

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
March 15, 2011

V

LEKISHA DANIELLE HINES,

Defendant-Appellant.

No. 295863
Wayne Circuit Court
LC No. 09-019100-FC

Before: CAVANAGH, P.J., and JANSEN and SERVITTO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. She was sentenced to consecutive prison terms of 18 to 30 years for the murder conviction and two years for the felony-firearm conviction. She appeals as of right. Because the trial court abused its discretion in disallowing the testimony of an expert witness in the area of battered woman syndrome and the error was not harmless, we reverse and remand for a new trial.

I. FACTS

Defendant's convictions arise from the shooting death of her boyfriend, Johnathan Raspberry, who was shot once in the chest in defendant's home. Defendant admitted shooting Raspberry, but claimed that Raspberry initiated a physical altercation and that she acted in self-defense.

The prosecutor attempted to establish a timeline for the shooting and circumstances that were incompatible with an ongoing altercation. According to Catherine Robinson, Steven Campbell called her at 4:00 a.m. on the day of the shooting and said he needed to pick up Raspberry. At approximately 4:30 a.m., Robinson and Campbell proceeded to defendant's home. When they pulled up to the curb in front of defendant's home at approximately 4:40 a.m., Robinson put her window down. Raspberry came to the front door and said, "Here I come," or "I'm coming out." Robinson heard defendant say, "Oh, you moving?" and then Robinson heard a gunshot, after which she and Campbell pulled off in their car. Thereafter, Robinson heard Raspberry and Campbell speaking on Campbell's cell phone, which was on the speaker phone setting.

Campbell denied having any recollection of the events of May 28, 2009, due to intoxication. His telephone records indicated that calls were placed from his cell phone to Raspberry's phone at 4:51 a.m., and 5:05 a.m., and that his phone received a call from Raspberry's phone at 5:09 a.m. According to the medical examiner, Raspberry died from a single gunshot wound to the chest, which penetrated both lungs and the heart, and it is possible for a person to speak for a brief period after being shot in that manner.

Defendant called 911 at 5:10 a.m., 5:15 a.m., and 5:19 a.m. She reported that some unknown people had shot her boyfriend. When the police arrived, defendant provided varying accounts of the shooting by purported intruders. She told Officer Meredyk that she overheard Raspberry call someone and ask to be picked up, and she initially denied that there were any weapons in the house. Several weapons were found in the home and the police found a .22-caliber revolver on the roof of the house next door.

Defendant testified that she and Raspberry had been in a relationship for five months. The relationship started well, but they began arguing and fighting after a few months. The verbal arguments led to Raspberry grabbing, then pushing, and then "smacking" and "pushing" defendant around. Defendant testified that in the third month of the relationship, she felt in fear of her life "all the time." Defendant claimed that she called the police on Raspberry approximately five times. On all but one occasion, however, she did not let the police into her home because, before they arrived, Raspberry would apologize and promise not to hit her anymore.

Defendant testified that on April 12, 2009, Raspberry called and left threatening messages for her. When she came home, he was sitting on the couch with a gun to his head. She went over to him and he put the gun to her head and threatened to kill her. The police arrived and arrested Raspberry, although the prosecutor elicited on cross-examination that Raspberry was arrested because of outstanding warrants. When Raspberry was released, he returned to defendant's home because defendant believed that he was going to change and she loved him.

Defendant testified that, on the night of the shooting, May 28, 2009, she came home from work and Raspberry was drunk. They ate, bathed together, and got into an argument about him doing some chores around the house. Raspberry then began grabbing her. They left the tub and put on nightclothes. The argument continued and Raspberry punched defendant on the top of her head. He then threw her on the bed, placed two blankets over her face, and began suffocating her. She eventually was able to get up, ran to the bathroom, and locked the door. After it was quiet for a few minutes, defendant opened the door and peeked out. Raspberry was standing right there. He grabbed, hit, and punched her, and then rammed her head into a door. When defendant got away from him, she ran downstairs and he followed. The physical confrontation continued.

Defendant stated that she opened the door and told Raspberry to leave. He refused and kept coming at her. Defendant claimed that based on Raspberry's actions and prior threats, she believed that her life was in danger, so she grabbed a gun from behind a computer stand. Raspberry came at her and appeared to try to grab the gun. Defendant backed up, but thought Raspberry was going to take it and kill her with it, so she fired it once. Raspberry fell, she ran

over to him, looked at his chest, and then called 911. At some point before the police arrived, she took the gun outside and threw it on the roof of the house next door.

Defendant testified that she was afraid that no one would believe that she was defending herself, so she lied to the responding police officers. Within hours, she went to the police station and admitted to Detective Simon that she shot Raspberry and told her “everything.” Defendant testified that she told Detective Simon that she had been abused, but that information was not in the written statement that the prosecutor produced at trial. The statement did, however, refer to “fighting upstairs.” Defendant claimed that some pages of the statement were missing.

Defendant acknowledged that at some point during the incident, Raspberry changed from night clothes to jeans, a shirt, and gym shoes. She did not know when, but noted that she was in the bathroom for awhile. She denied that Raspberry was getting ready to leave, but did not know why he got dressed. She was unaware that Campbell and Robinson were coming over, and did not see a car. Defendant admitted that photographs of her face taken on May 28 did not show any marks or bruises.

After defendant testified, defense counsel sought to call a domestic violence counselor as an expert witness on behavioral characteristics of victims of domestic violence. The trial court refused to allow the testimony, ruling that it was “common knowledge” for which expert testimony was not required.

The jury acquitted defendant of first-degree premeditated murder, but found her guilty of second-degree murder and felony-firearm.

II. EXPERT TESTIMONY

Defendant argues that the trial court abused its discretion by precluding her from calling an expert witness in the area of battered woman syndrome (“BWS”). We review a trial court’s decision to admit or exclude expert testimony for an abuse of discretion. *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009).

The admissibility of expert testimony is governed by MRE 702, which 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.

“Expert testimony may be received when it is ‘necessary’ or ‘helpful’ to the trier of fact in deciding an issue that is material.” *People v Wilson*, 194 Mich App 599, 602; 487 NW2d 822 (1992).

In *Wilson*, 194 Mich App at 603, this Court quoted the following description of battered woman syndrome:

“The ‘battered woman syndrome’ generally refers to common characteristics appearing in women who are physically and psychologically abused by their mates. The typical pattern of violence consists of three recurrent phases of abuse: a tension-building stage, characterized by minor abuse; an acute battering stage, characterized by uncontrollable explosions of brutal violence; and a loving respite stage, characterized by calm and loving behavior of the batterer, coupled with pleas for forgiveness. The continued cycle of violence and contrition results in the battered woman living in a state of learned helplessness. Because she is financially dependent on the batterer, she may feel partly responsible for the batterer's violence, she may believe that her children need a father, or fear reprisal if she leaves. The battered woman lives with constant fear, coupled with a perceived inability to escape. Eventually, she comes to believe that her only options are enduring the abuse, striking back, or committing suicide. [*Id.*, quoting *Tourlakis v Morris*, 738 F Supp 1128, 1134 (SD Ohio, 1990), citing *Fennell v Goolsby*, 630 F Supp 451, 456 (ED Pa, 1985).]”

Both this Court and our Supreme Court have recognized that expert testimony is useful to explain this syndrome to the jury. See *Wilson*, 194 Mich App at 603 (“[w]e do not believe the average juror is familiar with the complex behavior of a victim of the BSS”); *People v Christel*, 449 Mich 578, 588; 537 NW2d 194 (1995) (“[w]hen the precipitating facts of the syndrome are offered into evidence in either case, the syndrome is not easily conceptualized by lay persons”). In *Christel*, 449 Mich at 591, the Court stated:

Today, we extend the general holding in [*People v Beckley*, 434 Mich 691, 714 n 33; 456 NW2d 391 (1990)] to expert testimony of the battered woman syndrome so that the expert may, when appropriate, explain the generalities or characteristics of the syndrome. We emphasize, however, “that the admissibility of syndrome evidence is limited to a description of the uniqueness of a specific behavior brought out at trial.” *Beckley*, *supra* at 725, (opinion of Brickley, J.). In other words, we do not adopt the battered spouse syndrome, but will permit testimony regarding specific behavior where relevant and helpful to the factfinder. Furthermore, we extend the prohibitions agreed on by seven justices in *Beckley*—the expert cannot opine that complainant was a battered woman, may not testify that defendant was a batterer or that he is guilty of the crime, and cannot comment on whether complainant was being truthful.

The Court provided some examples of where expert testimony would be helpful:

Generally, expert testimony is needed when a witness’ actions or responses are incomprehensible to average people. This may include, for example, when a complainant endures prolonged toleration of physical abuse and then attempts to hide or minimize the effect of the abuse, delays reporting the abuse to authorities or friends, or denies or recants the claim of abuse. [*Id.* at 592.]

In this case, defense counsel’s offer of proof indicated that the proposed witness would testify about the tendency of abuse victims to not want to report abuse, to take back the abuser,

and the “psychosis” behind this conduct. He indicated that the evidence would be helpful in light of questions that had been raised about defendant’s failure to report, or delay in reporting Raspberry’s abuse to the police. We agree with defendant that the trial court abused its discretion in ruling that expert testimony was not necessary because the proposed evidence was “common knowledge.” Both this Court and our Supreme Court have recognized that the behaviors associated with the syndrome are properly the subject of expert testimony. See *Wilson*, 194 Mich App at 603. The characteristics of the syndrome have not become so well-known that expert testimony “would add nothing at all to the jury’s common fund of information.” See *Beckley*, 434 Mich 714 n 32 (BRICKLEY, J.) (citations, internal quotation marks, and emphasis omitted).

We disagree with the prosecutor’s contention that an expert was not necessary because the jury merely had to determine whether defendant’s account of the events was credible, and because ordinary principles and instructions regarding self-defense were sufficient to enable the jury to evaluate defendant’s account. Prosecutor’s argument ignores how the evidence relates to a jury’s assessment of credibility and evaluation of a claim of self-defense. Defendant testified that Raspberry physically abused her for months before the shooting. She described in detail an incident in which he put a gun to her head six weeks before the shooting. Yet defendant allowed him to return to her house. The jury may have concluded that defendant’s account of violence and death threats by Raspberry on prior occasions was not credible because defendant allowed Raspberry to return to the house. That is, the jury may have concluded that if the abuse really did occur, defendant would not have continued to maintain a relationship with Raspberry. The jury could have also found that defendant’s apparent lack of credibility with respect to the prior instances was reason to doubt the credibility of her account of the altercation that preceded the shooting. The battered woman syndrome evidence “enables the jury to overcome common myths or misconceptions that a woman who had been the victim of battering would have surely left the batterer.” *Christel*, 449 Mich at 589, quoting *State v JQ*, 130 NJ 554, 574; 617 A 2d 1196 (1993). Furthermore, a central theme of the prosecution’s attack on defendant’s credibility was her deception in the 911 calls and her initial statement to the police, and her failure to initially disclose the purported abuse. As recognized in *Christel*, 449 Mich at 592, expert testimony may be helpful to explain a battered woman’s delay in reporting abuse to authorities.

Moreover, a determination that the evidence should not have been admitted because it was unnecessary to evaluate defendant’s culpability under the version of events that she described conflicts with the recognized right of a defendant to present inconsistent defenses. See *People v Lemons*, 454 Mich 234, 245; 562 NW2d 447 (1997). In other words, even if an understanding of the syndrome was unnecessary to exculpate defendant under her version of the events, she should have been allowed to present evidence that was relevant to her culpability if the jury disbelieved portions of her account.

For these reasons, we conclude that the trial court erred in excluding defendant’s proposed expert testimony.

III. RELIEF

We must next decide whether the error can be considered harmless. We conclude that it cannot. In *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010), the Court explained:

If a reviewing court concludes that a trial court erred by excluding evidence, under MCL 769.26 the verdict cannot be reversed “unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.” In examining whether a miscarriage of justice occurred, the relevant inquiry is “the ‘effect the error had or reasonably may be taken to have had upon the jury’s decision.’” *People v Straight*, 430 Mich 418, 427; 424 NW2d 257 (1988), quoting *Kotteakos v United States*, 328 US 750, 764; 66 S Ct 1239; 90 L Ed 1557 (1946). If the evidentiary error is a nonconstitutional, preserved error, then it “is presumed not to be a ground for reversal unless it affirmatively appears that, more probably than not, it was outcome determinative.” *People v Krueger*, 466 Mich 50, 54; 643 NW2d 223 (2002). An error is “outcome determinative if it undermined the reliability of the verdict”; in making this determination, this Court should “focus on the nature of the error in light of the weight and strength of the untainted evidence.” *Id.* (quotations marks and citations omitted).

This case involves nonconstitutional, preserved evidentiary error. The outcome of the case depended on the jury’s assessment of defendant’s credibility, and the nature of the error precluded the jury from hearing evidence that was relevant to that inquiry. The prosecutor attacked defendant’s version of events on several grounds, including that she lied in her 911 calls and to the officers at the scene, and that her statement to Detective Simon did not include specific details of the alleged abuse. The proposed expert testimony could have addressed delays in reporting abuse. The prosecutor also emphasized a “timeline” that purportedly could be created from Raspberry’s and Campbell’s telephone records, and argued that the completion of Raspberry’s call to Campbell within 18 seconds before defendant called 911 showed that there was not “vicious activity” going on just before the shooting. However, this argument fails to recognize that, according to Robinson, Raspberry made a call to Campbell *after* she heard the gunshot. Robinson’s testimony that she heard defendant say, “Oh, you moving?” just before the gunshot is difficult to reconcile with defendant’s version of the events; however, an account that Robinson could hear what was being said inside the house while sitting in a car parked along the curb is not so strong and compelling that it renders harmless the evidentiary error concerning the critical issue of defendant’s credibility.

The excluded testimony was significant to the jury’s assessment of defendant’s credibility, and its exclusion undermines the reliability of the verdict. Thus, we are satisfied that the error was not harmless. *Feezel*, 486 Mich at 192.¹

¹ Because we have determined that the evidentiary error requires reversal, we need not address defendant’s claim that the error also implicated her constitutional right to present a defense. See *People v Snyder*, 462 Mich 38, 46; 609 NW2d 831 (2000).

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Deborah A. Servitto