

PT-B – 55

Donor comments:

Structure was bad so anything in there was hard to find for a grader. Hitting 402 was good. Needed to hit 801 and 352 for each of the 8 items of testimony. Organizing by item was key here.

1)

Memorandum

To: Deputy District Attorney Milo Ward

From: Applicant

Date: August 1, 2013

Re: Admissibility of Professor Simoni's Testimony in the Matter of People v. Draper

### I. Standard for Evaluation of Admissibility

Pursuant to Columbia Evidence Code § 402 ("§ 402") the court may hear and determine the question of admissibility of evidence out of the presence or hearing of the jury.

Judge Parker has duly instituted a § 402 hearing on the matter of admissibility of Simoni's testimony upon simultaneous briefs submitted by both parties and seeks briefing on such admissibility.

### II. Simoni Is a Qualified Expert Witness and should be permitted to testify as to the cycle of violence, recantation, and the so-called "window" and why it closes.

Pursuant to Columbia Evidence Code § 801 ("§ 801"), if a witness is testifying as an expert, his testimony in the form of an opinion is limited to such opinion as is:

(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such

matter as a basis for his opinion.

Here, Deputy District Attorney, Amy Fortner ("the DA") does not object to Professor Simoni's ("Simoni's") qualifications. The DA objects to Simoni's expert testimony is not appropriate in this case because she claims (1) there is no evidence that Mr. Draper, the accused, fits the male batterer profile or (2) that there is any evidence that Ms. Morris, the alleged victim, suffers from battered woman's syndrome.

The issue is whether expert testimony from Simoni concerning battered women's syndrome is relevant, and if it is admissible in whole or in part per § 352 balancing.

II.A BWS Evidence is relevant or, in the alternative, partial testimony of Simoni is relevant to support Ms. Morris's credibility.

Expert Testimony on battered woman's syndrome (BWS) is "irrelevant unless there is a sufficient factual basis for the fact that [victim] experienced ongoing abuse or battering." *People v. Gould* ("Gould"). The prosecution "must present proper foundational evidence before they may use expert testimony regarding battered woman's syndrome to explain why a woman may recant, minimize or completely deny a violent incident." *Gould*. There are two major components of relevance analysis in admitting BWS evidence: "there must be sufficient evidence to support the contention that BWS applies to the woman involved" and "there must be a contested issue as to which it is probative." *People v. Slater* ("Slater"). But where it would "assist the trier of fact in evaluating the credibility of the victim's trial testimony and earlier statements to the police" such evidence will be admissible because it provides "relevant information about the tendency of victims of domestic violence to later recant or minimize their description of that violence." *People v. Bowen* ("Bowen"). When expert testimony provides such assistance it is admissible on any subject "sufficiently beyond common



experience that the opinion of an expert would assist the trier of fact." § 801; *Bowen*.

Here, it can be argued that Ms. Morris suffers from BWS and that there is a contested issue as to which BWS is probative, satisfying the standard set forth in *Slater*. During the § 402 hearing, testimony from Paul Morris, Ms. Morris's brother, indicated that after losing his job, the defendant "was a lot moodier and got upset a lot more" and that "he wanted Sarah to quit her job" and "he was making her give him all her paychecks because he couldn't trust her anymore." *Transcript of § 402 Hearing ("Transcript")*. Although only one incident, the issue at trial, involves physical violence, all of the incidents described by Paul Morris can be categorized as abusive events contributing to the cycle of violence. Evidence that the parties were in a cycle of violence is "an adequate foundation for that expert testimony." *Bowen*. With the first *Slater* factor satisfied, BWS expert testimony is relevant if there is a contested issue as to which it is probative. Here, the contested issue is the final act of violence that brings the case to trial and whether Ms. Morris's 911 call was accurate or if her recanted statements should impeach her.

Defense may argue that, like in *Gould*, no evidence of repeated or on-going abuse existed, and thus BWS evidence is not relevant. See *Gould*. While there is a strong argument to the contrary based on Paul Morris's statements in the § 402 hearing, even if the court finds for defense on this point, pieces of the expert testimony will still be relevant.

Alternatively, if the court finds *Gould* more persuasive or *Slater* factors are not satisfied for admission of BWS testimony, it has been held that "[w]hen the trial testimony of an alleged victim of domestic violence is inconsistent with what the victim had earlier told police" then "evidence relating to the credibility of the witness becomes relevant and admissible." *Bowen*. § 801(a) also explicitly permits testimony from a qualified expert "related to a subject sufficiently beyond

common experience that the opinion . . . would assist the trier of fact." So if *Slater* relevancy is not found to be satisfied the Court can admit all expert testimony as relevant that pertains to Ms. Morris's credibility. Without such admission "jurors may well assume that the victim is an untruthful or unreliable witness" because of the discrepancy between statements to police and later statements about the events surrounding the abuse. *Bowen*. The expert testimony explains why these inconsistencies exist and can restore the victim's credibility.

Here, expert testimony about the cycle of violence, recanting and the window in which a victim will accurately recall details of the event. See *Bowen*. Simoni offers such expert testimony indicating that "80% of the time a woman who has been initially assaulted by a boyfriend, husband or lover will recant change or minimize her story." *Transcript*. The suggestion of the possibility that the couple may have been in a cycle of violence is sufficient for foundation. See *Bowen*. Thus, Simoni's testimony regarding the cycle of violence and how women are hooked back into relationships is relevant. See *Transcript*. Post-abuse behavior and "the window" will also be relevant because they assist the trier of fact in understanding why, other than a fault in credibility of the victim, her story may have changed since making the 911 call.

II.B Admission of parts of Simoni's testimony do not violate § 305 balancing and should not be excluded.

In evaluating the admissibility of Simoni's testimony during a § 402 hearing, the court may, in its discretion, exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. *Columbia Evidence Code* § 352 ("§ 352").



Here, Simoni is a highly qualified expert, which defense does not object to. Defense will likely argue that any BWS testimony, or testimony supporting Ms. Morris's credibility is prejudicial. *Gould* found such evidence to be unduly prejudicial where it found that BWS evidence was irrelevant because there was no foundation to support the claim that the victim was an abused woman or that defendant fit the profile of a batterer. *See Gould*. Portions of the expert testimony that relate to batterers, their tendencies and behaviors and victim behavior right after abuse may be found to be unduly prejudicial because they, by default, tend to cause the jury to characterize the defendant as a batterer. *Gould* indicates that such testimony makes it "reasonably probably that the jury would have reached a result more favorable to [defendant] had the court excluded [expert's] testimony" and found the testimony to be prejudicial because of its inflammatory nature. *Gould*.

But this case is distinguished because even in the event that the court does not see fit to admit Simoni's full testimony, it may limit what is introduced. *Bowen*. The Court could make a similar instruction to that upheld in *Bowen*, indicating that "[t]his evidence is not going to be received and must not be considered by you to prove the occurrence of the act or acts of abuse which form the basis of the crimes charged." *Bowen*. The expert then explained "the window" and why victims recant their statements, and the cycle of violence, testimony very similar to that offered by Simoni. *See Bowen*. The court allowed the evidence as it is relevant to the victim's credibility. All of these concepts about domestic abuse explain why the victim's story may have changed over time and can, in the eyes of the jury, save the victim's credibility in the face of attack by the prosecution. The probative value of such evidence is not substantially outweighed by the probability that it would create undue prejudice, confuse the issues or mislead the jury. *See* §305. Expert testimony as to the cycle of violence, recantation, and "the window" should be permitted.

### III. Conclusion

Because parts of Simoni's testimony is relevant per *Bowen* and §801 as to the victim's credibility, and because that evidence satisfies § 305 balancing, Simoni should be allowed to testify as to the topics of the cycle of violence, recantation, and the so-called "window" and why it closes. All of these topics relate to why a victim may change their story as a result of domestic abuse and are relevant to Ms. Morris's credibility and do not prejudice the defendant.