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MEMORANDUM

TO: Deputy District Attorney Milo Ward
FROM: Applicant
DATE: August 1, 2013
RE: People v. Draper

The purpose of this memorandum is to assist you as you draft your post-hearing brief that was requested by the judge. Below you will find my analysis on portions of Professor Simoni's ("Professor") testimony that will be admissible or inadmissible. *Where applicable, I have included the facts from the Draper case.*

I. ADMISSIBILITY OF BATTERED WOMAN'S SYNDROME

Pursuant to Evidence Code Section 801, an expert's testimony is limited to opinions that "[r]elate to a subject that is sufficiently beyond common experience... [that] would assist the trier of fact," and it must be based on "matter... that is 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." Even if an expert's testimony is helpful to the trier of fact, it is within the courts discretion, under Evidence Code 352, to exclude it if "its probative value is substantially outweighed" by the the possibility of undue delay or unfair prejudice.

For any testimony regarding Battered Woman's Syndrome (BWS) to be admissible, we must first meet two requirements to show that the testimony is relevant: (1) "...there must be sufficient evidence to support the contention that BWS applies to the woman involved..." and (2) "there must be a contested issue as to which it is probative." People v. Stater (2008). In Stater, the expert

testimony regarding BWS was used to explain why the victim recanted her story. The expert in the Stater case presented ten points to assist the trier of fact in understanding BWS. It was then up to the trier of fact to determine whether BWS applied in that case. BWS is not to be used to prove that the battery event occurred, instead, it is to be used to determine the credibility of the victim. People v. Bowen (2004). The Bowen court held that there must be other independent evidence of domestic violence prior to admitting testimony regarding BWS. Two years prior to the Bowen case, the Columbia Court of Appeals held that there must be evidence that the victim suffered from an ongoing battery, in People v. Gould. Since the Gould case in 2002, however, courts have held that so long as it can be shown that there is a possibility that the victim was battered, BWS can be used to evaluate the credibility of the victim.

In this case, Professor Simoni's ("Professor") opinion will be helpful to the trier of fact, because it will help evaluate and the credibility of Sarah Morris ("Morris"). This office was informed that Morris has changed her story, and that she is now claiming that her injuries were accidental. If the defendant calls Morris as a witness, she will probably testify that she was not a victim of battery. The Professor's testimony will help explain to the jury why Morris is recanting. Thus, BWS applies to the woman (the victim) involved, meeting the first test of Stater.

Next, the Public Defender (PD) is asserting that the Professor's testimony does not apply in this case because the PD does not believe that Morris fits the profile of BWS since this is the first injury that Morris experienced during her marriage to defendant. As I will explain below, the Professor's testimony of BWS will be probative because we can use her testimony to show that Morris is a BWS victim, even though this is her first injury. We will also be able to show that this is the beginning of the cycle of BWS. We will be able to meet the second and final requirement of the Stater test.

Lastly, we will also be able to meet the requirements of Bowen, since there is independent evidence of a battery. According to Dr. Tucker's testimony, Morris sustained an injury that was consistent with a "high-impact blow," which may be more closely related to an intentional battery, than an accidental injury that Morris now contends. Morris's brother testimony can also show independent evidence of a battery since he witnessed the "bloody mouth" and the "large bruise on [Morris's] neck and shoulder area."

Thus, the Professor testimony of BWS is admissible to show why Morris recanted, but portions of her testimony will be inadmissible in this case.

II. ADMISSIBILITY OF PORTIONS OF THE PROFESSOR'S BWS TESTIMONY

The information below identifies the proposed testimony of the Professor, numbered by the subject by which she stated it in her testimony during the recent pre-trial evidentiary hearing.

1. The Typical Profile of a Batterer - ADMISSIBLE

The Professor wants to testify that there is typical profile of a batterer, not in terms of socioeconomic status or race, but rather in terms of behavior and actions. Morris's brother-in-law, Paul Morris ("Paul"), testified that after he lost his job he was "moodier" and "got upset a lot more" and that he "couldn't trust" Sarah anymore. Much of what the Professor said in terms of behavior closely relates to the characteristics in this case. For example, the Professor stated that a batterer would have rigid views on how men and women should behave, and in this case, Paul stated that Draper wanted Morris to quit his job. A trier of fact can view this as a reflection of how Draper feels about men and women.

The typical profile of a batterer will help assist the trier of fact in knowing why the victim, the brother-in-law, or even the mother may not have foreseen the

underlying, violent event. Also, the testimony will also help build a foundation of BWS, and explain how or why it occurs. The Professor's testimony as to this portion will be admissible.

2. Patters of Behavior of Batterers and Battering Victims - ADMISSIBLE

In the evidentiary hearing the Professor stated that BWS victims tend to feel low about themselves because the male will begin to blame the woman for everything that happens. Paul testified that after she got a promotion, she was not elated, but rather she was feeling "horrible, anxious, and depressed." Such emotions are not typical after getting a promotion. Paul also stated that Morris stated that her relationship with Draper changed after he lost his job and could not find another, which may indicate that there were domestic problems stemming from Draper's lost job. The trier of fact may make this logical connection, and this this evidence is relevant to the case.

The evidence is also not prejudicial because it is only stating the pattern of women, not Morris herself. In fact, there is no evidence Morris never exhibited the exact emotions that the Professor stated, and so the trier of fact may make that logical connection, since it is not a direction connect.

The patterns of behavior will also be admissible because it is highly relevant in this case, probative, and not unduly prejudicial. For the reasons above, a trier of fact may believe that Morris is indeed a victim of BWS.

3. The Cycle of Violence - ADMISSIBLE

The Professor will want to testify to the three phases in BWS. Under the facts presented by Paul, it seems that Morris and Draper are in the beginning "tension-building period." Also, since the DA is asserting that Morris is not a battered woman because this is the first and only instance of domestic violence, the Professor's testimony can show that Draper and Morris are in this first phase. As such a trier of fact may reasonably believe that no other domestic violence incidents are

not necessary to be considered a victim of BWS.

Furthermore, Paul stated that Draper wanted Morris to give him all of her paychecks. The Professor refers to this as "economic control" that is common during the "tension-building phase." There is circumstantial evidence that Draper caused Morris's low emotions, but the "emotional abuse" described in the Professor may help the jury determine that the couple were in fact, in this "tension-building phase." Thus, the Professor's testimony regarding the cycle of violence is probative.

The Professor will also testify that the not every factor in the phase is present, so Draper should not be prejudice by her testimony regarding the cycle of violence. Since the Professor's testimony will help assist the trier of fact, and is more probative than prejudicial, the Professors testimony regarding the three-phase cycle should be admitted in trial.

4. Recantation - ADMISSIBLE, BUT PORTIONS MAY BE INADMISSIBLE

The Professor's testimony regarding recantation is probative because it help the jury understand why Morris recanted. If the 911 emergency call describing her battery is played during trial and Morris later testifies to the contrary, the jury will more likely understand why there is a difference. This is probabtive to the case. Indeed, expert testimony regarding BWS was in higher courts to strengthen the credibility of a victim's first testimony or story.

The 80% statistic of recantation of an initial assault will most likely be contested by the defense as prejudicial. In your brief to the judge, please cite the Bowen case, because we will be able to show that there is an independent source of evidence of battery. Therefore, the question of a victim's credibility will be at issue and this statistic will be more probative than prejudicial. If the judge is unpersuaded by this, he may find the statistic of "80 percent" inadmissible, but will most likely find that the rest of the Professor's testimony regarding

recantation is more probative than prejudicial, and thus, admissible.

5. Behavior Right After the Abuse - INADMISSIBLE

Nothing in the Professors testimony regarding this portion of BWS relates to the case at hand. We have no facts about what Morris has done since the incident back in June of last year. Though it is not prejudicial to Draper, the court may hold that it is inadmissible under Evidence Code 352 because it would "necessitate undue consumption of time" and because it may "confuse the issues."

If, however, anyone any evidence of Morris's behavior is brought up at trial, we should request the judge to allow the Professor's testimonay regarding a victim's behavior right after the abuse.

6. The So-Called "Window" - INADMISSIBLE

This is the first instance that Morris reported a domestic violence incident so any of the Professor's testimony regarding a "window" where the victim leaves her defendant may be irrelevant and will probably confuse the jury. The Professor's testimony regarding "window" is more relevant to victims that are in the later of the 3-cycles, but since we are arguing that Morris is in her first cycle the "window" may not apply. Furthermore, we have no information on what Morris has done after the incident.

This portion of the testimony will be inadmissible under the Evidence Code 352.

7. Why Victims Return to the Relationship - ADMISSIBLE

The Professors testimony regarding why a victim returns will help the assist the jury in evaluating Morris's credibility and memory. The Professor stated that over time, a woman's self-esteem can change. This will be evidenced by Paul's testimony. Furthermore, this testimony also explains why the victim recants her story, since she will begin to believe her batterer's version of events. If Morris is

still with Draper and her testimony aligns with the Drapers, then this portion of the Professor's testimony will be probative. It will assist the jury understand that nature of BWS and also the later actions taken by the victims of BWS.

Like recantation described above, the defendant will argue that this is prejudicial. However, we can use the facts of Paul's testimony to show that this portion is more probative than unduly prejudicial.

8. The Posing of a Hypothetical - PROBABLY INADMISSIBLE

If we attempt to propose a hypothetical during trial much like the hypothetical that Ms. Fortner posed to the Professor, it will most likely be inadmissible. The facts of Ms. Fortner's hypothetical such as the loss of a job, the promotion of the victim, and the increased moodiness, may be too closely related to this case. If it is too closely related it may be unduly prejudicial to the defendant. The hypothetical as it stands, assist our expert witness in determining whether Draper is a batterer under the theory of BWS, but this is a question that should be left to the jury.

In order for any proposed hypothetical to be admissible, we should eliminate the "unduly prejudice" aspect of it. That is, we should pose a hypothetical that does not relate too closely to the facts in Draper's case. The hypothetical given in the evidentiary hearing will be inadmissible, but we should ask the judge if we can pose a "lighter", less related, yet still probative hypothetical to the Professor. For example, we should ask the professor, "If a single incident of violence is preceded by the loss of a job and is accompanied by the wife's promotion and some aspects of the husband's financial control, could this possibly be typical of a "tension-building" stage in BWS?"

In sum, the hypothetical given in the hearing is inadmissible, but we should attempt to create a hypothetical that is less prejudicial to Draper to render it admissible during trial.

III. CONCLUSION

It should be noted that in another case, an expert witness has been noted to be too "authoritative" in her testimony, thus prejudicing the defendant (People v. Gould). We should caution our expert not to be too lengthy or dramatic in her description of BWS. Overall, the majority of the Professor's testimony is admissible and we should be able to succeed in having her testify at the trial on Monday. Please let me know if you need further assistance in analyzing the admissibility of the Professor's testimony.