establish that a defendant may rely on self-defense if evidence supports that she both *reasonably* and *honestly* believed deadly force necessary to prevent her death or serious bodily harm. Whether a defendant acted in self-defense is a question of fact for the jury. *People v Prather*, 121 Mich App 324, 330; 328 NW2d 556 (1982). When a defendant claims self-defense, a jury must resolve whether the defendant honestly and reasonably believed that she faced imminent danger of death or great bodily harm. *People v George*, 213 Mich App 632, 635; 540 NW2d 487 (1995). And “[o]nce evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt.” *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993).

B. SELF-DEFENSE PRINCIPLES APPLIED

Several witnesses testified about the altercation that resulted in Prieto’s death. Michelle Estrada, at whose home the wedding reception took place, recalled seeing defendant and Prieto sitting on the back porch, talking and drinking beer. Michelle left her home briefly, and when she returned she saw defendant and Prieto arguing and asked her husband, Jesus Estrada, to intercede. Michelle “glanced back up to the porch,” and saw Prieto’s “hand come across [defendant’s] face, and that’s when I seen the blood on her lip, and that’s when the argument got heated more, I guess.” Michelle could not specifically recall if Prieto hit defendant with his “open hand” or his fist; she explained, “I just know it was the back of his hand is what made contact with her mouth.” The prosecutor does not dispute that Prieto initiated the affray.

After Prieto struck defendant's face, Michelle Estrada again urged her husband to step in and deescalate the situation. Michelle remembered that Prieto left the porch and defendant threw a beer bottle and a flowerpot at him, but missed. Defendant went inside the house and came out with a knife in her hand. Prieto and defendant continued fighting in the yard, and Jesus Estrada attempted to separate them, until Jesus tired and put his hands on his car. When Jesus turned to find defendant and Prieto, the knife lay on the ground and Prieto had been stabbed. Neither of the Estradas saw defendant stab Prieto.

VanHorn's testimony at the evidentiary hearing focused primarily on the general characteristics of battered women and the "cycle of violence" in which they live:

Q. Does—in this cycle of violence, does the violence repeat itself typically?

A. Well, it does, and sometimes . . . the relationship could last for a year and nothing happen[s] or months and nothing happen[s], so it's not like it happens all the time one after another. The person, the woman doesn't know when it's going to happen.

Q. Does the violence always or typically escalate?

A. Yes.

Q. How so?

A. It's the power and control that the man has. . . . It's a pattern of coercion and control that the man has on the woman. And so it's . . . [a] repeated number of assault[s], one after another sometimes, but most of the time it's—you know, it stay—it's quiet and then it's the cycle start[s] again. And the woman tries all her best not to let this happen. She's very much attune[d] of the clues of what will trigger this range [sic] in the men. She is always in constant fear of her life. She's always looking out. She's always feel [sic] that she's in danger.

VanHorn averred that physical abuse can distort a victim's perception of harm, and affect "her ability to make rational decision[s] and use good judgment."

Expert testimony concerning BWS bore direct relevance to a critical element of self-defense: the honesty and reasonableness of defendant's belief that she faced imminent danger of death or great bodily harm during her fight with Prieto. VanHorn's explanation of BWS would have assisted the jury in assessing whether defendant honestly believed that at the time of the altercation with Prieto she faced imminent death or serious bodily injury, and in assessing the reasonableness of defendant's actions after Prieto hit her in the face. VanHorn posited that physical abuse in a battering relationship alters a victim's state of mind and her perceptions of danger. This testimony would have enhanced the jury's ability to consider whether defendant's actions in obtaining and using the knife constituted a reasonable effort at self-defense, derived from an honest belief in the imminence of life threatening danger.

The majority rejects that the facts of this case support self-defense, in part because the majority divides the relevant events of September 9, 2006 into two separate brawls. As the majority would have it, defendant “became the aggressor” in a second affray when she threw objects at Prieto, and “decided to physically attack Prieto after the initial altercation had ended.” *Ante* at 4. According to the majority, during the second series of events, defendant formed the intent to “escalate the violence by arming herself with a deadly weapon, running Prieto down, and stabbing him to death.” *Id.* (emphasis in original). The majority’s characterization of events supports that defendant could not have harbored a reasonable belief in the imminence of death or serious bodily harm. But the majority ignores that a jury must view the events as they appeared to defendant, rather than to a panel of appellate judges reading a cold record:

For over 100 years Michigan law has acknowledged the right of a person to act upon a reasonable belief that he is in danger of death or serious bodily harm. Actual necessity is not the test for self-defense; where circumstances present a person with reasonable cause to believe he is in danger he may respond, even if his belief is later shown to have been a mistaken one. *Pond v People*, 8 Mich 150 (1860). See, also, *People v Macard*, 73 Mich 15; 40 NW 784 (1888); *People v Giacalone*, 242 Mich 16; 217 NW 758 (1928), and *People v Cameron*, 52 Mich App 463; 217 NW2d 401 (1974).

In *People v Burkard*, 374 Mich 430; 132 NW2d 106 (1965), the Supreme Court found error in the part of the trial court’s instruction that required a finding that an assault was in fact about to be made before the defendant would be justified in using lethal force to protect his wife. The proper test, stated the Court, was not necessity in fact but rather an honest belief in the necessity for action.

It is unlikely that *Burkard* introduced a new determination for self-defense cases—whether a defendant’s belief in impending harm was honest or dishonest. The test of ‘honest belief,’ we take it, means only that a defendant’s conduct should be judged ‘from the circumstances as they appeared to him at the time.’ *People v Tubbs*, 147 Mich 1, 12; 110 NW 132 (1907).

‘The question to be determined is, did the accused, under all the circumstances of the assault, as it appeared to him, honestly believe that he was in danger of his life, or great bodily harm, and that it was necessary to do what he did in order to save himself from such apparent threatened danger?’ *People v Lennon*, 71 Mich 298, 300-301; 38 NW 871 (1888). [*People v Shelton*, 64 Mich App 154, 156-157; 235 NW2d 93 (1975).]

Introduction of expert testimony concerning BWS would have permitted the jury to view the evidence through the lens of defendant’s experience as a victim of Prieto’s violence, and to determine, on the basis of the circumstances as they presented to defendant following her blow to the face, whether defendant’s belief in imminent death or serious bodily harm qualified as reasonable. A jury could reasonably have concluded that defendant did not perceive two separate, distinct affrays, but one continuous, unrelenting peril in the course of which the threat of serious bodily injury never abated. “[T]he expert’s testimony might also enable the jury to find that the battered [woman] ... is particularly able to predict accurately the likely extent of violence in any attack on her. That conclusion could significantly affect the jury’s evaluation of

the reasonableness of defendant's fear for her life." *State v Kelly*, 97 NJ 178, 207; 478 A2d 364 (1984). See also *State v Allery*, 101 Wash2d 591, 597; 682 P2d 312 (1984):

We find that expert testimony explaining why a person suffering from the battered woman syndrome would not leave her mate, would not inform police or friends, and would fear increased aggression against herself would be helpful to a jury in understanding a phenomenon not within the competence of an ordinary lay person. Where the psychologist is qualified to testify about the battered woman syndrome, and the defendant establishes her identity as a battered woman, expert testimony on the battered woman syndrome is admissible. This evidence may have a substantial bearing on the woman's perceptions and behavior at the time of the killing and is central to her claim of self-defense. [Citation omitted.]

Had Prieto been the first to draw a knife, defendant would have had no need of testimony explaining her perception of imminent death or great bodily harm. Here, however, defendant claimed that the threat Prieto posed could only be fully understood in the context of a battered woman's past experience. The notion that an abused woman could reasonably and honestly fear death or serious bodily harm absent immediate and obvious deadly force directed against her is hardly new in the annals of Michigan law. In *Giacalone*, 242 Mich at 19, the defendant shot and killed her husband at home, and raised a self-defense claim. "To support the defense, evidence was offered of threats made by deceased to defendant shortly before the shooting, of assaults made by him upon her, of her physical injuries, and of his brutal and violent treatment of her for some time prior to the event in question." *Id.* At around 7:00 p.m. on the evening of the shooting, the deceased "became violently enraged, without just cause, and choked defendant, leaving bruises on her throat." *Id.* The deceased threatened to kill the defendant and hung a loaded pistol on a nail near his bed. Other guns were also present in the bedroom. At approximately 9:00 p.m., the deceased went to bed. About two or three hours later, when the defendant believed the decedent to be asleep, the defendant took the pistol and "started to leave the room to go to the home of a neighbor." *Id.* at 19-20. As the defendant left, she heard the deceased make a noise, thought he had awakened, and feared that he would kill her with another weapon, prompting her to shoot and kill him. *Id.* at 20.

The trial court refused to admit evidence supporting the defendant's self-defense theory, and charged the jury that the shooting "is neither excusable nor justifiable homicide but ... is felonious homicide." *Giacalone*, 242 Mich at 18. The Supreme Court reversed the defendant's murder conviction, explaining in pertinent part:

The rule obtaining in this State is:

"That the circumstances must be viewed from the standpoint of the accused alone, and that if they are sufficient to induce in him an honest and reasonable belief that he is in danger of great bodily harm or loss of life, he is justified or excused in killing." 30 C.J. p 63.

It is said in 1 Michie on Homicide, p 1029:

"Evidence of the conduct of the deceased is admissible to show the reasonableness of the defendant's apprehension of danger."

and on p 1027:

“Upon the issue of self-defense, any evidence, which, according to the common experience of mankind, tends to show that the defendant had reasonable cause to apprehend great bodily harm from the deceased is admissible. [*Id.* at 21.]

The Supreme Court in *Giacalone*, 242 Mich at 22, reasoned that the defendant’s version of events supported self-defense because

[a]fter beating defendant deceased said he would kill her before morning. It was not yet morning. He had hung the loaded pistol within reach. He had other guns and ammunition near and in the room. Defendant had suffered his violence and brutality. She knew him. Her fear would not be lessened by her apprehension of being discovered in her attempt to leave the home. Viewed from her standpoint of the time, or from any standpoint, it cannot be said as a matter of law that he had abandoned his declared purpose to kill her, nor that the circumstances were not sufficient to induce in defendant an honest and reasonable belief that she was in danger of great bodily harm or loss of life.

VanHorn’s testimony in this case likewise would have contributed to the jury’s ability to view the events that occurred in the Estradas’ yard from defendant’s “standpoint of the time.” Accordingly, VanHorn’s testimony had relevance, probative value and materiality to the honesty and reasonableness of defendant’s state of mind at the time she wielded the knife and stabbed Prieto.

At the evidentiary hearing, VanHorn answered affirmatively when asked whether defendant qualified as a battered woman. Nevertheless, defense counsel acknowledged that at trial,

the expert cannot testify to whether or not this particular witness or particular defendant has been battered. The only thing that they can do is offer specific testimony that would give the trier of fact a better understanding of the evidence, that the average juror might be misinformed about. The *Wilson* court limited the testimony to only explanation of symptoms and general description of the syndrome.

Given these recognized limitations on the scope of VanHorn’s proffered trial testimony, I submit that no “analytical gap” could possibly have existed between the data detailing the features of BWS and VanHorn’s opinions at trial. According to *Beckley*, *Christel* and *Wilson*, an expert who offers syndrome evidence may not render an opinion on the ultimate issues in the case. Unlike most cases involving scientific expert opinion, a witness offering syndrome evidence simply may not “appl[y] the principles and methods ... to the facts of the case.” MRE 702(3). Consequently, neither logic nor law supports the majority’s holding that the trial court properly excluded VanHorn’s testimony because she “failed to close the ‘analytical gap’ between her expertise on battered woman syndrome and the facts of the particular case.” *Ante* at 6.

In my view, VanHorn's proposed expert testimony fully satisfied the applicable requirements of MRE 702. I would hold that the trial court abused its discretion when it precluded VanHorn from enlightening the jury with evidence about BWS.

V. CONSTITUTIONAL ERROR AND ERROR REQUIRING REVERSAL

The United States and Michigan Constitutions afford a criminal defendant the right to present a defense. US Const, Ams VI, XIV; Const 1963, art 1, § 13; *People v Kurr*, 253 Mich App 317, 326; 654 NW2d 651 (2002). The right of an accused to present a defense “stands on no lesser footing than the other Sixth Amendment rights” previously held applicable to the states. *Taylor v Illinois*, 484 US 400, 409; 108 S Ct 646; 98 L Ed 2d 798 (1988) (internal quotation omitted). “Few rights are more fundamental than that of an accused to present witnesses in his own defense.” *Id.* at 408.

Through the introduction of expert testimony with respect to BWS, defendant sought to establish that she stabbed Prieto because she honestly and reasonably feared for her life. The trial court's improper exclusion of BWS evidence foreclosed defendant from proving the honesty and reasonableness of her perception of immediate, lethal danger. In my estimation, the trial court thereby deprived defendant of the ability to present a meaningful self-defense.⁴

But regardless whether the trial court's erroneous ruling falls within the category of constitutional or nonconstitutional error, I believe that defendant has shown prejudice requiring a new trial. Preserved nonconstitutional error “is harmless unless the defendant demonstrates that the error was outcome determinative.” *People v Schaefer*, 473 Mich 418, 443; 703 NW2d 774 (2005), mod in part on other grounds in *People v Derror*, 475 Mich 316, 320, 334, 341-342; 715 NW2d 822 (2006).⁵ The defendant must prove that, in light of the entire record, it affirmatively appears “more probable than not that the error was outcome determinative.” *Id.* (internal quotation omitted). “An error is not outcome determinative unless it undermined the reliability of the verdict.” *Id.* (internal quotation omitted).

In my judgment, the improper exclusion of BWS evidence undermined the reliability of the verdict. When a criminal defendant asserts self-defense, “the reasonableness of a defendant's belief that his life is in danger must be judged on the basis of the circumstances as they were perceived by the defendant, and not as they actually existed.” *People v Green*, 113 Mich App 699, 704; 318 NW2d 547 (1982). VanHorn's testimony would have afforded a window into defendant's mind, permitting the jury to understand and potentially validate her claim that when

⁴ The majority opines that “[t]he trial court did not err when it refused to give a self-defense instruction that was not supported by the facts.” *Ante* at 5. The record reflects that defendant filed a pretrial request for instructions related to self-defense. At the conclusion of the testimony, defense counsel raised no objection to the trial court's proposed instructions, which did not include self-defense. It appears that in light of the trial court's exclusion of BWS evidence and the testimony regarding Prieto's previous abusive behavior, defendant concluded that no factual basis existed for a self-defense claim.

⁵ The Michigan Supreme Court recently overruled *Derror* in part. *People v Feezel*, 486 Mich 184, 205, 207-217; 783 NW2d 67 (2010).

she entered the Estrada home and grabbed a knife, she honestly and reasonably believed that deadly force was necessary to prevent her death or grave bodily injury. The jury's decision to convict defendant of voluntary manslaughter reinforces that the exclusion of VanHorn's testimony affected the outcome of defendant's trial. "The elements of voluntary manslaughter are (1) the defendant must kill in the heat of passion, (2) the passion must be caused by an adequate provocation, and (3) there cannot be a lapse of time during which a reasonable person could control his passions." *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998), aff'd 461 Mich 992 (2000). "The provocation must be adequate, namely, that which would cause a *reasonable person* to lose control." *Id.* (emphasis in original).

Here, the jury's verdict embodies its belief that Prieto provoked defendant's rage, and that defendant lacked the ability to control her passion. VanHorn would have advised the jury that a battered woman might honestly fear for her life under these same circumstances. And in the face of a self-defense claim, the prosecutor would have borne the burden of proving beyond a reasonable doubt that despite Prieto's provocation and his history of violence toward defendant, defendant unreasonably and dishonestly believed Prieto had threatened her life. Had the jury heard evidence explaining that physical abuse distorts perceptions of the immediacy of danger and "skews" a woman's ability to assess threats, I firmly believe that a different result would have obtained.

/s/ Elizabeth L. Gleicher