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State v. Stewart: Self-Defense and Battered Women: Reasonable Perception of Danger or License to Kill

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SELF-DEFENSE AND BATTERED WOMEN: REASONABLE PERCEPTION OF DANGER OR LICENSE TO KILL

INTRODUCTION

Kansas, poised on the brink of enlightenment, recently took two steps backward in resolving self-defense issues in battered women homicide cases. In *State v. Stewart*[1] the issue was whether self-defense instructions can be given when a battered woman kills her sleeping spouse. The Kansas Supreme Court held that because the woman was in no imminent danger at the time of the act, no self-defense instruction could be given. In reaching this conclusion, the Kansas court failed to apply its own well-established rule that a defendant is entitled to self-defense instructions if there is *any* evidence supporting self-defense.[2] Further, the court also side-stepped its carefully crafted definition of "imminent" danger.[3] Thus, the court's concern was not the use of self-defense instructions. Rather, the court was faced with the fear that the battered woman syndrome would become a defense per se and give women a license to kill.

First, this Note explores the criminal justice system's ineffective response to wife abuse, the law of self-defense, and the impact of battered woman syndrome on the doctrine of self-defense. Then, the Note evaluates the Kansas court's denial of self-defense instructions in view of its previous holdings on quantity of evidence and imminent danger. The remainder of the Note analyzes the unfounded fear that the battered woman syndrome could become an independent form of self-defense and sanction unnecessary self-help. The Note concludes that successful use of battered woman syndrome testimony ensures the woman's right to act in self-defense and restricts only her husband's license to kill.

BACKGROUND

Wife[4] bashing may be the most underreported crime in America,

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[1] 243 Kan. 639, 763 P.2d 572 (1988).

[2] State v. Hill, 242 Kan. 68, 79, 744 P.2d 1228, 1236 (1987).

[3] *Stewart*, 243 Kan. at _____, 763 P.2d at 578. "Imminent" was distinguished from "immediate" danger in State v. Hundley, 236 Kan. 461, 465-66, 693 P.2d 475, 479 (1985).

[4] The term "wife" will be used in this Note for any female living with a male, married or unmarried.

with wives actually reporting only one in five beatings.[5] Battery is the most common cause of injury to women, injuring more women than auto accidents, rapes, and muggings.[6] Statistics from the Akron Battered Women's Shelter indicate that there are 28 million battered women, approximately one in every four women.[7] Despite this evidence of wholesale violence against women, the criminal justice system has ineffectively responded to wife beating.[8]

Criminal Justice System Minimizes the Criminality of Wife Abuse

Although the law no longer condones domestic chastisement, law enforcement officers only half-heartedly recognize wife beating as criminal behavior.[9] The concepts of marital privacy and wife-as-property continue to influence the criminal justice system's response to wife abuse.[10] Police are reluctant to respond to domestic violence calls and to arrest battering husbands.[11] Police have good reason for their caution; domestic violence calls are the leading cause of police killings.[12] The unstated policy of nonarrest by police has come under attack as an abuse of police discretion, but police officers argue that there is no need to risk lives because battered wives rarely press charges.[13]

The judicial system has also fostered an ineffective position on wife abuse. Overburdened district attorneys recognize the high attrition rate in domestic violence cases, routinely assign them a low priority, and implicitly support the police policy of nonarrest.[14] The battered victim faces the burden of proceeding with a disfavored case, feeling she will be responsible for her abusive husband's incarceration, loss of employment, and probable retaliation.[15]

Ineffectiveness characterizes two other remedies available to the battered woman: temporary restraining orders (TRO's) and mandatory

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[5] Akron Battered Women's Shelter, *Fact Sheet* (1988). Akron Battered Women's Shelter provides victims of domestic violence a physically and emotionally safe shelter facility, 24-hour emergency crisis helpline, a 24-hour pickup service, in-shelter counseling, community support groups, legal advocacy, a children's program, and speaker's bureau. In 1988, they sheltered 965 women and children, and answered 4262 crisis calls. *Id.*

[6] *Id.*

[7] *Id.*

[8] Note, *The Battered Wife's Dilemma: To Kill or to be Killed*, 32 HASTINGS L.J. 895, 897 (1981).

[9] *Id.*

[10] *Id.*

[11] *Id.* at 905.

[12] *Fact Sheet, supra* note 5. Nationally, domestic violence calls are responsible for 40% of police injuries and 20% of the deaths of police officers while on duty. *Id.*

[13] Note, *supra* note 8, at 906-07.

[14] *Id.* at 910-11.

[15] *Id.* at 911.

diversion programs. TRO's are frequently used but are ineffective because they require police officers to actually witness the violation before they can make an arrest.[16] Although the court order might enjoin the abusive spouse from "molesting, attacking, striking, threatening, sexually assaulting or battering"[17] his wife, she would have to call the police as he begins the violent assault so that they could witness the abuse.[18] It may be that few women can get to a telephone at that time. In addition, few husbands continue the battering once the police arrive.[19] Further, the battered woman must go through an expensive, complex legal procedure before she can obtain an enforceable but largely ineffective TRO.[20]

Mandatory diversion programs exacerbate the difficulties battered women encounter in the legal system.[21] Diversion programs use mediation to attempt to satisfactorily resolve the problem and to achieve judicial economy.[22] Unfortunately, they may attain only one of the objectives - judicial economy.[23] Mediation fails in wife abuse cases because the goals of mediation are incompatible with stopping violence.[24] Mediation's goals are to reach an agreement, to reconcile the parties, and to "recognize mutual responsibility for the problem."[25] The last objective implicitly endorses the fallacy that although the man is violent, somehow the woman provoked him and is jointly responsible.[26] Thus, the battered woman's encounter with the legal system includes a non-arrest policy, district attorneys reluctant to prosecute, expensive, complex and ineffective TRO's, and diversion programs that blame the victims for the violence suffered.

Abandoned by the criminal justice system, the battered woman who defends herself confronts a host of ineffective legal defenses. Defense

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[16] *Id.* at 912.
[17] *Id.* at 913 n.116 (quoting CAL. CIV. CODE § 4359(a) (West Supp. 1980)).
[18] *Id.* at 912.
[19] *Id.* at 903-04.
[20] *Id.* at 912.
[21] *Id.* at 914.
[22] *Id.* at 914-15.
[23] *Id.* at 915.
[24] Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57, 72 (1984). Professor Lerman rejects the conciliation model in domestic violence cases; she contends that mediation fails to protect women from future violence and perpetuates their continued victimization. The article advocates a law enforcement model that protects victims, holds abusers responsible for stopping the violence, and legally enforces mediation agreements.
[25] *Id.* at 72.
[26] *Id.* at 86.

attorneys and scholars have suggested temporary insanity,[27] diminished responsibility,[28] heat-of-passion,[29] and imperfect self-defense[30] as viable defenses for the battered wife. However, if the abused woman uses temporary insanity as a defense, she is labeled borderline psychotic and may face mandatory commitment in a mental institution.[31] Experts on domestic violence categorically reject use of temporary insanity pleas and assert that the battered wife rationally concludes that she will be killed by her batterer unless she defends herself.[32] Diminished responsibility mitigates the intent necessary to commit a murder but generally allows conviction of the woman on a lesser charge.[33] Heat-of-passion and imperfect self-defense may also result in mitigation of the murder charge to the lesser offense of manslaughter.[34] Self-defense remains the battered woman's best defense to the charge of murder.[35]

Traditional Self-Defense Doctrine Discriminates Against Abused Women

The doctrine of self-defense justifies the use of reasonable force when (1) one who is not the aggressor, (2) reasonably believes, (3) she is in im-

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[27] Comment, *The Defense of Battered Women Who Kill*, 135 U. PA. L. REV. 427, 429 (1987). Comment advocates use of the defense of temporary insanity when the battered woman cannot establish the elements of self-defense. It asserts that the presence of the battered women syndrome supports the theory that the women views her situation from a psychologically distorted perspective, sometimes suffers from other mental health problems, and frequently is not aware that she has killed her batterer until told by a third party. The Comment acknowledges that use of the defense may require mandatory commitment in a mental institution as a trade-off against a homicide charge but it points out that, in some jurisdictions, the woman may elect voluntary commitment or outpatient psychotherapy.

It is significant for this Note that Kansas is one of the minority jurisdictions requiring mandatory commitment of persons acquitted by reason of insanity. KAN. STAT. ANN. § 22-3428(1) (1981 & Supp. 1987). Further, Kansas presumes that if the person was mentally ill at the time he committed the crime, his mental illness "is of a continuing nature." Comment, *supra*, at 446.

[28] Hudsmith, *The Admissibility of Expert Testimony on Battered Woman Syndrome in Battered Women's Self-Defense Cases in Louisiana*, 47 LA. L. REV. 979, 987 (1987).

[29] Comment, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L. REV. 1679, 1682 (1986). Comment examines sex biases in defenses to homicide charges and the use of fear in manslaughter cases. It argues that juries should consider more than immediate events when deciding whether the victim provoked the defendant to commit murder.

[30] *Id.* at 1682. *See also* W. LAFAVE & A. SCOTT, CRIMINAL LAW 463 (2d ed. 1986). The emerging doctrine of imperfect self-defense mitigates the offense when the defendant uses force in an honest but unreasonable belief that she was under an imminent attack by the victim. *Id.*

[31] Comment, *supra* note 27, at 442-45.

[32] Note, *supra* note 8, at 918. A woman kills when she perceives that she is going to die. It is the sanest moment of her life. Interview with Lynn Bravo Rosewater, Ph.D. (Feb. 9, 1989). Dr. Rosewater specializes in domestic violence victims and travels the country testifying at trials of battered women who have been charged with murder or attempted murder of the man who beat them. She is one of the founders of Women Together, the Cleveland Battered Woman's Shelter.

[33] *See* W. LAFAVE & A. SCOTT, *supra* note 30, at 368-69.

[34] Comment, *supra* note 29, at 1682, 1710.

[35] Note, *supra* note 8, at 918.

minent danger of harm, and (4) a particular degree of force is necessary to prevent that harm.[36] In most jurisdictions, women threatened with bodily harm do not have to retreat from their home before using deadly force against a cohabiting aggressor.[37] When the person acts reasonably, self-defense is a complete defense to murder.[38] A homicide committed in self-defense is justified rather than excused and results in acquittal rather than mitigation to a lesser offense.[39]

Reasonableness is the key to the self-defense doctrine: reasonable belief as to the imminence of harm and the force necessary to repel it. Reasonableness, however, becomes a stumbling block to the battered woman when it is defined according to a sex-biased "reasonable man" standard.[40] A battered woman's reasonable response to physical violence is likely to be different from a man's response because of the atypical self-defense setting in which she acts and because of her size, strength, and socialization.[41]

The Washington Supreme Court first recognized that the traditional self-defense standard failed to consider a woman's use of force in light of her own perceptions of the situation.[42] *State v. Wanrow* did not involve an abused wife, but rather a woman who shot a man she believed was a child molester.[43] One of the grounds on which the case was reversed was that the jury instructions concerning reasonable force denied Wanrow equal protection.[44] The court found it unlikely that a 5'4" woman with a cast on her leg and using a crutch could repel an attack by a 6'2" intoxicated man without using a weapon, even though the man was unarmed.[45]

Wanrow not only addressed the use of a reasonable degree of force, it tackled the thornier question of a woman's reasonable belief as to the imminence of harm.[46] In domestic violence situations where the wife

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[36] *See* W. LAFAVE & A. SCOTT, *supra* note 30, at 454.
[37] *See id.* at 460-61.
[38] *Id.* at 454.
[39] *Id.* at 454-55.
[40] Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 636 (1980).
[41] *See id.* at 631-37.
[42] State v. Wanrow, 88 Wash. 2d 221, 559 P.2d 548 (1977).
[43] *Id.* at 226, 559 P.2d at 551.
[44] *Id.* at 240, 559 P.2d at 558-59.
[45] *Id.*
[46] *Id.* at 235-36, 559 P.2d at 556.

kills during an acute battering incident, her self-defense claim is likely to succeed.[47] However, when the killing does not occur during an acute battering incident, the battered woman's self-defense plea frequently depends on the jury considering all of the circumstances surrounding the killing.[48] Battered women might kill during an apparent time lag between the violent acts and the deadly act.[49] If the jury is allowed to consider all of the surrounding circumstances, then the jury can consider the battered woman's perception of imminent danger.[50] Ultimately, however, the abused wife's self-defense plea can only be understood within the framework of the battered woman's syndrome.

Battered Woman Syndrome Demonstrates Imminence of Danger

The battered woman syndrome attempts to explain the reactions of women trapped by domestic violence in terms of the cycle theory of violence and the theory of learned helplessness.[51] According to the cycle theory of violence, abusive relationships develop a recurring cycle of three phases: a period of tension-building, followed by an acute battering episode, followed by a period of loving contrition.[52] During the first phase, the abuser gradually escalates the tension with mean and abusive acts; the woman recognizes the danger signals and attempts to please him to ward off his hostility.[53] The tension escalates and finally explodes in an acute battering incident.[54] In the final phase, the uncontrollable release of tensions is followed by profuse apologies which may provide positive reinforcement for the woman to remain in the relationship.[55] Over the course of a battering relationship the violence increases in frequency and severity, while the loving contrite behavior declines.[56] Pursuant to a learned

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[47] Comment, *supra* note 27, at 434.

[48] Note, *supra* note 8, at 920-21.

[49] Schneider, *supra* note 40, at 634.

[50] *Id.* at 634-35. The battered woman's perception of imminent danger is based on her intimate knowledge of the abuser and his history of violent acts. *Id.*

[51] L. WALKER, THE BATTERED WOMAN SYNDROME, 147-151 (1984). Licensed psychologist Lenore Walker identified characteristics of the syndrome after clinical research with hundreds of battered woman. Dr. Walker defines a battered woman as "a woman, 18 years of age or over, who is or has been in an intimate relationship with a man who repeatedly subjects or subjected her to forceful physical and/or psychological abuse." *Id.* at 203. To dispell some of the myths surrounding battered women, and to attempt to explain why women remain in a battering relationship, Dr. Walker advances both the cycle theory of violence and the learned helplessness theory. Because the battering is cyclical, the woman experiences a reconciliation period during which the abuser's loving behavior persuades her to remain, hoping the abuser will change. Inevitably, tension rebuilds and the woman recognizes signs of the impending acute battering stage. Repeated over time, the battered woman's inability to control the batterer's violence reinforces her mounting feelings of helplessness and powerlessness. *Id.* at 203.

[52] *Id.* at 95.

[53] *Id.*

[54] *See id.* at 95-96.

[55] *Id.* at 96.

[56] *See id.* at 147-51.

helplessness theory, battered women learn the probability of being beaten by recognizing specific predictive cues in the batterer's behavior.[57] Their inability to control the impending violence generalizes into a feeling of helplessness about all aspects of the relationship, including their ability to escape from the relationship.[58] The unrelenting cycle of violence and feelings of helplessness place the battered woman in a constantly heightened state of terror because she believes that one day the batterer will kill her.[59] Thus, to the battered woman, the threat of violence is continuously imminent, the abuser's earlier threats are still in force, and the imminent danger arguably justifies self-defense even in a period of apparent calm.[60]

The reasons battered women stay with their husbands, despite their constant state of terror and their perceived inability to escape from the battering relationship, can only be explained in the context of the battered woman syndrome.[61] The psychological effects of repeated brutal beatings are beyond the understanding of the average person.[62] Consequently, courts in a growing number of jurisdictions admit expert testimony on the battered woman syndrome.[63] In 1986, Kansas courts

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[57] *Id.* at 102.

[58] Comment, *supra* note 27, at 432.

[59] Note, *supra* note 8, at 928.

[60] *Id.* at 929. *See also* W. LAFAVE & A. SCOTT, *supra* note 30, at 458. (If the threatened harm cannot be avoided if the victim waits until the last moment, self-defense must permit acting earlier.)

[61] *See* Schneider, *supra* note 40, at 645-46.

[62] Fennell v. Goolsby, 630 F. Supp. 451, 458 (E.D. Pa. 1985).

[63] *Id.* at 459. Ohio is the only state that unilaterally does not allow expert testimony on the battered woman syndrome, according to psychologist, Lynn Bravo Rosewater. Zorc, *Speaking Out for Women Who Kill*, Akron Beacon Journal, Beacon Magazine, Jan. 29, 1989, at 5, col. 2. In the leading Ohio case, a jury found Kathy Thomas guilty of murder. The Cuyahoga County Court of Appeals reversed the trial court's judgment on the ground that excluding expert testimony on the battered woman syndrome was reversible error. The Ohio Supreme Court later reversed the Court of Appeals. The Supreme Court refused to admit expert testimony because the battered woman syndrome was not sufficiently developed as a matter of accepted scientific knowledge to warrant expert opinion. The court further ruled that expert testimony is irrelevant and that the average juror understands domestic violence in a way that makes expert testimony unnecessary. State v. Thomas, 66 Ohio St. 2d 518, 521-22, 423 N.E.2d 137, 139-40 (1981).

Dr. Rosewater believes that this lack of understanding in Ohio courts has resulted in many women in Ohio not getting fair trials. Zorc, *supra*, at 6, col. 4. Shortly after *Thomas*, the American Psychological Association, representing more than 55,000 psychologists, strongly endorsed expert testimony on battered woman syndrome. In an Amicus Curiae brief, the Association argued: (1) that the standards for evaluating the state of scientific knowledge in an area only require that the expert's methodology be "*generally* accepted by the relevant scientific community," not that it be accepted unanimously or that it be infallible; and (2) "the methodology used by psychologists studying battered women is generally accepted by the relevant scientific community and the state of scientific knowledge supports a reasonable expert opinion" on the syndrome. Amicus Brief of the American Psychological Association, Hawthorne v. State, 408 So.2d 801 (Fla. Dist. Ct. App. 1982) (No. VV-307).

endorsed admission of expert testimony[64] to prove the nature and effect of wife-beating just as it was admissible to prove "the standard mental state of hostages, prisoners of war, and others under long-term life-threatening conditions."[65] With acceptance of expert testimony on battered woman syndrome and emphasis on considering all circumstances when determining justification for self-defense, Kansas courts were on the cutting-edge of judicial thinking — but then the *Stewart* opinion was issued.[66]

FACTS

Peggy Stewart endured twelve years of physical and emotional abuse from her husband, Mike.[67] Mike brutally beat and kicked her, sexually assaulted her two daughters, shot her cat, adulterated her medications, and repeatedly held a shotgun to her head and threatened to pull the trigger.[68] In early May, 1986, Peggy escaped to Oklahoma but, within the month, Mike found her and brought her back.[69] Upon their return to Kansas, Peggy recognized Mike's violence building.[70] She knew that Mike was going to retaliate for her running away.[71] Throughout the day and evening after their return to Kansas, Mike increased his sexual demands and made veiled threats against her life.[72] Peggy found a loaded gun, which she hid.[73] That night, Peggy thought about suicide and heard voices in her head telling her to "kill or be killed."[74] She retrieved the loaded gun and killed Mike as he slept.[75]

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[64] State v. Hodges, 239 Kan. 63, 716 P.2d 563 (1986).

[65] State v. Hundley, 236 Kan. at 467, 693 P.2d at 479.

[66] *Id.*

[67] State v. Stewart, 243 Kan. at _____, 763 P.2d at 574-75.

[68] *Id.* at _____, 763 P.2d at 574-75. "He abused both drugs and alcohol, and amused himself by terrifying Peggy, once waking her from a sound sleep by beating her with a baseball bat. He shot one of Peggy's pet cats, and then held the gun against her head and threatened to pull the trigger." "Two social workers informed Peggy that Mike was reportedly taking indecent liberties with her daughters." At one point, Peggy confronted Mike. "Mike responded by holding a shotgun to Peggy's head and threatening to kill her. Mike once kicked Peggy so violently in the chest and ribs that she required hospitalization." *Id.*

[69] *Id.* at _____, 763 P.2d at 575.

[70] *Id.* at _____, 763 P.2d at 575-76. "Dr. Hutchinson testified that Mike was preparing to escalate the violence in retaliation for Peggy's running away. She testified that loaded guns, veiled threats, and increased sexual demands are indicators of the escalation of the cycle." *Id.* at _____, 763 P.2d at 576.

[71] *Id.* at _____, 763 P.2d at 575. "Peggy testified that Mike threatened to kill her if she ever ran away again." *Id.*

[72] *Id.* "When they reached the house, Mike . . . forced her to have oral sex four or five times in the next 36 hours, with such violence that the inside of her mouth was bruised." *Id.* at _____, 763 P.2d at 581. "[A]s she cleaned house, Mike kept making remarks that she should not bother because she would not be there long, or that she should not bother with her things because she could not take them with her." *Id.* at _____, 763 P.2d at 575.

[73] *Id.*

[74] *Id.*

[75] *Id.*

The State charged Peggy Stewart with murder in the first degree.[76] Peggy pleaded not guilty and claimed self-defense.[77] Expert testimony showed that Peggy suffered from the battered woman syndrome.[78] The trial judge instructed the jury on self-defense and the jury found Peggy not guilty.[79] The prosecutor reserved questions for appeal.[80] The Kansas Supreme Court granted certiorari.[81]

The question the prosecutor reserved was whether the trial judge erred in giving self-defense instructions when the victim was not imminently threatening the defendant.[82] A related question was whether the court would allow the battered woman syndrome to expand the self-defense justification for use of deadly force.[83]

ANALYSIS

Reasonableness is central to the doctrine of self-defense: reasonable belief as to: 1) the imminence of harm and 2) the necessary force to repel it.[84] In Kansas, when self-defense is asserted, the abused wife can introduce evidence of her batterer's prior cruel and violent actions.[85] Expert testimony is admissible to show the systematic build up of fear and terror which influences the battered wife's reasonable apprehension of danger and her perceived need to defend with deadly force.[86] Reasonableness as to imminence of danger and need for deadly force is evaluated by a two-pronged self-defense test:

1) a subjective standard — the woman's own sincere and honest belief that it was necessary to kill in order to defend herself; and

2) an objective standard — "how a reasonably prudent battered wife would perceive the aggressor's demeanor."[87]

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[76] *Id.* at _____, 763 P.2d at 574.
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.* at _____, 763 P.2d at 572.
[81] *Id.*
[82] *Id.* at _____, 763 P.2d at 574.
[83] *Id.* at _____, 763 P.2d at 576.
[84] *Id.* at _____, 763 P.2d at 577. *See also* KAN. STAT. ANN. § 21-3211 (1981). "A person is justified in the use of force against an aggressor when and to the extent it appears to him and he reasonably believes that such conduct is necessary to defend himself or another against such aggressor's imminent use of unlawful force."
[85] State v. Hundley, 236 Kan. at 464, 693 P.2d at 477.
[86] *Id.* at 467, 693 P.2d at 479.
[87] *Stewart*, 243 Kan. at _____, 763 P.2d at 577.

The issue in *Stewart* was whether the trial court erred by giving jury instructions on self-defense.[88] This note will focus on: 1) the *Stewart* court's denial of self-defense instructions despite its own precedent that provides they should be given if there is *any* evidence supporting self-defense, and 2) the court's abrupt narrowing of the time-frame surrounding the fatal incident. The Note then addresses the court's unstated fear that the battered woman syndrome will become an independent form of self-defense and give women unrestrained freedom to kill.

The court failed to apply precedent that any evidence entitles a defendant to self-defense instructions.

In *State v. Hill*, Kansas courts established the quantum of evidence required for self-defense instructions: *any* evidence to support a claim of self-defense.[89] They might have required sufficient evidence or substantial evidence but chose to require *any* evidence;[90] "some . . . even a little . . . no matter how great or how small."[91] The Kansas court reiterated that rule in *Stewart* but failed to apply it.[92] The *Stewart* dissent concluded that Peggy Stewart "met her burden of showing some competent evidence that she acted in self-defense."[93] The majority, however, chose to ignore:

1) The evidence of Mike's past abuse,

2) the escalation of violence,

3) his threat to kill her should she attempt to leave him, and

4) expert witness' testimony that appellee was indeed in a "lethal situation."[94]

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[88] *Id.* at _____, 763 P.2d at 576.

[89] State v. Hill, 242 Kan. at _____, 744 P.2d at 1236. (emphasis added) "A person must have a belief that the force used was necessary to defend himself and, also, show the existence of some facts that would support such a belief." *Id.* (quoting State v. Childers, 222 Kan. 32, 48, 563 P.2d 999, 1011 (1977). "The issue is whether there is any evidence supporting defendant's statement that the force she used was necessary to defend herself." *Id.*

[90] *Id. Compare with*, State v. Allery, 101 Wash. 2d 591, 682 P.2d 312 (1984) (Washington requires "sufficient" evidence to be entitled to self-defense instructions).

[91] THE WORLD BOOK DICTIONARY 97 (1975).

[92] State v. Stewart, 243 Kan. at _____, 763 P.2d at 577.

[93] *Id.* at _____, 763 P.2d at 580 (Herd, J., dissenting). Justice Herd traced the formulation of self-defense instructions to State v. Simon, 231 Kan. 572, 646 P.2d 1119 (1982) (defendant did not shoot victim when approached but waited until victim was innocently entering his own duplex), and earlier to State v. Kelly, 131 Kan. 357, 291 P. 945 (1930) (self-defense instructions given because "self-defense was woven into" the defendant's testimony; defendant did not plead self-defense). *Id.*

[94] *Stewart* at _____, 763 P.2d at 580 (Herd, J., dissenting).

Kansas courts admit evidence of an abuser's prior cruel and violent actions.[95] Kansas courts also admit expert evidence to show a systematic build up of fear and terror that would account for the battered wife's reasonable apprehension of danger and need to defend herself with deadly force.[96] Although Kansas courts traditionally accepted this evidence, they failed to accept it in Peggy Stewart's case.[97] Instead of reviewing the record to ascertain the presence of *any* evidence, the *Stewart* court judged and weighed the evidence and thereby usurped the jury's function.[98] The *Stewart* court refused to apply its own rule concerning evidence in a self-defense situation and concentrated the bulk of its analysis on the issue of "imminent" danger.[99]

The court abruptly narrowed the time frame for the imminence of danger.

In *State v. Hundley*,[100] the court graphically described the terror and fear that characterizes the battered woman:

> The abuse is so severe, for so long a time, and the threat of great bodily harm so constant, it creates a standard mental attitude in its victims. Battered women are terror-stricken people whose mental state is distorted and bears a marked resemblance to that of a hostage or a prisoner of war. The horrible beatings they are subjected to brainwash them into believing there is nothing they can do. They live in constant fear of another eruption of violence.[101]

The court described the battered woman's plight to illustrate the injustice of using "immediate" instead of "imminent" when describing the way the battered woman perceives danger.[102] The *Hundley* court emphasized the "buildup of terror and fear that had been systematically created over a long period of time."[103] Later, the court repeated its comparison of the battered woman's mental state to that of "hostages, prisoners of war, and others under *long-term life-threatening conditions*."[104]

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[95] State v. Hundley, 236 Kan. at 464, 693 P.2d at 477.
[96] *Id.* at 467, 693 P.2d at 479.
[97] *Stewart*, 243 Kan. at _____, 763 P.2d at 580 (Herd, J., dissenting).
[98] *Id. See also* State v. Kelly, 131 Kan. at 357, 291 P. at 945, "a killing is not justified unless apprehension of immediate danger be reasonable, of which jury is judge."
[99] *Stewart*, 243 Kan. at _____, 763 P.2d at 577-79.
[100] 236 Kan. at 461, 693 P.2d at 475.
[101] *Id.* at 467, 693 P.2d at 479.
[102] *Id.* at 467-68, 693 P.2d at 479.
[103] *Id.*
[104] *Id.* (emphasis added)

It is significant that the *Hundley* court analogized the battered woman to a hostage or prisoner of war. In a hostage situation, where the victim is told he will be killed in a week, it is commonly held that he can act with deadly force at any opportunity, rather than waiting until the kidnapper is "standing over him with a knife."[105] "If a threatened harm is such that it cannot be avoided if the intended victim waits until the last moment, the principle of self-defense must permit him to act earlier—as early as is required to defend himself effectively."[106]

The *Hundley* court had compared the battered woman to a hostage, living in constant fear and under long-term life-threatening conditions. If a hostage can seize the opportunity to defend herself, why should the battered woman be prevented from doing the same? Peggy Stewart was brutally terrorized for twelve years.[107] She believed with virtual certainty that her life was in danger.[108] After Mike had brutalized her throughout the day and threatened her life, she found a loaded gun.[109] Peggy knew from past experience that she could not avoid the harm if she waited until the last moment.[110] Mike was asleep, but on another occasion, Mike had awakened her from sleep by beating her with a baseball bat.[111] Sleep was an uncertain lull in Mike's building hostility toward her. At one time the *Hundley* court acknowledged that the battered woman was in an unending life-threatening situation.[112] Abruptly the *Stewart* court narrowed the time frame and demanded an overt act contemporaneous with the killing.[113] The *Stewart* court paid lip-service to their traditional "imminent" standard but, in actuality, demanded an immediate "confrontational circumstance" contemporaneous with the killing.[114] The court pointedly stated that they would not make an exception for a defendant who had suffered long-term domestic violence.[115] Peggy Stewart did not need an exception. Mike brutalized and threatened her life all day and then demanded that the terrified Peggy come to bed with him.[116] Even if an immediate standard was applied, the circumstances immediately preceeding Mike's sleep were contemporaneous with the killing.[117]

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[105] *See* W. LAFAVE & A. SCOTT, *supra* note 30, at 458.
[106] *Id.*
[107] State v. Stewart, 243 Kan. at _____, 763 P.2d at 574-76.
[108] *Id.* at _____, 763 P.2d at 575.
[109] *Id.*
[110] *Id.* at _____, 763 P.2d at 575-76.
[111] *Id.* at _____, 763 P.2d at 575.
[112] State v. Hundley, 236 Kan. at 467, 693 P.2d at 479.
[113] *Stewart*, 243 Kan. at _____, 763 P.2d at 578.
[114] *Id.* at _____, 763 P.2d at 577.
[115] *Id.*
[116] *Id.* at _____, 763 P.2d at 581.
[117] *Id.* at _____, 763 P.2d at 577.

The court held that the jury did not properly weigh the reasonableness of Peggy Stewart's perception of danger because they applied only the subjective standard and not the objective standard of reasonableness.[118] In truth, the Kansas objective standard of a reasonably prudent battered woman is nothing more than an expanded subjective standard. Could a reasonably prudent battered woman living in constant fear and under life-threatening conditions, have acted differently than Peggy acted? "Actually, to ask how a reasonably prudent battered woman would have perceived the aggressor's demeanor results in applying a subjective standard of reasonableness, i.e., from the viewpoint of defendant's mental state."[119]

The court concluded that the twice-divorced Peggy Stewart knew there were non-lethal methods of getting out of her relationship with Mike.[120] The same court had previously stated that battered women were "brainwashed into believing there is nothing they can do."[121] Peggy had escaped once but Mike found her, brought her back home and threatened to kill her if she ever left again.[122] Research indicates that a battered woman develops survival skills that keep her alive; these are skills developed at the expense of escape skills.[123] Peggy's behavior illustrates how these survival skills narrow the battered woman's perceptions so she focuses only on survival and misperceives other important information.[124] For example, after she killed her husband, she fled wildly outside and ran a mile to her neighbor's house, totally ignoring the car and truck parked outside of her home.[125]

The *Hundley* court described the battered woman as living in constant fear under long-term life-threatening conditions.[126] It insisted that

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[118] *Id.* at _____, 763 P.2d at 574.
[119] State v. Hodges, 239 Kan. at 72, 716 P.2d at 569.
[120] *Stewart*, 243 Kan. at _____, 763 P.2d at 576.
[121] State v. Hundley, 236 Kan. at 467, 693 P.2d at 479.
[122] *Stewart*, 243 Kan. at _____, 763 P.2d at 575.
[123] L. WALKER, *supra* note 51, at 33. Dr. Walker's interview data suggest that battered women learn survival or coping skills to "keep them alive with minimal injuries." *Id.* Examining victim response following a battering incident, Dr. Walker found marked movement toward passivity. *Id.* This is consistent with learned helplessness theory research in which animal and human subjects adopted passivity as the basic coping mechanism for survival. *Id.* As part of the coping process, the battered woman narrows her perceptions and focuses only on survival, causing misperception of other important information and an inability to problem-solve options in order to escape from the relationship. Nevertheless, despite the appreciable move toward passivity, Dr. Walker's data disclosed that, even after repeated beatings, close to 50% of the women were able to take some affirmative action to stay alive. *Id.*
[124] *Id.*
[125] *Stewart*, 243 Kan. at _____, 763 P.2d at 582 (Herd, J., dissenting).
[126] State v. Hundley, 236 Kan. at 467, 693 P.2d at 479.

"imminent" rather than "immediate" be used to describe the harm.[127] However, the *Stewart* court chose to ignore a loaded gun, sexual abuse, and veiled threats within hours of the killing.[128] Moreover, the *Stewart* court applied an immediate standard and held that the jury had not properly weighed the reasonableness of Peggy Stewart's perception of harm. Their rationale was that the jury did not consider how a reasonable battered woman would view the situation.[129] The *Stewart* court recited all of the right descriptors about battered woman syndrome but failed to apply them when analyzing the imminent danger that confronted Peggy Stewart.[130]

The court fears that battered woman syndrome will give women a license to kill.

No jurisdiction holds that battered woman syndrome operates as a defense to murder.[131] The law does not favor a defendant because she is a victim of battered woman syndrome.[132] Courts nervously proclaim that they do not intend to expand the justification for self-defense just because the court admits evidence of battered woman syndrome.[133]

Courts harbor an unspoken fear that recognizing battered woman syndrome will give women a license to kill.[134] Crime statistics do not support this fear. In 1984, and for at least thirty years before that time, women accounted for approximately 13 percent of those arrested for homicide.[135] During the past several years, more jurisdictions have admitted evidence of battered woman syndrome to explain the reasonableness of the woman's perception of danger.[136] Recent statistics indicate that women still represent only 12.5 percent of persons arrested for homicide.[137] It appears that women have not, in fact, declared "open season on men."[138] Battered women kill their husbands in self-defense because they believe with virtual certainty that they are in danger of being killed.[139]

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[127] *Id.* at 467-68, 693 P.2d at 479.
[128] *Stewart*, 243 Kan. at _____, 763 P.2d at 583 (Herd, J., dissenting).
[129] *Id.* at _____, 763 P.2d at 579.
[130] *Id.* at _____, 763 P.2d at 577. The Court acknowledged that traditional concepts of self-defense may not apply to victims of long-term domestic violence. Further, the Court noted that given the cumulative terror and probable inequality of size and strength, the victim might chose to defend during a lull in the abuse, rather than while the conflict was raging. *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.* at _____, 763 P.2d at 578.
[134] Rosewater, *supra* note 32.
[135] Comment, *supra* note 29, at 1680.
[136] State v. Hodges, 239 Kan. at 68-69, 716 P.2d at 567.
[137] FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS 181 (1987).
[138] Note, *supra* note 8, at 930-31.
[139] Rosewater, *supra* note 32.

Evidence of battered woman syndrome helps illustrate the influence of numerous factors on "the woman's perception of her limited options and need to use self-defense."[140] Courts should examine all of the circumstances surrounding the killing in order to determine if the woman held a reasonable belief that deadly force was necessary at the time she acted.[141] Courts should analyze the specific incident (e.g., murder) in the context of a history of abuse.[142] The abuser's sleep or inattention does not automatically mean the woman was safe or not at risk.[143] From the battered woman's perception, "when he wakes up, she's had it; wherever she runs, she's had it; wherever she is, she's had it."[144] Battered women do not want a protected right to use deadly force, but rather the *same* right to act in self-defense as any other victim of assault.[145] Without self-defense, the only credible battered woman will be a dead one.[146]

CONCLUSION

In deciding *Stewart*, The Kansas Supreme Court: 1) failed to apply its own precedent for self-defense instructions and 2) sidestepped its own definition of imminent danger. In *Stewart*, the issue was whether self-defense instructions were appropriate when a battered woman killed her sleeping spouse. The court answered "no" because the woman was in no imminent danger of death.

The *Stewart* court failed to apply its own well-established rule that a defendant was entitled to self-defense instructions if there was *any* evidence supporting self-defense. The court completely overlooked evidence of past abuse, a present escalation of violence, the husband's threats to kill the victim should she attempt to run away, and expert testimony that the battered spouse was in a life-threatening situation.

Further, the *Stewart* court paid lip-service to its own definition of "imminent" danger and also ignored its explicit rejection of an "immediate" standard. Previously, Kansas courts analogized the battered woman to a hostage living in constant fear and under life-threatening conditions. The courts recognized that these circumstances had to be considered in deciding the reasonableness of a battered woman's perception of danger. Abruptly the *Stewart* court narrowed the relevant time frame.

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[140] State v. Hundley, 236 Kan. at 468, 693 P.2d at 480.
[141] State v. Stewart, 243 Kan. at _____, 763 P.2d at 577.
[142] Comment, *supra* note 29, at 1704.
[143] *Stewart*, 243 Kan. at _____, 763 P.2d at 578.
[144] Rosewater, *supra* note 32.
[145] Hudsmith, *supra* note 28, at 990 n.58.
[146] Rosewater, *supra* note 32.

The court required an overt act "contemporaneous" with the killing. Consequently, the court held that the jury did not properly weigh the reasonableness of Peggy Stewart's perception of danger because they did not apply the objective standard of a reasonably prudent battered woman.

Finally, the *Stewart* court reacted to unfounded fears that evidence of battered woman syndrome will give women a license to kill. Unfortunately, unless battered women have a valid self-defense plea, the law appears to give abusive husbands a license to kill.

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