

REQUIEM FOR A SURVIVOR: THE USE OF BATTERED WOMAN SYNDROME IN ACQUITTING SURVIVORS OF ABUSE

Bailey Pierce¹

INTRODUCTION

In January 2019, Marjory Dingwall was charged with three counts of robbery and three counts of brandishing a firearm during a crime of violence.² Dingwall admitted to the robberies but maintained that she was acting under “fear of brutal violence” by her then-boyfriend Aaron Stanley.³ A Wisconsin District Court denied Dingwall’s motion *in limine* to admit detailed records of emails and text messages between Dingwall and Stanley that showed a history of abuse and an evaluation by a physician with the Midwest Domestic Violence Resource Center, who diagnosed Dingwall with Post-Traumatic Stress Disorder and Battered Woman Syndrome.⁴ Marjory Dingwall was sentenced to thirty months and one day in prison along with three years of supervised release.⁵

Stories like that of Marjory Dingwall are found across the country.⁶ According to a 2016/2017 report on intimate partner violence, in a twelve-month period in the United States alone, approximately eleven women experienced physical violence by an intimate partner every minute.⁷ Additionally, 32.5% of women in the same twelve-month period reported severe physical violence, such as being hit by a fist, choked, burned, or harmed with a knife or gun.⁸ Of 120 women in a 2012 study who are survivors of intimate partner violence, 94.2% reported being subject to economic abuse, which includes controlling how and when the woman spends her own money,

¹ J.D. Expected 2024, University of Kentucky J. David Rosenberg College of Law; BA Sociology 2021, BA Political Science 2021, University of Kentucky

² United States v. Dingwall, 6 F.4th 744, 745 (7th Cir. 2021).

³ *Id.* at 745–46.

⁴ *Id.* at 749–50.

⁵ *Id.* at 750.

⁶ See generally Dando v. Yukins, 461 F.3d 791 (6th Cir. 2006) (explaining the case of Debra Dando, who was charged with a string of armed robberies and assaults that were committed after her boyfriend, Brian Doyle, beat her and threatened to kill her); United States v. Lopez, 913 F.3d 807 (9th Cir. 2019) (explaining the case of Lashay Marie Lopez, who was charged with three federal offenses that were committed after Hector Karaca threatened to harm her and her family); United States v. Nwoye (*Nwoye II*), 824 F.3d 1129 (D.C. Cir. 2016) (explaining the case of Queen Nwoye, who was charged with conspiring with her boyfriend, Adriane Osuagwu, to extort money from a doctor which was done after “Osuagwu repeatedly beat her and forced her to participate in the extortion scheme”).

⁷ See RUTH W. LEEMIS, NORAH FRIAR, SRIJANA KHATIWADA, MAY S. CHEN, MARCIE-JO KRESNOW, SHARON G. SMITH, SHARON CASLIN & KATHLEEN C. BASILE, CTRS. FOR DISEASE CONTROL & PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2016/2017 REPORT ON INTIMATE PARTNER VIOLENCE, 5 (October 2022) (The study provides that “4.5% of women (5.6 million) reported experiencing any physical violence by an intimate partner.” In dividing 5.6 million by the number of minutes in 12 months, the statistic shows that approximately eleven women experienced physical violence by an intimate partner every minute).

⁸ *Id.*

forcing the woman to give the abuser money, and threatening physical violence if their financial demands are not met.⁹

Repeated and persistent physical, sexual, and/or economic abuse by an intimate partner can lead to “measurable psychological changes” that can prevent women from “recognizing opportunities for escape or other alternatives to their abusive environment.”¹⁰ These psychological changes are collectively referred to as Battered Woman Syndrome (hereinafter “BWS”).¹¹ Women who experience recurring, escalating abuse often develop “avoidance responses,” such as minimizing or denying the present danger or forgetting a particular incident, that “protect [them] from experiencing the full-blown trauma response.”¹²

In the United States criminal justice system self-defense and duress defenses, as well as “a history of abuse,” can be considered to establish culpability and to determine sentences, even in cases of murder.¹³ However, cases like Marjory Dingwall’s illustrate why evidence of Battered Woman Syndrome and recurring abuse should be admissible in *all* cases where such a defense would be relevant.

This Note argues that evidence of Battered Woman Syndrome and related abuse should be admissible to support an affirmative duress defense, even when not related to a homicide or assault charge, in line with the guidance offered by the Seventh Circuit in *United States v. Dingwall*.¹⁴ Part I explored the origins of BWS and the psychology of abuse. Part II discusses the affirmative defense of duress and its application. It also compares the use of BWS in self-defense cases to affirmative duress defenses. Part III looks at how the Circuits have addressed the use of evidence related to BWS as a defense of duress and rationale for allowing or disallowing. Use by state courts is also examined in this section. Part IV will go over why it is imperative that BWS evidence be admitted.

A. Limitations

Before proceeding, it is important to note a few things. The language surrounding BWS generally focuses on heterosexual relationships, where violence and abuse are perpetrated by a cisgender man against a cisgender woman.¹⁵ Dr. Walker, in *The*

⁹ Judy L. Postmus, Sara-Beth Plummer, Sarah McMahon, N. Shaanta Murshid & Mi Sung Kim, *Understanding Economic Abuse in the Lives of Survivors*, 27 J. INTERPERSONAL VIOLENCE 411, 419–20 (2012).

¹⁰ Michaela Dunn, Note, *Subjective Vulnerabilities or Individualized Realities: The Merits of Including Evidence of Past Abuse to Support a Duress Defense*, 54 SUFFOLK UNIV. L. REV. 347, 348 (2021).

¹¹ LENORE E. A. WALKER, *THE BATTERED WOMAN SYNDROME* 3 (4th ed. 2017).

¹² *Id.* at 52.

¹³ See PENAL REFORM INTERNATIONAL, *WOMEN WHO KILL IN RESPONSE TO DOMESTIC VIOLENCE: HOW DO CRIMINAL JUSTICE SYSTEMS RESPOND?*, 5–6 (2016).

¹⁴ 6 F.4th 744, 761 (7th Cir. 2021) (“...we conclude that Dingwall should not have been denied the opportunity to offer evidence of battering and its effects, including expert opinions, to support her duress defense. Such evidence can help inform the factfinder how an objectively reasonable person in her circumstances may behave.”).

¹⁵ WALKER, *supra* note 10, at 49–50 (explaining that the original concept of BWS focused on a woman’s signs and symptoms of abuse as a pattern while also explaining that “usually, but not always, a man” is the source of abuse).

Battered Woman Syndrome, notes that it is important to acknowledge that those who fall outside of that relationship dynamic may have different, more nuanced experiences.¹⁶ Focusing on experiences of cisgender heterosexual intimate partner abuse is in no way intended to invalidate, ignore, or subjugate the experience of same-sex and trans survivors. Space is left open for those with more applicable identities and experiences to tell those stories.

BATTERED WOMAN SYNDROME AND THE PSYCHOLOGY OF ABUSE

A. Origins in Psychology and Diagnosis

Battered Woman Syndrome was first discussed in the first edition of Dr. Lenore E. A. Walker’s book of the same name.¹⁷ Now considered a subcategory of Post-Traumatic Stress Disorder (hereinafter “PTSD”), BWS refers to the pattern of behaviors that are often exhibited by women who have suffered persistent sexual, physical, and/or emotional abuse by an intimate partner.¹⁸ The partner exerts control and power over the female that dictates her every action with no regard for her health, safety, or wellbeing.¹⁹ BWS looks specifically at intimate partner violence,²⁰ which refers to partners in a “romantic or dating relationship.”²¹

Women who experience abuse go through the three phases of abuse—which Walker refers to as the “cycle of violence”—and remain in the relationship with their abuser.²² Phase I is marked by escalating tension between the woman and the abuser.²³ The abuser may engage in intentionally hurtful behaviors, such as verbal abuse and physical violence, or express dissatisfaction and hostility.²⁴ These behaviors, however, do not take on the “extreme or maximally explosive form.”²⁵ The woman may attempt to temporarily appease the abuser to avoid further violence.²⁶ She is often successful at placating her abuser for a time, which begins

¹⁶ See generally *id.* at 405 (explaining that it is important to consider “race, culture, sexual orientation, and lesbian, gay, bisexual, transgender, and queer (LGBTQ) and gender-nonconforming issues”).

¹⁷ See WALKER, *supra* note 10, at 5.

¹⁸ *Id.* at 49–50; See also Omri Berger, Dale E. McNiel, & Rene’e L. Binder, *PTSD as a Criminal Defense: A Review of Case Law*, 40 J. AM. ACAD. PSYCHIATRY & L. 509, 509 (2012) (“[O]ther trauma-related syndromes not included in the DSM, such as [BWS] ... have been offered as bases for criminal defenses. However, these related syndromes have generally been presented as special types [or subcategories] of PTSD.”).

¹⁹ WALKER, *supra* note 10, at 49–50.

²⁰ See *id.* at 8.

²¹ *The Language We Use*, WOMEN AGAINST ABUSE, <https://www.womenagainstabuse.org/education-resources/the-language-we-use> (last visited Feb. 15, 2024) (explaining the difference in domestic violence and intimate partner violence) [<https://perma.cc/XNC7-Y6T8>]. In this Note, I will *not* be using the phrases interchangeably. Any use of “domestic violence” should be understood under the definition used by Women Against Abuse.

²² WALKER, *supra* note 10, at 94.

²³ *Id.* at 94, 97.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 97.

the “unpredictable noncontingency response/outcome pattern” between the woman and the abuser.²⁷

In response to Phase I, the woman is likely to withdraw from her abuser to avoid the heightening tension as she becomes more fearful of violence.²⁸ As she becomes more withdrawn, the abuser will intensify his oppressive actions, causing tensions to escalate even more until they reach Phase II, the “acute battering incident.”²⁹ The abuser releases “a barrage of verbal and physical aggression.”³⁰ Hence, Phase II is the phase most likely to involve injury to the woman.³¹ The “acute battering incident” ends when the battering ends and is usually followed by a period of peace between the woman and the abuser, further reinforcing the phases themselves, as “[v]iolence often succeeds because it works.”³²

Phase III, according to Walker, can take on several forms, but could be indicated by a lack of violence or tension.³³ The abuser may show remorse or kindness toward the woman, and may “shower her with gifts and/or promises.”³⁴ The woman likely trusts these promises and, as a result, she receives “positive reinforcement,” which could lead to “learned helplessness.”³⁵ While the cycle seems predictive, within each phase, the woman is unable to predict the exact reaction of her abuser, creating further noncontingency between the woman’s response to abuse and the reaction of the abuser.³⁶ The inability to control or predict when and why the physical, emotional, and verbal abuse of Phase I will escalate to the more severe violence in Phase II leads to “perceptual distortions,” and may “diminish the woman’s motivation to respond” or escape her relationship.³⁷

Professionals have rationalized that leaving an abusive relationship requires women to make numerous difficult decisions: realizing their relationship is unhealthy, understanding it will never change, “giving up” on the hope of an idealized relationship, and facing the realization that the relationship may never truly end (e.g. shared custody of a child).³⁸ Further, many women in abusive relationships face barriers regarding access to shelter, economic support, and protection from the world at large.³⁹

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 98.

³⁴ *Id.*

³⁵ *See id.* at 77, 98

³⁶ *Id.* at 75 (noting the “original intended meaning” of learned helplessness is “having lost the ability to predict that what you do will make a particular outcome occur” or “the loss of contingency between response and outcome”).

³⁷ *See id.* at 76–77, 94, 97–98 (discussing perceptual distortions because of unpredictability and explaining the phases in Walker’s cycle theory of violence).

³⁸ Ola W. Barnett, *Why Battered Women Do Not Leave, Part I*, 1 TRAUMA, VIOLENCE, Abuse 345–46 (2000).

³⁹ *See id.* at 347–49.

In analyzing the use of BWS in an affirmative duress defense, the need for a diagnosis is less important than the concepts and research behind the theory. Nonetheless, looking toward the introduction of PTSD diagnoses and the similarities between PTSD and BWS can provide guidance in analyzing a claim of duress.⁴⁰ Walker’s research has produced six criteria that identify BWS: 1) intrusive reexperiencing of the trauma event(s); 2) hyperarousal and high levels of anxiety; 3) high levels of avoidant behavior and emotional numbing; 4) difficulty in cognitive function; 5) disrupted interpersonal relationships; 6) body image distortion and issues with physical health; 7) “[s]exual and intimacy issues.”⁴¹

Notably, the first four criteria are also present in the diagnosis of PTSD, while the remaining three criteria are unique to BWS.⁴² There have been numerous uses of PTSD in criminal cases to refute both *actus reus* and *mens rea*.⁴³

AFFIRMATIVE DURESS DEFENSE AND BWS

A. BWS and Self-Defense in Homicide

Historically, BWS evidence has been admissible in cases, frequently in the absence of present, immediate, and impending harm.⁴⁴ In 1989, the Pennsylvania Supreme Court overturned the conviction of a woman who killed her former boyfriend because trial counsel failed to submit evidence of BWS as a defense of duress.⁴⁵ Carol Stonehouse provided substantiated evidence of years of abuse suffered at the hands of her former boyfriend and co-worker.⁴⁶ This cycle of abuse, similar to the cycle outlined in Walker’s work, led Stonehouse to shoot and kill her abuser.⁴⁷ Though the issue of expert evidence was not raised on appeal, the Supreme Court of Pennsylvania held that failing to bring evidence of battered woman syndrome was prejudicial to Stonehouse and “allowed the jury to base the verdict on unfounded myths surrounding the battered woman.”⁴⁸

This decision made expert testimony on BWS admissible to demonstrate the need for self-defense.⁴⁹ Other state courts at the time echoed the decision of the

⁴⁰ See Jennifer Gentile Long & Dawn Doran Wilsey, *Understanding Battered Woman Syndrome and its Application to the Duress Defense*, 40 PROSECUTOR 36, 37–38 (2006).

⁴¹ See WALKER, *supra* note 10, at 3.

⁴² *Id.*

⁴³ See generally Berger, McNiel & Binder, *supra* note 18, at 510–17 (discussing cases such as the *Daubert* trio and listing in Tables 1 and 2 cases involving the use of PTSD evidence).

⁴⁴ See Elizabeth Williams, *Proof of Criminal Acts Committed Under Duress*, 204 AM. JURIS. PROOF FACTS 3D 95 § 10 (2023).

⁴⁵ Commonwealth v. Stonehouse, 555 A.2d 772, 784–85 (Pa. 1989).

⁴⁶ *Id.* at 774–81.

⁴⁷ Compare *id.* (detailing the history of abuse Stonehouse suffered before fatally shooting her former boyfriend), with WALKER, *supra* note 10, at 94–99 (explaining the cycle theory of violence).

⁴⁸ Gayle P. Lafferty, *Criminal Law—Battered Women and Self-Defense—Pennsylvania Allows Expert Evidence on Battered Woman Syndrome as a Basis for Proving Justification in the Use of Deadly Force When Evidence Indicates Defendant Is Victim of Abuse: Commonwealth v. Stonehouse*, 94 DICK. L. REV. 553, 553–54 (1990).

⁴⁹ *Id.* at 554.

Pennsylvania Supreme Court.⁵⁰ State courts have also allowed expert testimony on BWS to establish the “reasonableness” requirement of self-defense.⁵¹ The very nature of self-defense requires that an individual take account of the circumstances *before* defending oneself to determine the reasonableness of their actions and the force to be used.⁵² In the heat of the moment, the defender does not have the Court’s gift of hindsight. This analysis begs the question of whether legal analysis of self-defense is based on what is *right* or what is truly *justified*.⁵³ “If the defender acts on the information available to him, has he acted justifiably?”⁵⁴

The information available to a battered woman is not isolated to a single event, but is instead a combination of multiple, *predictable* interactions with a known abuser. Walker’s cycle of violence expertly paints this picture: a barrage of verbal and physical abuse escalates to a pinnacle before collapsing back into a routine of abatement and apology before beginning again.⁵⁵ This is more information than is normally available to those who fend off a strange attacker or defend their home from an intruder. Yet women who have experienced a history of battering are held to a higher standard of decorum than those in analogous positions.

B. BWS and the Elements of Affirmative Defenses

i. Imminent Threat

To establish a defense of duress in general, the defendant must show that there was “reasonable fear of imminent death or serious injury.”⁵⁶ Additionally, the defendant must show that there was no “reasonable, legal alternatives” available to the defendant, which prompted the commission of the crime to avoid serious bodily harm and/or death.⁵⁷

The Federal Rules of Evidence generally allow for testimony of an “alleged victim’s pertinent trait,” such as a tendency to be violent, to demonstrate the imminence of a threat.⁵⁸ Evidence of BWS would fall under this rule to contextualize the interaction between the woman and the abuser to illustrate imminence—courts have echoed this sentiment.⁵⁹

⁵⁰ See *State v. Kelly*, 478 A.2d 364, 375–76 (N.J. 1984); *People v. Torres*, 488 N.Y.S.2d 358, 362 (N.Y. Sup. Ct. 1985).

⁵¹ See *State v. Allery*, 682 P.2d 312, 314 (Wash. 1984), *overruled on other grounds by* *State v. Weaver*, 198 Wash.2d 459 (2021); *State v. Anaya*, 438 A.2d 892, 894 (Me. 1981).

⁵² Kimberly Kessler Ferzan, *Justifying Self-Defense*, 24 L. & PHIL. 711, 715 (2005).

⁵³ See *id.* at 716.

⁵⁴ *Id.* at 715.

⁵⁵ See WALKER, *supra* note 10, at 94–99 (explaining the cycle theory of violence).

⁵⁶ Williams, *supra* note 44, at § 4.

⁵⁷ *Id.*

⁵⁸ FED. R. EVID. 404(a)(2)(B).

⁵⁹ See *Battered Women Who Kill Their Abusers*, 106 HARV. L. REV. 1574, 1582 (1993); *Ibn-Tamas v. United States*, 407 A.2d 626, 634 (D.C. 1984); *Smith v. State*, 277 S.E.2d 678, 683 (Ga. 1981); *State v. Anaya*, 438 A.2d 892, 894 (Me. 1981); *State v. Kelly*, 478 A.2d 364, 377 (N.J. 1984); *State v. Wilkins*, 407 S.E.2d 670, 673 (S.C. 1991); *State v. Allery*, 682 P.2d 312, 315–16 (Wash. 1984).

ii. Reasonableness

The language surrounding a defense of duress implies that it is a defense of “self-protection.”⁶⁰ A *reasonable* person acting in the defendant’s position would “not be able to resist such conduct.”⁶¹ The actor has been “placed in a moral dilemma,” where they maintain rational decision-making abilities but cannot reasonably act lawfully without endangering themselves.⁶² While it is often understood to be a gender-neutral term, the Ninth Circuit has adopted a “reasonable woman standard” when addressing issues of workplace harassment.⁶³ The Third Circuit is the only circuit to date that has followed the Ninth in adopting a “reasonable person of the same sex in that position” standard, while “[t]he Fifth, Sixth, Eighth, and Eleventh Circuits have clearly rejected a gender-specific standard.”⁶⁴ In recent years, there has been a concerted effort to transition the court system to use more gender-neutral language in proceedings, forms, and orders.⁶⁵ Gender should be considered, however, when the disparate treatment of gender plays a central role in the dynamics between parties and their interaction with society.⁶⁶ The illusion of gender neutrality still tends to favor a “male-biased” experience and “systematically ignore[s] the experience of women.”⁶⁷ Instead, the background knowledge of preexisting social imbalance should be considered when determining true reasonableness.⁶⁸

Given this, objective reasonableness must consider the experience of a person in that individual’s position, especially considering gender identity, gender roles, and prior experiences. This does not convert reasonableness to a subjective standard, but rather brings objectivity in line with objective reality.

⁶⁰ See Dunn, *supra* note 10, at 356.

⁶¹ *Id.*

⁶² *Id.* at 357.

⁶³ Alyssa Agostino, *The Reasonable Woman Standard's Creation of the Reasonable Man Standard: The Ethical and Practical Implications of the Two Standards and Why They Should Be Abandoned*, 41 J. LEGAL PROF. 339, 339 (2017).

⁶⁴ Nicole Newman, *The Reasonable Woman: Has She Made a Difference?*, 27 BOS. COLL. THIRD WORLD L.J. 529, 532 (2007).

⁶⁵ ANDY WIRKUS, NAT’L CTR. FOR STATE CTS. , GENDER INCLUSIVITY IN THE COURTS: HOW TO TREAT EVERYONE WITH FAIRNESS, DIGNITY, AND IMPARTIALITY 21–22 (2023).

⁶⁶ See *Domestic abuse is a gendered crime*, Women’s Aid, <https://www.womensaid.org.uk/information-support/what-is-domestic-abuse/domestic-abuse-is-a-gendered-crime/> (last visited Jan. 19, 2024) (discussing the distinct experiences of both women and men who experience abuse and the importance of providing tailored services to survivors based on the intersection of their gender identity and abuse suffered) [<https://perma.cc/D8ZJ-B2M5>].

⁶⁷ Newman, *supra* note 64, at 536.

⁶⁸ See *id.* at 530.

CURRENT CIRCUIT SPLIT REGARDING EVIDENCE OF BWS AND DEFENSE OF DURESS

There has been pushback when presenting evidence of BWS to support affirmative defenses of duress, despite the similarities in the self-defense and affirmative duress defense.⁶⁹

A. Rejecting BWS Defenses

The Fifth Circuit has held that evidence of BWS is “inherently subjective” and does not offer guidance on how the objective, reasonable person would have reacted in that circumstance.⁷⁰ In 1992, Kathy Willis and David Perez were arrested in connection to a narcotics transaction organized by an undercover agent.⁷¹ Willis was charged with “carrying a firearm during, and in relation to, the commission of a drug trafficking crime....”⁷² Willis alleged that Perez took a gun out of his pants and slipped it into her purse, fearing that Willis would get caught as a convicted felon in possession of a hand gun.⁷³

At trial, Willis raised an affirmative defense of duress, arguing that she feared that if she refused to hold Perez’s weapon, he would have beat her in that moment, as he had done many times before.⁷⁴ The Court sustained objections against the defendant’s evidence of abuse and BWS, stating that evidence of BWS cannot be considered in conjunction with the “objective terms” of a defense of duress.⁷⁵ *United States v. Dixon* built upon *United States v. Willis* in the Fifth Circuit, finding that discussion of the defendant’s “subjective perception of danger” was irrelevant to a defense of duress.⁷⁶

Other circuits have echoed this rationale, finding issue with the use of evidence similar to BWS to support a defense that relies on objective, reasonable fear and rational action.⁷⁷ BWS is not offered, however, to shift to a subjective view of the

⁶⁹ See *United States v. Smith*, 987 F.2d 888, 891 (2d Cir. 1993) (stating that the Court found testimony of the defendant’s susceptibility to coercion due to a history of abuse “irrelevant and inadmissible”); *United States v. Willis*, 38 F.3d 170, 176 (5th Cir. 1994) (summarizing the Court’s finding that “evidence of the particular susceptibility of battered women could not be taken into account in determining criminal liability”); *United States v. Dixon*, 901 F.3d 1170, 1180–81 (10th Cir. 2018) (finding that the defendant’s “subjective beliefs” about the imminence of danger are not controlling).

⁷⁰ *Willis*, 38 F.3d at 175.

⁷¹ *Id.* at 173.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 174.

⁷⁵ *Id.* at 174–175 (“Such evidence is not addressed to whether a person of reasonable firmness would have succumbed to the level of coercion present in a given set of circumstances.”).

⁷⁶ *United States v. Dixon*, 413 F.3d 520, 524 (5th Cir. 2005).

⁷⁷ See *United States v. Smith*, 987 F.2d 888, 893 (2d Cir. 1993); *United States v. Dixon*, 901 F.3d 1170, 1181 (10th Cir. 2018).

circumstances, but rather to add context to the “reasonableness” requirement of a defense of duress.⁷⁸

B. Allowing BWS Defenses

As stated, an affirmative defense of duress requires that the threat or danger be present, imminent, and impending, and place the defendant in a position where the danger is inevitable should the criminal action not occur.⁷⁹ Evidence of BWS demonstrates to a jury *why* the defendant had an objectively reasonable fear that harm or danger was imminent.⁸⁰ The traditional view of a defense of duress involves “[t]he proverbial mode of . . . a gun pointed at the head as the ultimate persuader to do (or not do) something . . . and right now!”⁸¹ Taken another way, however, it seems equally as reasonable to believe that a *predictable cycle of unpredictable violence*, as in Walker’s theory of BWS, would result in an *objective* fear of imminent harm.⁸²

Recently, the Seventh Circuit ruled for Marjory Dingwall, allowing her to present evidence of persistent abuse against robbery charges.⁸³ Dingwall’s experience serves as a perfect picture of the cycle of violence and abuse suffered by many women. Dingwall met her abuser, Aaron Stanley, “while she was in treatment for alcohol abuse.”⁸⁴ After several bouts of homelessness and difficulty finding space at local homeless shelters, Dingwall and her daughter moved in with Stanley.⁸⁵ Dingwall and her daughter left after a week after Dingwall became concerned with Stanley’s treatment of her, but after reaching the maximum stay at the homeless shelter once again, they were forced to move back in with him.⁸⁶ After Stanley began to use crack cocaine, the abuse suffered by Dingwall escalated from emotional to physical.⁸⁷ A clear pattern emerged: “Stanley would beat Dingwall, then apologize profusely, and things would then return to ‘normal’” behavior before unpredictably beginning the

⁷⁸ Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211, 231 (2002) (“The cycle theory of violence [a substantial component of the theory of Battered Woman Syndrome] is said to help jurors not only to weigh the credibility of a domestic violence victim’s account of subjective fear, but also to determine whether the defendant had an objectively reasonable belief that harm was imminent. If the jury is permitted to consider expert testimony summarizing the cycle theory of violence and its impact on the battered woman, the argument goes, then the jury may conclude that a reasonable person in the battered woman’s position would have perceived an imminent threat of harm, despite the apparent peacefulness of the current situation.”).

⁷⁹ See Williams, *supra* note 44, at § 4.

⁸⁰ See Burke, *supra* note 78, at 231.

⁸¹ GEORGE P. FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT 105 (1996).

⁸² See Burke, *supra* note 78, at 254.

⁸³ United States v. Dingwall, 6 F.4th 744, 746 (7th Cir. 2021); see *supra* Introduction at 1–2 (discussing Marjory Dingwall’s case).

⁸⁴ *Dingwall*, 6 F.4th at 747.

⁸⁵ *Id.* at 748.

⁸⁶ *Id.*

⁸⁷ *Id.*

cycle of abuse again.⁸⁸ At one point, Stanley bought a gun and shot “into the mattress on the side where Dingwall slept.”⁸⁹

In January 2019, when Stanley was out of money from his own previous robberies, he drove Dingwall to a Stop-N-Go gas station, put a gun in her hand, and said it was her “turn.”⁹⁰ That night, Stanley did not hit Dingwall, “sending the message that committing the crime as ordered was a way to avoid his abuse.”⁹¹ Dingwall would commit two more robberies at Stanley’s request before being arrested.⁹²

Marjory Dingwall can be considered a “textbook” case of Walker’s cycle of violence and learned helplessness.⁹³ There is moderate emotional and physical abuse before escalating to physical violence.⁹⁴ Dingwall also experienced common tactics of economic abuse.⁹⁵ When Dingwall would give Stanley money, he would be “nice to [her].”⁹⁶ When Dingwall complied with Stanley’s robbery plans, she was rewarded with an evening of peace, indicating that to avoid violence, she must comply with Stanley’s wishes, regardless of the legality.⁹⁷ Dingwall expressed a desire to leave Stanley but “felt that she had no other options.”⁹⁸

The District Court ruled that evidence of BWS and abuse would do little to satisfy the elements of a duress defense.⁹⁹ On appeal, the Seventh Circuit Court of Appeals relied on rulings from other circuits to guide new precedent.¹⁰⁰

In *Dando v. Yukins* out of the Sixth Circuit, the petitioner committed several armed robberies with her boyfriend after he threatened to kill her.¹⁰¹ The Sixth Circuit ruled that “evidence of Battered Woman's Syndrome can explain why a reasonable person might resort to such actions given a history of violent abuse and the imminent violent threats.”¹⁰² The court noted that BWS theory “is not at odds with the reasonableness requirement” of a defense of duress, but instead, could potentially assist the jury in understanding what is or is not reasonable.¹⁰³

Similarly, then-Judge Kavanaugh writing for the D.C. Circuit in *United States v. Nwoye (Nwoye II)*, said, “the duress defense requires a defendant to have acted reasonably under the circumstances, and expert testimony [discussing BWS] can

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 748–49.

⁹³ Compare *United States v. Dingwall*, 6 F.4th 744, 747–49 (7th Cir. 2021) (detailing the history of abuse Dingwall suffered before Dingwall committed a robbery to appease Stanley), with *WALKER*, *supra* note 10, at 94–99 (explaining the cycle theory of violence).

⁹⁴ See *Dingwall*, 6 F.4th at 748–49.

⁹⁵ See *id.* at 748.

⁹⁶ *Id.*

⁹⁷ See *id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 750, 762.

¹⁰⁰ *Id.* at 746, 751–53.

¹⁰¹ *Dando v. Yukins*, 461 F.3d 791, 794 (6th Cir. 2006).

¹⁰² *Id.* at 801.

¹⁰³ *Id.*

help a jury assess whether a battered woman’s actions were reasonable.”¹⁰⁴ Whether the actions taken were reasonable remains a question for the jury, but expert testimony assists in illustrating the role persistent abuse plays in “a battered woman’s particular circumstances.”¹⁰⁵

The Ninth Circuit cited *Nwoye II* in its own landmark case regarding BWS evidence in *United States v. Lopez*.¹⁰⁶ Lopez’s abuser threatened her and her family before forcing her to buy a gun for him using her twin sister’s identification.¹⁰⁷ When Lopez was arrested for lying in order to obtain a firearm, she presented evidence of her abuser’s threats to support her defense of duress.¹⁰⁸ The Ninth Circuit reversed the exclusion of BWS evidence in the district court and affirmed that BWS lends context to the objective reasonableness element of duress, going on to say that BWS “serves an important role in helping dispel many of the misconceptions regarding women in abusive relationships.”¹⁰⁹ Most significantly, the Court proffered that “expert testimony may be characterized as explaining how a reasonable person can nonetheless be trapped and controlled by another at all times even if there is no overt threat of violence at any given moment.”¹¹⁰

i. Summary

The parallels between self-defense and affirmative duress defenses are striking, calling into question the struggle the courts seem to have with allowing BWS in one instance and prohibiting it in another. Both self-defense and affirmative duress defenses require reasonableness and imminent danger.¹¹¹ Both defenses require an objective consideration of the circumstances of a reasonable person.¹¹² Both should allow for the admission of BWS expert testimony. While the circuits are split, there is a clear majority of circuits that find BWS admissible in affirmative duress

¹⁰⁴ *United States v. Nwoye (Nwoye II)*, 824 F.3d 1129, 1136 (D.C. Cir. 2016).

¹⁰⁵ *Id.* at 1137.

¹⁰⁶ 913 F.3d 807, 821 (9th Cir. 2019).

¹⁰⁷ *Id.* at 811.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 825.

¹¹⁰ *Id.* at 820 (citing *United States v. Marengi*, 893 F.Supp. 85, 95 (D.Me. 1995)).

¹¹¹ *See United States v. Dingwall*, 6 F.4th 744, 746 (7th Cir. 2021) (“To present a duress defense, the defendant must produce evidence that ‘(1) she reasonably feared immediate death or serious bodily harm unless she committed the offense; and (2) there was no reasonable opportunity to refuse to commit the offense and avoid the threatened injury.’”); Lucas D. Martin, *Defense of self-defense in prosecution for assault or battery, generally; elements of defense; relation of defense to retaliation or accident*, AM. JURIS. 2D ASSAULT AND BATTERY § 47 (2023).

¹¹² *Dingwall*, 6 F.4th at 752 (stating that “the duress defense used an objective standard of reasonableness”); Martin, *supra* note 111, at § 47. Though Martin does not use the word “objective” in laying out the elements of self-defense, the reasonable person standard is understood to be an objective standard. *See* Legal Information Institute, *reasonable person*, CORNELL L. SCH., https://www.law.cornell.edu/wex/reasonable_person [<https://perma.cc/EZ26-HZX3>] (last updated Aug. 2021).

defenses.¹¹³ The decisions of the courts that do not allow such evidence are based on an incorrect perception of the use of such evidence.

ii. Moving Forward

According to the National Coalition Against Domestic Violence, one in four women experience sexual violence or other physical violence in their lifetime.¹¹⁴ “On a typical day,” more than 19,000 calls are placed to domestic violence hotlines.¹¹⁵ Intimate partner violence accounted for 20% of all violent crime in the United States in 2018, which costs \$5.8 billion or more a year and an accumulated eight million days of lost work for survivors.¹¹⁶

Leaving an abusive relationship requires much more than simply deciding to leave. Women must first make a series of difficult decisions including realizing that they are in fact in an abusive relationship and that their experience is unlikely to change.¹¹⁷ For most, it takes experiencing a traumatic event to prompt them to leave, giving up on the hope of an idealized relationship and facing the realization that the relationship may never truly end.¹¹⁸ When their abuser asks them to commit a crime—buy or sell drugs, rob a convenient store, steal from a loved one—it is often easier to comply than to risk the retaliation that they have come to expect.¹¹⁹

The circuits are currently split on whether to allow expert testimony on the impact of BWS in cases that do not involve homicide.¹²⁰ In these cases, the courts have misconstrued the purpose of BWS testimony.¹²¹ Instead of challenging the objectivity of duress defenses, BWS testimony strives to expand juror general knowledge—knowledge that is expected to be treated as commonplace.¹²² It is not only impractical, but irresponsible to ask jurors to make determinations based on a base of knowledge they do not possess. The Sixth, Seventh, Ninth, and D.C. circuits have successfully navigated this distinction.¹²³ Women who fall within the parameters of BWS are not unreasonable, nor do they assert this when raising a

¹¹³ See *supra* Part III a–b (discussing the current circuit split where four of the seven circuits that have faced this issue have held to allow admission of BWS evidence).

¹¹⁴ *National Statistics*, NAT’L COAL. AGAINST DOMESTIC VIOLENCE (2020) <https://ncadv.org/STATISTICS> [<https://perma.cc/8PZ5-EYQ4>].

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Barnett, *supra* note 37, at 345–46.

¹¹⁸ *Id.*

¹¹⁹ See Burke, *supra* note 78, at 223–24; see also *United States v. Dingwall*, 6 F.4th 744, 748 (7th Cir. 2021) (Dingwall discussing that the established cycle of violence reinforced her imminent fear of abuse and danger if she denied her abuser’s wishes).

¹²⁰ See *supra* Part III a–b (discussing the current circuit split).

¹²¹ *Id.*

¹²² *United States v. Marengi*, 893 F.Supp. 85, 96 (D.Me. 1995).

¹²³ See *Dando v. Yukins*, 461 F.3d 791, 801 (6th Cir. 2006); *United States v. Dingwall*, 6 F.4th 744, 757–58 (7th Cir. 2021); *United States v. Lopez*, 913 F.3d 807, 811 (9th Cir. 2019); *United States v. Nwoye (Nwoye II)*, 824 F.3d 1129, 1136–37 (D.C. Cir. 2016).

duress defense.¹²⁴ Instead, reasonable should be viewed as what a reasonable person in a similar situation would have done.¹²⁵ A similarly situated reasonable individual would likely share the perspective that is being submitted through BWS expert testimony.¹²⁶

The statistics nationally on the prevalence of domestic violence and intimate partner violence paint a grim picture: the experiences of women who are survivors of abuse are not novel. Luckily, federal sentencing guidelines permit a court to consider an individual's experiences in determining an appropriate sentence.¹²⁷ Judges are permitted to stray from sentencing requirements if there is evidence that the defendant "committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense."¹²⁸ While this is an exceptional safeguard for survivors of abuse, steps should be taken to ensure they never reach this stage.

Allowing BWS evidence to be admitted at the guilt-innocence phase of a trial will not force the criminal justice system to treat battered women any differently than other offenders.¹²⁹ This discomfort, however, should be examined further. Institutions that are typically relied on for protection, such as police or family services, have historically been inadequate at meeting the needs of battered women.¹³⁰ Battered women typically do not have an extensive criminal record and a nonexistent history of violent behavior, making their often-sudden departure into crime all more shocking.¹³¹ It is for these reasons that attempts must be made to ensure equal treatment for the most vulnerable among us.

¹²⁴ *Cf. Dingwall*, 6 F.4th at 751 ("Dingwall argues, however that a reasonable person in her situation, including the repeated violent abuse and psychological pressure from Stanley, could fear imminent death or serious injury if she did not commit the robberies and could not see other reasonable alternatives to the crimes." Dingwall is asserting her reasonableness viewed in the light of someone in her situation, which is consistent with a reasonable person standard.).

¹²⁵ *Cf. Dando*, 461 F.3d at 802 ("The Sixth Circuit concluded that, where the defendant participated in a crime spree while accompanied by her heavily armed boyfriend who had threatened her life, 'a reasonable person in her situation would likely have feared death or serious bodily harm.'").

¹²⁶ *Cf. id.* ("The court reasoned that 'evidence of Battered Woman's Syndrome can explain why a reasonable person might resort to such actions given a history of violent abuse and the imminent violent threats.'").

¹²⁷ See U.S. SENT'G GUIDELINES MANUAL § 5K2.12 (U.S. SENT'G COMM'N 2021).

¹²⁸ *Id.*

¹²⁹ *Battered Women Who Kill Their Abusers*, *supra* note 59, at 1591.

¹³⁰ See Julie Blackman, *Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill*, 9 WOMEN'S RTS. L. REP. 227, 233 (1986).

¹³¹ See *Battered Women Who Kill Their Abusers*, *supra* note 59, at 1591.