[Cite as *State v. Goff*, 2009-Ohio-4914.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	Case No. 07CA17
v.	:	
	:	DECISION AND
Megan Goff,	:	JUDGMENT ENTRY
	:	
Defendant-Appellant.	:	File-stamped date: 9-14-09

APPEARANCES:

Paula Brown, William Bluth, Kristopher Haines, and Richard R. Parsons, KRAVITZ, BROWN & DORTCH, LLC, Columbus, Ohio, for appellant.

J.B. Collier, Jr., Lawrence County Prosecutor, and Robert C. Anderson, Lawrence County Assistant Prosecutor, Ironton, Ohio, for appellee.

Kline, P.J.:

{¶1} Megan Goff appeals her aggravated murder (with gun specification) conviction after a bench trial in the Lawrence County Common Pleas Court. On appeal, Goff contends that the trial court violated her right against self-incrimination by ordering her to submit to a psychiatric examination. Because Goff initially retained her own psychiatrist to undergo an evaluation to prove her mental condition (battered woman syndrome) as part of her defense before the court granted the State's request for its psychiatric examination to rebut Goff's claim, we disagree and find that Goff's use of her own psychiatric testimony at trial waived her privilege against self-incrimination. Goff next contends that the trial court improperly ruled that evidence regarding the battered woman

syndrome was relevant only to the imminent harm element of self-defense. We disagree. Goff next contends that the trial court erred when it failed to control the prosecutor, who led the state witnesses, and repeatedly crossed the line of adversarial representation. Because Goff failed to object at trial, and because Goff cannot demonstrate that any of the leading questions or other conduct of the prosecutor, either in isolation or combined, affected the outcome of the trial, we disagree. Goff next contends that the trial court erred in many of its evidentiary rulings. Because we find that the trial court did not abuse its broad discretion regarding the evidentiary rulings, we disagree. Goff next contends that the trial court erred when it allowed the State's expert witness to testify regarding her motive and state of mind. Because Goff's expert witness testified to her motive and state of mind, we disagree. In addition, we find that the trial court did not abuse its discretion because Goff's state of mind was a critical issue as it related to Goff's self-defense claim involving the battered woman syndrome. Goff next contends that the trial court's finding that she did not act in self-defense is against the manifest weight of the evidence. Because substantial evidence supports the trial court's finding, we disagree. Goff next contends that the evidence regarding "prior calculation and design" is insufficient to support a conviction for aggravated murder. Because, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements (including prior calculation and design) of the crime of aggravated murder proven beyond a reasonable doubt, we disagree. Goff next contends that she was denied the effective assistance of trial counsel because of

numerous errors and omissions. Because Goff cannot show how any of the alleged deficiencies prejudiced her, we disagree. Finally, Goff contends that the trial court erred when it failed to record all of the proceedings. Because Goff has failed to show that: (1) she either requested that the trial court record the proceedings at issue or objected to the trial court's failure to comply with the recording requirements; (2) she made an effort on appeal to comply with App.R. 9 and to reconstruct what occurred or to establish its importance; or (3) material prejudice resulted from the trial court's failure to record the proceedings at issue, we disagree.

{¶2} Accordingly, we overrule all nine of Goff's assignments of error and affirm the judgment of the trial court.

I.

{¶3} In 1995, fifteen-year old Goff and her family moved into the house next door to the forty-year old victim. Over the next two years, Goff and the victim developed a romantic relationship that ultimately culminated in their marriage in late 1998. During their marriage, they had two children.

{¶4} On March 18, 2006, Goff shot the victim fifteen times in the head and chest area, resulting in his death. After the shooting, Goff dialed 911 to report the shooting, explaining to the 911 dispatcher that she "just killed" her husband because "[h]e said he was gonna kill my babies." Goff further explained that despite having shot the victim, she feared he would still get up and kill her. Goff remained on the phone until former Lawrence County Sheriff's Deputy Robert Van Keuren arrived.

{¶5} When Van Keuren arrived, Goff remained hysterical and kept repeating that the victim was going to kill her. Shortly thereafter, Lawrence County Sheriff's Detective Aaron Bollinger spoke with Goff. Goff explained to him that she shot her husband because he threatened to kill her and the children in two days, i.e., on Monday, March 20, 2006.

{¶6} A Lawrence County Grand Jury subsequently indicted Goff for aggravated murder, in violation of R.C. 2903.01(A), with a firearm specification. Goff pled not guilty and asserted the affirmative defense of self-defense. In support of the self-defense theory, Goff contended that, during the course of her marriage, she was a “battered woman” as the result of enduring psychological abuse by the victim; and that, on the night of the shooting, she believed her actions were justified because the victim threatened to kill her and her children two days later. Goff retained a psychiatrist and underwent an evaluation to support her defense.

{¶7} The State then made several motions. First, it moved for an order requiring that Goff submit to a psychiatric examination conducted by an expert retained by the State. Goff opposed the motion, arguing that compelling her to submit to a State psychiatric examination would violate her right against self-incrimination. The court granted the State's motion. Next, the State moved for an order determining that "as a result of the death of the victim any attorney-client privilege that existed between the victim and his divorce attorneys no longer exists." With Goff's counsel agreeing, the court granted the motion.

{¶8} Finally, the State moved for an order requiring Goff to submit or proffer

some evidence supporting her self-defense theory before allowing the presentation of expert testimony regarding the battered woman's syndrome. Goff initially opposed this motion, arguing that such an order would, in essence, dictate Goff's trial strategy, i.e., the order would dictate the order of her witnesses, and specifically, would require that Goff testify before her psychiatrist. However, in the end, Goff's counsel stated that he had no problem putting Goff on the stand before her psychiatrist. The court then determined that it would admit evidence concerning battered woman syndrome at trial to prove that Goff reasonably believed she was in imminent danger at the time of the offense so long as she first: (1) offered evidence that she was not at fault in creating the situation; and (2) that she did not violate any duty to retreat or to avoid the danger.

{¶9} At trial, Goff did not dispute that she killed her estranged husband, but instead sought to prove that she killed him because he had threatened to kill her and the children. The state, however, presented abundant testimony that largely discredited Goff's claims.[1]

{¶10} The trial judge subsequently found Goff guilty of aggravated murder and guilty of the firearm specification. The court found that she had not proven self-defense by a preponderance of the evidence. The court observed that she had claimed to be immensely fearful that her husband was going to kill her, yet went to his house on the evening of March 18. The court also noted that two prosecution witnesses testified regarding the March 17, 6:00 p.m. phone call and stated that at no time did the victim threaten Goff, as she claimed in her

[1] The evidence presented at trial is included in the appendix.

testimony.

{¶11} The court sentenced Goff to three years on the firearm specification and to a life sentence on the aggravated murder conviction, with the possibility of parole after thirty years.

{¶12} At the sentencing hearing, the court specifically stated that it did not believe some of Goff's claims regarding her husband's abusive behavior, especially her claim that he dangled mangled kittens in front of her child's face. The court thought that she was not truthful.

{¶13} Goff appeals the trial court's judgment and asserts the following nine assignments of error. "I. The trial court violated appellant's right against compulsory self-incrimination when it ordered her to submit to a compelled psychiatric examination in violation of the fifth and fourteenth amendments to the United States Constitution, Art. I, Section 10, of the Ohio Constitution, and Section 2901.06 and Section 2945.371 of the Ohio Revised Code." "II. The trial court erred when it used the wrong standard and compelled appellant to submit to an independent psychiatric evaluation, and analogized this case to a civil proceeding." "III. The trial court erred when it failed to control the prosecutor, who led the state witnesses, and repeatedly crossed the line of adversarial representation." "IV. The trial court erred in many of its evidentiary rulings during trial, any one of which merits reversal. Looked upon cumulatively, the errors require reversal of the appellant's conviction under even a plain error standard of review." "V. The trial court erred by admitting those portions of Dr. Resnick's testimony that dealt with motive and state of mind over the objection of appellant

in violation of Ohio Rule of Evidence 702(A) and State v. Wilcox (1982), 70 Ohio St.2d 182." "VI. The trial judge's finding that appellant did not act in self-defense was against the manifest weight of the evidence." "VII. The evidence is insufficient to sustain a finding of guilt and as a result the federal constitution and the Ohio constitution require the conviction to be reversed with prejudice to further prosecution." "VIII. Appellant was deprived of the effective assistance of counsel due to numerous errors and omissions which prejudiced appellant's trial." "IX. The court erred when it failed to record all of the proceedings in the case."

II.

A.

{¶14} In her first assignment of error, Goff contends that the trial court violated her right against self-incrimination by ordering her to submit to a psychiatric examination.

{¶15} Goff's contention raises a legal question that we review de novo. See, e.g., *State v. Messer*, Ross App. No. 08CA3050, 2009-Ohio-312, ¶5.

{¶16} The Self-Incrimination Clause of the Fifth Amendment of the United States Constitution provides that no "person * * * shall be compelled in any criminal case to be a witness against himself." The Fifth Amendment privilege against self-incrimination applies to the States through the Fourteenth Amendment of the United States Constitution. See, e.g., *Pennsylvania v. Muniz* (1990), 496 U.S. 582, 588-589; *Malloy v. Hogan* (1964), 378 U.S. 1. The privilege "protects an accused only from being compelled to testify against

himself, or otherwise provide the State with evidence of a testimonial or communicative nature." *Schmerber v. California* (1966), 384 U.S. 757, 761. "It is the 'extortion of information from the accused,' * * * the attempt to force him 'to disclose the contents of his own mind,' * * * that implicates the Self-Incrimination Clause." (internal cites omitted.) *Doe v. United States* (1988), 487 U.S. 201, 211; see, also, *Muniz,* supra, at 594-595.

{¶17} Here, the compelled examination forced Goff to disclose the contents of her mind to a state-retained psychiatrist. Thus, the compelled psychiatric examination implicates the self-incrimination clause. The question then becomes whether the compelled examination violated Goff's privilege against self-incrimination.

{¶18} A compelled psychiatric examination may violate the privilege against self-incrimination. See *Estelle v. Smith* (1981), 451 U.S. 454. In *Estelle*, the court held that a capital murder defendant's right against compelled self-incrimination prohibits the state from subjecting the defendant to a psychiatric examination regarding future dangerousness without first informing the defendant that he has the right to remain silent and that anything he says can be used against him at a sentencing proceeding.

{¶19} In *Estelle*, the defendant was convicted of capital murder. At the sentencing phase, the prosecution introduced psychiatric testimony that it had obtained after the trial judge, sua sponte, ordered the defendant to submit to a psychiatric examination, even though the defendant had not placed his mental state at issue or had questioned his competency to stand trial. The court

determined that the admission of the psychiatric testimony violated the defendant's Fifth Amendment privilege against self-incrimination. The court explained: "A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." Id. at 468.

{¶20} Goff asserts that the holding in *Estelle* mandates that we overturn the trial court's decision ordering her to submit to a psychiatric examination and reverse the trial court's judgment of conviction. However, we find *Estelle* readily distinguishable.

{¶21} Here, unlike the defendant in *Estelle*, Goff initiated a psychiatric evaluation to attempt to prove that she suffered from the battered woman syndrome in an effort to prove her theory of self-defense. Moreover, unlike *Estelle*, the trial court did not sua sponte order Goff to submit to an evaluation. Instead, the trial court ordered her to submit to a psychiatric evaluation so that the state could retain its own expert to examine her claim that she suffered from the battered woman syndrome.

{¶22} Additionally, *Estelle* suggests that a court may order a defendant to submit to a psychiatric evaluation when the defendant seeks to introduce expert psychiatric testimony. Id. at 466, fn. 10. Consequently, Goff's assertion that *Estelle* requires us to reverse the trial court's judgment of conviction is without merit.

{¶23} Other cases decided after *Estelle* also appear to disfavor Goff's position. In *Buchanan v. Kentucky* (1987), 483 U.S. 402, the defendant was convicted of murder. At trial, he asserted "extreme emotional disturbance" as a defense. On cross-examination, the prosecutor requested a social worker to read from a psychologist's report that the prosecutor and defense counsel had jointly recommended. The defendant objected to this line of questioning, arguing that the psychologist's evaluation did not relate to his emotional disturbance but only to his competency to stand trial. He further asserted that admitting such evidence would violate his Fifth and Sixth Amendment rights because his counsel was not present for the evaluation and he had not been advised that the results could be used against him at trial. The trial court allowed the testimony.

{¶24} The *Buchanan* court considered "whether the admission of findings from a psychiatric examination of [the defendant] proffered solely to rebut other psychological evidence presented by [the defendant] violated his Fifth and Sixth Amendment rights where his counsel had requested the examination and where [the defendant] attempted to establish at trial a mental-status defense." *Buchanan* at 404. The court distinguished *Estelle*, observing that in *Estelle*, "the trial judge had ordered, sua sponte, the psychiatric examination and [the defendant] neither had asserted an insanity defense nor had offered psychiatric evidence at trial." Id. at 422. The court then noted it had "acknowledged that, in other situations, the State might have an interest in introducing psychiatric evidence to rebut petitioner's defense: 'When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive

the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist.' [*Estelle*] at 465." Id. at 422.

{¶25} The court further observed that when a criminal defendant does not initiate a psychiatric evaluation or does not attempt to introduce any psychiatric evidence, then he "'may not be compelled to respond to a psychiatrist if his statements can be used against him * * *.'" Id. at 468, quoting *Estelle*. The court then explained that "[t]his statement logically leads to another proposition: if a defendant requests such an evaluation or presents psychiatric evidence, then, *at the very least*, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution." Id. at 422-423 (emphasis added). See, also, *Powell v. Texas* (1989), 492 U.S. 680, 683-684.[2]

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[2] In *Powell,* the court seemingly approved of the Fifth Circuit's analysis in *Battie v. Estelle* (C.A. 5, 1981), 655 F.2d 692, regarding a defendant's Fifth Amendment right against self-incrimination. The *Powell* court explained:

> "In [*Battie*], the Court of Appeals suggested that if a defendant introduces psychiatric testimony to establish a mental-status defense, the government may be justified in also using such testimony to rebut the defense notwithstanding the defendant's assertion that the psychiatric examination was conducted in violation of his right against self-incrimination."

Powell at 683-684.

The *Powell* court found that language in *Estelle* and *Buchanan* supports "the Fifth Circuit's discussion of waiver." *Powell* at 684.

{¶26} Under the foregoing authorities, when a defendant asserts an insanity defense or raises his competency to stand trial, the court may order him to submit to a compelled psychiatric examination. We believe that a fair corollary to these cases is that when a defendant places his mental state at issue in a criminal trial and introduces his own expert to testify as to his mental state, then fairness dictates that the State have an opportunity to rebut that testimony through the use of its own expert.

{¶27} Here, Goff put her mental state at issue by raising the battered woman syndrome as part of her defense. She retained a psychiatrist to evaluate her for the syndrome and to present testimony regarding the syndrome at her trial. Under these circumstances, Goff's use of psychiatric testimony waived her privilege against self-incrimination. The state would have had "overwhelming difficulty" rebutting her expert's conclusion that she suffered from the battered woman syndrome without a chance for its own expert to evaluate Goff for the syndrome. Therefore, we find that the compelled psychiatric examination did not violate Goff's privilege against self-incrimination.

{¶28} Our decision is consistent with *State v. Manning* (1991), 74 Ohio App.3d 19, 24, which held "When a defendant introduces psychiatric evidence and places her state of mind [battered woman syndrome] directly at issue, as here, she can be compelled to submit to an independent examination by a state psychiatrist."

{¶29} Goff nevertheless asserts that *Manning* (1) is no longer valid because R.C. 2945.371(J) superseded it, (2) failed to analyze the Ohio statutes that

address compelled psychiatric evaluations, (3) is not binding in our district, and (4) is factually distinguishable from the instant case.

{¶30} We can readily dispose of Goff's assertion that *Manning* is not binding in our district. While her assertion is correct, we may nonetheless find it persuasive authority.

{¶31} Next, we find her contention that R.C. 2945.371(J) superseded *Manning* unavailing. R.C. 2945.371(J) states, "No statement that a defendant makes in an evaluation * * * shall be used against the defendant on the issue of guilt in any criminal action or proceeding, but, in a criminal action or proceeding, the prosecutor or defense counsel may call as a witness any person who evaluated the defendant or prepared a report pursuant to a referral under this section."

{¶32} The concern of this provision is that a defendant's statements made during a compelled examination not be used during a criminal proceeding "on the issue of guilt." However, this provision does not speak to the issue involved in *Manning*--whether a court may compel a psychiatric examination in a case involving the battered woman syndrome. Consequently, we do not agree with Goff's argument that R.C. 2945.371(J) superseded *Manning*.

{¶33} Goff further asserts that *Manning* was wrongly decided. She claims that the *Manning* court failed to examine the statute governing the admissibility of the battered woman syndrome or to recognize that no Ohio statute specifically authorizes a court to compel a psychiatric examination in a case involving the battered woman syndrome.

{¶34} Although R.C. 2945.371(A) does not specifically authorize a mental evaluation in a case in which the defendant raises the battered woman syndrome in support of a theory of self-defense, the statute appears to contemplate that a court may order an evaluation to determine a defendant's mental condition at the time of the offense charged and specifically authorizes the examiner to consider whether, in an offense involving the use of force against another, the defendant suffered from the battered woman syndrome. See R.C. 2945.371(E) and (F). Thus, a defendant who raises the battered woman syndrome puts her mental state at issue and is subject to a compelled psychiatric examination.

{¶35} Moreover, Goff's argument presupposes that a court's only authority to order a compelled psychiatric examination rests with statutory law. However, a court may have inherent authority to order a compelled psychiatric examination in an appropriate case. See *United States v. Davis* (C.A.6, 1996), 93 F.3d 1286, 1295 (stating that even though neither criminal rules nor statutes authorized trial court to order examination of defendant concerning mental state, "the statutes and rules do not displace extant inherent authority to order a reasonable, noncustodial examination of a defendant under appropriate circumstances"). As *Estelle, Buchanan,* and *Powell* state, a court may order a criminal defendant to submit to a compelled psychiatric evaluation in certain situations. None of those cases limit a court's authority to do so only if a statute authorized it. See, also, Fed.R. Crim.P. 12.2 Advisory Committee Notes ("The amendment to Rule 12.2(c)(1) is not intended to affect any statutory or inherent authority a court may have to order other mental examinations.").

{¶36} Goff additionally asserts that *Manning* is factually distinguishable based upon the following circumstances: (1) Manning shot her victim in his head while he was sleeping; and (2) the defense initially consented to the psychiatric evaluation. Goff claims that because her victim was fully conscious and allegedly threatened to kill her and the children immediately before she shot him, then her claim of self-defense is more compelling than the claim of self-defense in *Manning*.

{¶37} We find Goff's attempt to distinguish *Manning* on this basis unpersuasive. Nothing in the *Manning* court's decision indicates that it based its decision upon the circumstances of the crime. Moreover, nothing in the *Manning* court's decision suggests that it relied upon the defendant's initial consent to the evaluation when reaching its decision. Therefore, we find Goff's attempts to distinguish *Manning* unavailing.

{¶38} Goff additionally relies upon several federal court cases to support her argument that the trial court lacked authority to order her to submit to a compelled psychiatric examination. See, e.g., *Davis,* supra, at 1288. However, each of those cases relied upon the pre-2002 amendment version of Fed.R. Crim.P. 12.2 when deciding that a court could not compel a criminal defendant to submit to a psychiatric evaluation in a case other than one involving an insanity defense or one in which the defendant raises his competency to stand trial. The 2002 amendment broadened the rule to specifically authorize compelled psychiatric evaluations when the defendant "intends to introduce expert evidence relating to * * * any other mental condition of the defendant bearing on * * * the

issue of guilt." See Fed.R. Crim.P. 12.2(b) and (c)(1)(B). The 2002 advisory notes specifically state that the rule was amended, in part, to clarify "that a court may order a mental examination for a defendant who has indicated an intention to raise a defense of mental condition bearing on the issue of guilt." See *United States v. Taylor* (E.D.Tenn. Feb. 15, 2008), No. 1:04-CR-160. At the time the cases Goff cites were decided, the rule did not contain this same provision. Instead, the rule provided that "[i]n an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to an examination pursuant to 18 U.S.C. 4241 or 4242."

{¶39} Therefore, we reject Goff's argument that the trial court's order that she submit to a compelled psychiatric examination violated her right against self-incrimination.

B.

{¶40} Goff next contends that the trial court erroneously granted the state's motion to allow the prosecutor to attend Goff's follow-up interview with the state's psychiatrist.

{¶41} Goff fails to explain precisely how the prosecutor's presence at the follow-up interview affected her substantial rights or prejudiced the outcome of her trial. We will not speculate as to how the prosecutor's presence at the follow-up interview affected her substantial rights or prejudiced the outcome of Goff's trial. Thus, any error that resulted from his presence constitutes harmless error. See Crim.R. 52(A).

C.

{¶42} Goff next contends that the trial court erred by denying her motion to preclude Dr. Resnick's testimony because (1) the court never should have ordered her to undergo the compelled examination; (2) the trial court failed to understand the law that applied and improperly compared the situation involving Dr. Resnick's examination to a civil proceeding; and (3) he was unable to form an opinion to a reasonable degree of certainty as to whether Goff suffered from the battered woman syndrome.

{¶43} For the reasons we discussed above, we reject her argument that the court never should have ordered her to submit to the evaluation.

{¶44} Goff's contention that the trial court employed the wrong analysis when ordering her to submit to a compelled examination is also meritless. It is well-established that we may not reverse a correct judgment simply because the trial court relied upon the wrong analysis. See, e.g., *Joyce v. General Motors Corp.* (1990), 49 Ohio St.3d 93, 96 (stating that "a reviewing court is not authorized to reverse a correct judgment merely because erroneous reasons were assigned as the basis thereof".) As we previously stated, the court reached the correct decision regarding the compelled psychiatric examination. Thus, any error in its analysis is harmless error that did not affect the ultimate outcome.

{¶45} Goff's argument that the court should not have permitted Dr. Resnick's testimony because he was unable to form an opinion within a reasonable degree of scientific certainty as to whether Goff suffered from the battered woman syndrome also is unavailing.

{¶46} The admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Haines*, 112 Ohio St.3d 393, 2006-Ohio-6711, ¶50. Thus, absent an abuse of discretion, we will not disturb a trial court's decision regarding the admissibility of evidence. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶47} Evid.R. 702 governs the admissibility of expert testimony. Testimony regarding the battered-woman syndrome "meets the requirements of Evid.R. 702 in regard to scientific validity and the requirement of specialized knowledge," but must nevertheless "be admitted in conformance with the Ohio Rules of Evidence." *Haines* at ¶42, citing R.C. 2901.06(A) and *State v. Koss* (1990), 49 Ohio St.3d 213.

{¶48} Generally, battered woman syndrome testimony is relevant when used to "'explain a[n individual's] actions, such as prolonged endurance of physical abuse accompanied by attempts at hiding or minimizing the abuse, delays in reporting the abuse, or recanting allegations of abuse,'" because "[s]uch seemingly inconsistent actions are relevant to a witness's credibility." Id. at ¶44, quoting *People v. Christel* (1995), 449 Mich. 578, 580. However, "while such testimony can be relevant for explaining a[n individual's] behavior, it cannot be considered relevant if there is no evidence that the [individual] suffers from battered-woman syndrome." Id. at ¶46. Thus, the party seeking to introduce such evidence "'must lay an appropriate foundation substantiating that the

conduct and behavior of the witness is consistent with the generally recognized symptoms of the battered-woman syndrome, and that the witness has behaved in such a manner that the jury would be aided by expert testimony which provides a possible explanation for the behavior.'" Id. at ¶47, quoting *State v. Stringer* (1995), 271 Mont. 367, 378.

{¶49} In order to "dispel concerns about unfair prejudice," a court should not allow an expert to (1) opine that the individual was a battered woman; (2) testify that the alleged batterer indeed was a batterer or is guilty of a crime; or (3) comment on the alleged battered woman's veracity. Id. at ¶56. Instead, the expert may testify regarding the general characteristics of an individual suffering from the battered-woman syndrome. Id. The absence of expert opinion regarding whether the individual suffers from the syndrome aids the jury in understanding the characteristics of a battered woman without interfering with its role in determining the credibility of witnesses. Id. (stating that "general testimony regarding battered-woman syndrome may aid a jury in evaluating evidence and that if the expert expresses no opinion as to whether the victim suffers from battered-woman syndrome or does not opine on which of her conflicting statements is more credible, such testimony does not interfere with or impinge upon the jury's role in determining the credibility of witnesses").

{¶50} Here, the trial court did not abuse its discretion by permitting Dr. Resnick's testimony despite his inability to reach a conclusion whether Goff suffered from the battered woman syndrome. The 1980 Staff Notes to Evid.R. 702 state: "Although Ohio cases discuss expert testimony in terms of opinion

and it is normal for the expert to express his opinion, in response to facts he has observed or which he assumes to be true, the absence of an opinion does no violence to Ohio practice." See, also, *Galayda v. Lake Hosp. Systems, Inc.* (1994), 71 Ohio St.3d 421, 430 ("An analysis of an expert's testimony in terms of whether it expresses a degree of certainty in excess of fifty percent may not in every case be conclusive of the admissibility of the expert's opinion.").

{¶51} Thus, for the above stated reasons, we reject Goff's argument that the court should have prohibited Dr. Resnick from testifying due to his absence of an opinion within a reasonable degree of medical certainty regarding whether Goff suffered from the battered woman syndrome.

D.

{¶52} Goff further contends that the trial court improperly allowed Dr. Resnick to comment on Goff's credibility.

{¶53} Because the fact-finder retains ultimate responsibility to weigh the credibility of a witness, expert testimony regarding a witness's credibility generally is prohibited. See *State v. Boston* (1989), 46 Ohio St.3d 108, syllabus (stating that an expert may not render an opinion regarding the truthfulness of a child's statements); *State v. Moreland* (1990), 50 Ohio St.3d 58, 62.

{¶54} Here, the trial court did not improperly allow Dr. Resnick to comment on Goff's credibility. At no point during his testimony did Dr. Resnick give any opinion regarding whether Goff was truthful. Instead, he merely related to the court that he was unable to ascertain her truthfulness, which rendered him unable to reach an opinion within a reasonable degree of medical certainty

whether Goff suffered from the battered woman syndrome. Dr. Resnick noted in his testimony that the court would retain the ultimate responsibility to determine Goff's truthfulness. Therefore, we find no merit to Goff's argument.

E.

{¶55} Goff next contends that the trial court wrongly permitted Dr. Resnick to testify regarding the substance of the statements Goff made during the interview, rather than simply relating his observations regarding the battered woman syndrome. She essentially contends that Dr. Resnick improperly testified on the issue of guilt.

{¶56} R.C. 2945.371(J) "permits a defendant's statements during a court-ordered mental evaluation to be used against him on the issue of the defendant's mental condition (e.g., insanity), but prohibits their use to prove the defendant's factual guilt." *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶49, citing *State v. Cooey* (1989), 46 Ohio St.3d 20, 31-32.

{¶57} In *Hancock*, the Ohio Supreme Court considered whether a prosecution expert's testimony regarding the factual statements a criminal defendant made during a mental examination violated the above provision. In that case, the state presented the rebuttal testimony of Dr. Lehrer, who conducted a court-ordered mental examination pursuant to R.C. 2945.371. During direct examination, the prosecutor asked Dr. Lehrer: "Did [the defendant] tell you specifically how he caused the death of [the victim], what he did?" Lehrer testified: "He told me that he tied him up and strangled him." Id. at ¶48.

{¶58} The defendant argued that Dr. Lehrer's testimony violated R.C. 2945.371(J). He asserted that his admission to Dr. Lehrer that he had tied up the victim and strangled him must have been "used against [him] on the issue of guilt" in violation of R.C. 2945.371(J) because it was irrelevant to the insanity defense. Id. at ¶49.

{¶59} The Ohio Supreme Court rejected the defendant's argument, finding that his admission to Dr. Lehrer "was relevant to the insanity defense. Shortly before the testimony at issue, Lehrer had testified that Hancock was not suffering from a serious mental disease or defect when he killed Wagner. In reaching that conclusion, Lehrer had considered 'statements made to me or others that indicate his capacity to know the gravity of his situation and the potential wrongfulness of the acts in question.' Hancock's admission to Lehrer was relevant to 'his capacity to know the wrongfulness of' killing Wagner: the admission indicated that, when he strangled Wagner, he knew what he was doing." Id. at ¶50.

{¶60} The *Hancock* court additionally determined that Dr. Lehrer's testimony did not prejudice the defendant. The court observed that the doctor repeated the defendant's admission that "'he tied [the victim] up and strangled him. But other evidence overwhelmingly proved that Hancock did just that, and the defense expressly conceded the point at trial." Id. at ¶55. The *Hancock* court thus rejected the defendant's argument that the doctor improperly testified on the issue of guilt.

{¶61} Here, a similar analysis applies. Goff took the stand and testified as to the overwhelming majority of the factual statements contained in Dr. Resnick's report. Moreover, like the defendant in *Hancock*, Goff has never denied shooting and killing the victim. Therefore, we find no merit to Goff's argument that the trial court improperly allowed Dr. Resnick to testify regarding factual statements that she made during the evaluation.

F.

{¶62} Finally, Goff contends that the trial court erred by permitting the lead prosecutor to recuse himself from the case, by permitting the prosecutor to add his name to the State's witness list, and by rendering its verdict "one day after admitting it was unfamiliar with the law, taking no time to deliberate or perform legal research after the [S]tate presented its closing."

{¶63} As to Goff's first two arguments, she has not stated how either of the alleged errors had any impact on the outcome of the trial. Moreover, she has not cited any authority to support her position that the court's rulings were improper. Therefore, we summarily reject them.

{¶64} Further, Goff's assertion that we must reverse her conviction because the trial court rendered its verdict without proper deliberation or understanding of the law is without merit. Even if the trial court failed to understand the law and to properly deliberate the issues, we are authorized to uphold its judgment if it reached the correct result, albeit for allegedly erroneous reasons. As we will explain throughout our discussion of Goff's assignments of error, the trial court reached the correct result. Therefore, any alleged failure on its part to

understand the law or to properly deliberate did not affect the outcome of the case.

{¶65} Accordingly, based upon the foregoing reasons, we overrule Goff's first assignment of error.

III.

{¶66} In her second assignment of error, Goff raises three separate arguments.

A.

{¶67} Goff first contends that the trial court improperly ruled that she had a duty to retreat. Specifically, she asserts that the court did not rely upon *State v. Thomas* (1997), 77 Ohio St.3d 323, but instead relied upon the appellate decision in *State v. Thomas* (July 26, 1995), Athens App. No. 94CA1608.

{¶68} Whether the trial court properly applied the law is an issue that we review de novo. See, e.g., *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8.

{¶69} A person has no duty to retreat when assaulted in his own home. *Thomas* at syllabus. "This exception to the duty to retreat derives from the doctrine that one's home is one's castle and one has a right to protect it and those within it from intrusion or attack. The rationale is that a person in her own home has already retreated 'to the wall,' as there is no place to which she can further flee in safety.." (internal cites omitted.) Id. at 327. "Thus, a person who, through no fault of her own, is assaulted in her home may stand her ground,

meet force with force, and if necessary, kill her assailant, without any duty to retreat." Id.

{¶70} Here, the trial court did not erroneously determine that Goff had a duty to retreat. First, because Goff was not at her own home, but instead, went to the former residence she shared with her estranged husband, the *Thomas* rule does not apply. By its plain terms, the *Thomas* rule applies when the defendant invokes self-defense while present in the defendant's own home. Goff and the victim had separated and had been living separate and apart for approximately two months on the date of the shooting. There is no evidence that Goff had an equal right to be present at the residence on the night of the shooting. Therefore, the trial court properly applied the law and ruled that Goff had a duty to retreat.

B.

{¶71} Goff further contends that the trial court improperly ruled that evidence regarding the battered woman syndrome was relevant only to the imminent harm element of self-defense. She asserts that the Ohio Jury Instructions permit the fact-finder to consider evidence regarding the battered woman syndrome when determining "whether the defendant was at fault and whether the defendant had reasonable grounds to believe and an honest belief that the defendant was in (imminent/immediate) danger of death or great bodily harm and that the only reasonable means of escape from such danger was by use of deadly force."

{¶72} In Ohio, the affirmative defense of self-defense has three elements: (1) the defendant was not at fault in creating the violent situation, (2) the defendant had a bona fide belief that she was in imminent danger of death or great bodily

harm and that her only means of escape was the use of force, and (3) that the defendant did not violate any duty to retreat or avoid the danger. *Thomas* at 326, citing *State v. Williford* (1990), 49 Ohio St.3d 247, 249, and *State v. Robbins* (1979), 58 Ohio St.2d 74, paragraph two of the syllabus.

{¶73} The battered woman syndrome is not "'a new defense or justification.'" *Haines* at ¶30, quoting *Koss* at 217. Instead, evidence regarding battered woman syndrome is permitted "to prove one element of self-defense." Id. R.C. 2901.06(B) permits "expert testimony that the person suffered from [the battered woman] syndrome as evidence to establish the requisite belief of an imminent danger of death or great bodily harm that is necessary, as an element of the affirmative defense, to justify the person's use of the force in question." Similarly, the Ohio Supreme Court has held that expert testimony explaining the characteristics of the battered woman syndrome is admissible to "assist the trier of fact to determine whether the defendant acted out of an honest belief that she is in imminent danger of death or great bodily harm and that the use of such force was her only means of escape." *Koss* at paragraph three of the syllabus. "Accordingly, evidence of the battered woman syndrome serves to support the defendant's argument under the second element of self-defense and does not establish a new defense or justification independent of the defense of self-defense." *Thomas* at 330; see, also, *State v. Weston* (July 16, 1999), Washington App. No. 97CA31; *State v. Mariana* (Dec. 30, 1999), Butler App. No. CA98-09-202 (stating that "*Koss* and R.C. 2901.06(B) allow the admission of

battered woman syndrome testimony to assist the trier of fact in determining the second element of the affirmative defense of self-defense").

{¶74} Here, the trial court did not misapply the above-stated law. The court correctly ruled, in accordance with *Haines* and *Koss*, that evidence regarding the battered woman syndrome was relevant to proving the second element of self-defense—whether the defendant had a bona fide belief that she was in imminent danger of death or great bodily harm and that her only means of escape was by the use of force.

{¶75} Goff nevertheless claims that the Ohio Jury Instructions correctly state the law and that the trial court did not apply this law. The Ohio Jury Instructions suggest the following instruction in a case involving a battered woman: "The expert evidence about the (abuse) (battering) of the defendant by the (deceased) (injured person) does not in itself establish self-defense. You may consider that evidence in deciding whether the defendant was at fault and whether the defendant had reasonable grounds to believe and an honest belief that the defendant was in (imminent) (immediate) danger of death or great bodily harm and that the only reasonable means of escape from such danger was by the use of deadly force. In that event, the defendant had no duty to (retreat) (escape) (withdraw), even though the defendant was mistaken as to the existence of that danger." Ohio Jury Instructions, Section 411.31(7).

{¶76} The Ohio Jury Instructions are pattern instructions and are not binding legal authority. See *State v. Ward*, 168 Ohio App.3d 701, 2006-Ohio-4847; *State v. Maine*, Washington App. No. 04CA46, 2005-Ohio-3742; see, also, *State v.*

Gardner, 118 Ohio St.3d 420, 2008-Ohio-2787, ¶97 (Lanzinger, J., dissenting). Instead, we look to the Ohio Supreme Court's discussion of battered woman syndrome testimony to determine the law. Because the Ohio Jury Instructions are not binding legal authority, Goff's assertion that the above instruction correctly states the law is unavailing. Therefore, we disagree with her argument that the trial court misapplied the law and reached an incorrect decision.

C.

{¶77} Goff additionally contends that the trial court improperly analogized certain legal issues presented in the case to a civil proceeding. For example, she complains that the court wrongly analogized the following two issues to a civil proceeding: (1) the court's power to compel her to submit to a psychiatric evaluation; and (2) the prosecutor's request to be present for Goff's follow-up interview with Dr. Resnick.

{¶78} As we stated earlier, even if the court applied the wrong analysis, we may nonetheless uphold its judgment if it reached the correct decision. See, e.g., *State ex rel. McGrath v. Ohio Adult Parole Auth.,* 100 Ohio St.3d 72, 2003-Ohio-5062, ¶8 ("Reviewing courts are not authorized to reverse a correct judgment on the basis that some or all of the lower court's reasons are erroneous").

{¶79} Here, even if the court applied the wrong analysis to its power to compel Goff to submit to a psychiatric evaluation, as we explained in our discussion of Goff's first assignment of error, the court reached the correct result. Furthermore, even if the court applied the wrong analysis to the prosecutor's

motion to be present at the follow-up interview, as we already explained, Goff cannot establish any prejudice that resulted from the court's decision. Thus, we disagree with Goff's argument that the court's analogies to a civil proceeding deprived her of a fair trial.

{¶80} Accordingly, we overrule Goff's second assignment of error.

IV.

{¶81} In her third assignment of error, Goff essentially contends that the prosecutor engaged in misconduct. She asserts that the prosecutor "repeatedly led its witnesses, injected its own testimony, commented on matters unsupported by the evidence, and stated its belief regarding the guilt or innocence of the accused."

{¶82} Initially, we observe that Goff objected to only one of the alleged instances of misconduct. Thus, she has forfeited all but plain error. See *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, ¶137, citing *State v. D'Ambrosio* (1993), 67 Ohio St.3d 185, 190.

{¶83} Under Crim.R. 52(B), we may notice plain errors or defects affecting substantial rights, even though the defendant failed to bring them to the trial court's attention. "[T]he rule places three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial." *State v. Barnes* (2002), 94 Ohio St.3d 21, 27. First, an error must exist. Id., citing *State v. Hill* (2001), 92 Ohio St.3d 191, 200, citing *United States v. Olano* (1993), 507 U.S. 725, 732. Second, the error must be plain, obvious, or clear.

Id. (citations omitted). Third, the error must affect "substantial rights," which the court has interpreted to mean that "the trial court's error must have affected the outcome * * *." Id., citing *Hill* at 205; *Moreland,* supra, at 62; *State v. Long* (1978), 53 Ohio St.2d 91, paragraph two of the syllabus.

{¶84} "The burden of demonstrating plain error is on the party asserting it. A reversal is warranted if the party can prove that the outcome 'would have been different absent the error.'" *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶17 (citation omitted); see, also, *State v. Countryman*, Washington App. No. 08CA12, 2008-Ohio-6700, ¶13. A reviewing court should use its discretion under Crim.R. 52(B) to notice plain error "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Long* at paragraph three of the syllabus.

{¶85} Here, Goff has failed to demonstrate plain error. Goff first complains of several leading questions that the prosecutor posed. "A leading question is 'one that suggests to the witness the answer desired by the examiner.'" *State v. Diar*, --- Ohio St.3d ---, 2008-Ohio-6266, ¶149, quoting 1 McCormick, Evidence (5th Ed.1999) 19, Section 6. Under Evid.R. 611(C), "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony." Id. However, the trial court has discretion to allow leading questions on direct examination. Id., citing *D'Ambrosio* at 190. Moreover, Evid.R. 611(C) expressly allows leading questions on cross-examination.

{¶86} Here, because Goff cannot demonstrate that any of the leading questions to which she failed to object, either in isolation or combined, affected the outcome of the trial, we readily dispose of those alleged errors. We have reviewed the entire transcript and cannot agree with Goff that the prosecutor "relied so heavily on leading its witnesses that it tainted the very essence of the trial." Instead, the transcript shows that overall, Goff received a fair trial and that despite the prosecutor's use of leading questions, the court reached the correct decision. Furthermore, the prosecutor asked several of the leading questions of which Goff complains while cross-examining witnesses—a practice Evid.R. 611(C) expressly allows.

{¶87} The only leading question to which Goff objected concerned the prosecutor's cross-examination of Deputy Collins regarding the number of guns found in the residence. As stated above, Evid.R. 611(C) permits leading questions on cross-examination.

{¶88} Goff further complains that the prosecutor committed misconduct during closing arguments.

{¶89} "The test for prosecutorial misconduct during closing argument is whether the remarks were improper and, if so, whether they prejudicially affected the accused's substantial rights. To determine prejudice, the record must be reviewed in its entirety." *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, ¶170 (citations omitted). The touchstone of the analysis "is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips* (1982), 455 U.S. 209, 219. We must affirm the conviction if, based on the whole record, the

prosecution's improper comments were harmless beyond any reasonable doubt. See *State v. Zimmerman* (1985), 18 Ohio St.3d 43, 45.

{¶90} Furthermore, "in reviewing a bench trial, an appellate court presumes that a trial court considered nothing but relevant and competent evidence in reaching its verdict. The presumption may be overcome only by an affirmative showing to the contrary by the appellant." *State v. Wiles* (1991), 59 Ohio St.3d 71, 86.

{¶91} Here, Goff did not object to any of the alleged instances of misconduct during closing arguments. Therefore, she has forfeited all but plain error. Because Goff has not shown that the prosecutor's alleged misconduct affected the outcome of the trial, we may not recognize the alleged error. There is no indication that the alleged misconduct improperly appealed to the trial judge's passions or encouraged the judge to disregard the law. Instead, the trial judge, as the trier of fact, looked to the relevant evidence in the record and determined that Goff failed to establish that she shot the victim in self-defense. Overwhelming evidence supports its decision, as we explain in our discussion of Goff's sixth assignment of error, and thus, we find no danger that any alleged prosecutorial misconduct influenced the trial judge's decision. Therefore, Goff has failed to show plain error.

{¶92} Accordingly, we overrule Goff's third assignment of error.

V.

{¶93} In her fourth assignment of error, Goff contends that the trial court issued eight erroneous evidentiary rulings.

{¶94} "The admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶172, citing *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus. Thus, absent an abuse of discretion, we will not disturb a trial court's evidentiary ruling. As we previously explained, an abuse of discretion implies that the trial court acted in an unreasonable, arbitrary, or unconscionable manner.

{¶95} First, we note that of the eight alleged instances of evidentiary error, Goff fails to cite any legal authority to support five of them. Therefore, we would be within our discretion to summarily dismiss her arguments regarding those five alleged errors. See App. R. 16(A)(7); App. R. 12(A)(2); see, also, *State v. Rinehart*, Ross App. No. 07CA2983, 2008-Ohio-5770, ¶37, citing *State v. McGee*, Washington App. No. 05CA60, 2007-Ohio-426, ¶21 ("It is not an appellate court's duty to discover and rationalize the basis for appellant's claim * * *."); *Knapp v. Knapp*, Lawrence App. No. 05CA2, 2005-Ohio-7105, ¶45 ("We are not obligated to search for authority to support an appellant's argument as to an alleged error."); see, also, *State v. Collins*, Cuyahoga App. No. 89668, 2008-Ohio-2363, ¶88 (stating that "the appellant carries the burden of establishing his claims on appeal through the use of legal authority and facts contained in the record"). Nonetheless, we briefly address them.

A.

{¶96} Goff first asserts that the trial court should have permitted defense counsel to question witnesses whether she seemed genuinely afraid of the

victim. She contends that such questioning would have helped establish her self-defense claim.

{¶97} The first instance she complains of concerned hearsay testimony and thus, the court properly refused to allow the testimony. Goff's counsel questioned Detective Bollinger: "Isn't it true * * * that with respect to all the people that we've mentioned so far, they all indicated to you at the time that you talked to them that [Goff] was in fear of her husband * * *?" To answer this question, the detective would have had to rely on what others had told him, rather than his own personal observations. The court properly disallowed the question on hearsay grounds.

{¶98} The second instance occurred when defense counsel asked a prosecution witness whether Goff's concern for the well-being of her children appeared to be genuine. The prosecutor objected, and the court sustained the objection. The third instance was a similar question. Although the trial court did not provide a reason for sustaining the prosecutor's objections to these two questions, we find no abuse of the court's discretion. Moreover, several of Goff's defense witnesses testified as to her fear following the domestic violence incident. Thus, even though she was unable to cross-examine prosecution witnesses about her fear of the victim, the court permitted her to present such testimony during the defense case. Therefore, we find that the trial court did not abuse its discretion.

B.

{¶99} Next, Goff contends that the court improperly allowed the State to introduce evidence regarding the victim's character during its case-in-chief. She asserts that the State may not introduce such evidence during its case-in-chief, but may only introduce it in rebuttal after the defense places the victim's character in issue.

{¶100} Evid.R. 404 governs the admission of evidence concerning a victim's character or reputation for a particular character trait. Under Evid.R. 404(A)(2), the prosecution may not introduce evidence regarding the victim's character during its case-in-chief, but may introduce such evidence in rebuttal.

{¶101} Here, the prosecution presented evidence concerning the victim's character during its case-in-chief, in contravention of Evid.R. 404(A)(2). Nonetheless, because the error occurred during a bench trial, we find that the error is harmless beyond a reasonable doubt. At the time Goff interposed the objection, the court noted that her counsel might be correct that the victim's character evidence was improper during the state's case-in-chief, yet allowed the evidence. Because Goff's defense rested upon the victim's status as a batterer, the victim's character would become an issue during her defense. Knowing this, the court, sitting as the fact-finder, could have chosen to streamline the trial by allowing the state to present character evidence during its case-in-chief.

{¶102} Moreover, other prosecution witnesses testified to the victim's character, without objection. For example, Schilling testified that he did not believe the victim dominated Goff. Other witnesses testified that the victim appeared to be a normal father and husband and that they never saw the victim

angry. Instead, prosecution witnesses testified that he was mild-mannered. Goff does not claim error in any of these instances. See *State v. Schmidt* (1979), 65 Ohio App.2d 239, 242-243 (finding that character evidence of the victim was properly admitted during state's case-in-chief when defense counsel did not object). Consequently, the trial court did not abuse its discretion by overruling her objection. Even if the court abused its discretion, because other witnesses testified regarding the victim's character without objection, its error was harmless.

C.

{¶103} Goff next contends that the trial court erred by admitting inadmissible hearsay. Evid.R. 801(C) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is generally inadmissible unless the evidence falls within one of the recognized exceptions. Evid.R. 802.

{¶104} The first instance of which Goff complains occurred during Schilling's direct testimony. He stated, in reference to overhearing a phone conversation between the victim and Goff: "Well, he explained that [Goff] wanted to meet with him, and that she had asked him to take this Saturday off, which he was scheduled to work, and he told her he had to work. He indicated this was very disappointing to her, very disappointing. He also indicated that she had been running up and down the road looking for him at the moment they were talking, or had been running up and down the road. At the very moment they were talking, she indicated she was sitting in his driveway."

{¶105} Goff also asserts that the following testimony constituted inadmissible hearsay: "* * * Yes, sir. I offered him a gun. I told him, I said, 'Bill, I got a couple guns there at the house. If you need a gun up here for protection, you can get a gun.' I said, 'I'll give you one of my guns for protection,' and he wouldn't take it. He wouldn't take it because he said, 'Jimmy said I can't take it because of the Restraining Order,' or whatever it was they had against him. He said, 'I'm not allowed to be in possession of a firearm."

{¶106} Goff did not object to any of the above testimony. Therefore, she has forfeited all but plain error. Goff has not shown how the testimony affected the outcome of the trial. Thus, we decline to recognize it as plain error. Therefore, we find that the trial court did not abuse its discretion.

D.

{¶107} Goff further asserts that the trial court erred by prohibiting defense counsel from asking Dr. Resnick a hypothetical question. As background, Dr. Resnick first agreed with defense counsel that a certain video, by itself, did not substantiate a domestic violence situation. Second, Dr. Resnick theoretically agreed that the video plus the testimony of someone in the room who observed events outside the range of the camera may be enough to substantiate a domestic violence situation. Counsel then asked, "And when you take all that into consideration, along with the video, that may substantiate beyond a reasonable doubt that a domestic violence incident did occur in that room, correct?" At that point, the prosecutor objected and defense counsel re-phrased the question as, "It may substantiate to your satisfaction that a domestic violence

did occur?" The prosecutor again objected, asserting that the question was "too hypothetical." The court sustained the objection.

{¶108} Goff has failed to show how the trial court abused its discretion by refusing to allow defense counsel to pose the hypothetical. The court reasonably could have determined that the question required the assumption of too many facts not in evidence. Therefore, we find that the trial court did not abuse its discretion.

E.

{¶109} Goff next contends that the trial court erred by ruling that she had to testify before her expert could testify regarding the battered woman syndrome. She asserts that defense counsel, after consulting with the client, must retain the decision regarding when to present testimony and thus, that the trial court's decision deprived Goff of her right to decide when to testify at trial. She cites *Brooks v. Tennessee* (1972), 406 U.S. 605 to support this argument.

{¶110} In *Brooks*, a state statute required a criminal defendant who chose to take the stand to do so before the defendant could present any other defense witnesses. During Brooks' criminal trial, defense counsel moved the court to allow Brooks to testify after the other defense witnesses testified. The trial court denied this motion, finding that it could not deviate from the statute. The defense ultimately called two witnesses and Brooks did not testify.

{¶111} On appeal to the United States Supreme Court, Brooks asserted that the statutory requirement that a defendant testify first violates the United States Constitution. The Court agreed, concluding that the statute infringed upon a

defendant's right against self-incrimination. The court stated that the statute was "an impermissible restriction on the defendant's right against self-incrimination, 'to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty * * * for such silence.'" Id. at 609, citing *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

{¶112} The court also found that the statute violated a defendant's right to due process. The court explained, "Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right. By requiring the accused and his lawyer to make that choice without an opportunity to evaluate the actual worth of their evidence, the statute restricts the defense--particularly counsel--in the planning of its case. Furthermore, the penalty for not testifying first is to keep the defendant off the stand entirely, even though as a matter of professional judgment his lawyer might want to call him later in the trial." *Brooks* at 612-613.

{¶113} Because in *Brooks*, the defendant did not take the stand, we question whether it applies to the facts here, where Goff did take the stand. However, even if the trial court's decision was improper under *Brooks*, Goff has not shown how the decision prejudiced her case. She does not claim that her testimony would have been any different had her expert testified before she did. Furthermore, our review of the record shows that while Goff's counsel initially objected to this procedure, her counsel later agreed to it. Therefore, we find that the trial court did not abuse its discretion.

F.

{¶114} Goff next contends that the trial court erred by failing to record all "critical stage proceedings." She further asserts that there is no evidence that she was present at these hearings or that she waived her right to be present at the hearings.

{¶115} We address Goff's argument regarding the court's failure to record certain proceedings in our discussion of Goff's ninth assignment of error.

{¶116} With respect to Goff's claim that she was not present at certain proceedings, she does not specify the proceedings from which she was absent or cite any authority to show that her absence from these proceedings was of constitutional significance such that we must reverse her conviction. Additionally, she summarily raises this argument. For these reasons, we forthwith dismiss this argument.

G.

{¶117} Goff further contends that the trial court erred by admitting hearsay testimony over objection. She claims that the following testimony constituted inadmissible hearsay: "He explained that [Goff] wanted to meet with him and was looking for him." When defense counsel objected, the prosecutor argued that the testimony was not hearsay because it was not being offered for the truth of the matter asserted, but instead, to show the victim's state of mind.

{¶118} "To constitute hearsay, two elements are needed. First, there must be an out-of-court statement. Second, the statement must be offered to prove the truth of the matter asserted. If either element is not present, the statement is not 'hearsay.' In *State v. Thomas* (1980), 61 Ohio St.2d 223, 232, this court

held that testimony which explains the actions of a witness to whom a statement was directed, such as to explain the witness' activities, is not hearsay. Likewise, it is non-hearsay if an out-of-court statement is offered to prove a statement was made and not for its truth, to show a state of mind, or to explain an act in question." (internal cites omitted.) *State v. Maurer* (1984), 15 Ohio St.3d 239, 262.

{¶119} Here, the trial court reasonably could have determined that the testimony was not offered for the truth of the matter asserted, but instead, to show the victim's state of mind and to explain the reason why he went to Schilling's home. Thus, the court did not abuse its discretion by allowing the testimony.

H.

{¶120} Finally, Goff contends that the trial court erred by permitting the State to ask Dr. Miller, on cross-examination, and Dr. Resnick, on direct examination, questions requiring a legal conclusion. She asserts that the following question to Dr. Miller was improper, "And you testified in your opinion is that she had reason to believe and reasonably believed that she and her children were in imminent danger of death or serious bodily injury. Do you understand where the Battered Woman Syndrome fits into the law in Ohio in a murder case?" Goff also contends that the following question to Dr. Resnick was improper, "Even if a person is found by a psychiatrist, and Doctor Miller found that, you didn't, but he did, to be a battered woman, is it something that can occur that the battered

woman can elect to kill the husband outside of the Battered Woman Syndrome as a cause factor [sic]?"

{¶121} We find that both questions did not call for a legal conclusion. Instead, the prosecutor asked Dr. Miller whether he understood how the battered woman syndrome applied in Ohio. And, the prosecutor asked Dr. Resnick for his professional opinion whether a woman who suffers from the battered woman syndrome could nonetheless kill her husband for a reason other than being a battered woman. Therefore, we find that the trial court did not abuse its discretion.

{¶122} Accordingly, we overrule Goff's fourth assignment of error.

VI.

{¶123} In her fifth assignment of error, Goff contends that the trial court erred by permitting Dr. Resnick to testify regarding her motive and state of mind.

{¶124} We again note that the trial court has broad discretion regarding the admission of evidence.

{¶125} "'In Ohio, to prove self-defense it must be established that the person asserting this defense had " * * * a bona fide belief that he [she] was in imminent danger of death or great bodily harm and that his [her] only means of escape from such danger was in the use of such force." (Emphasis added.)' (Bracketed material sic.) *Koss* recognized that since Ohio has a subjective test to determine whether a defendant properly acted in self-defense, the defendant's state of mind is a crucial issue." (internal cites omitted.) *Haines* at ¶30; see, also, *Mariana*

(stating that a defendant's mens rea is at issue to the extent it relates to the second element of self-defense).

{¶126} Here, before Dr. Resnick testified, the defense witness, Dr. Miller testified. The defense extensively questioned Dr. Miller regarding the substance of Dr. Resnick's report, including the statements he made concerning Goff's possible motives for shooting the victim. Thus, the defense directly placed these statements, to which Dr. Resnick later testified, directly at issue.

{¶127} Moreover, as *Haines* explicitly states, the defendant's state of mind is a crucial issue in a self-defense case based upon the battered woman syndrome. Thus, the state could properly question Dr. Resnick regarding Goff's state of mind to help rebut Goff's claim of self-defense. Furthermore, Goff placed her state of mind at issue by questioning her own expert regarding her state of mind. Therefore, the trial court did not abuse its discretion by allowing this testimony.

{¶128} Accordingly, we overrule Goff's fifth assignment of error.

VII.

{¶129} Goff contends in her sixth assignment of error that the trial court's finding that she did not act in self-defense is against the manifest weight of the evidence.

{¶130} When an appellate court considers a claim that a conviction is against the manifest weight of the evidence, the court must dutifully examine the entire record, weigh the evidence, and consider the credibility of witnesses. *State v. Issa* (2001), 93 Ohio St.3d 49, 67. The reviewing court must bear in mind, however, that credibility generally is an issue for the trier of fact to resolve. See

State v. DeHass (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Once the reviewing court finishes its examination, the court may reverse the judgment of conviction only if it appears that the fact-finder, in resolving conflicts in evidence, "'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶131} If the prosecution presented substantial evidence upon which the trier of fact reasonably could conclude, beyond a reasonable doubt, that the essential elements of the offense had been established, the judgment of conviction is not against the manifest weight of the evidence. See *State v. Eley* (1978), 56 Ohio St.2d 169, syllabus. A reviewing court should find a conviction against the manifest weight of the evidence only in the "'exceptional case in which the evidence weighs heavily against conviction.'" *Thompkins* at 387, quoting *Martin* at 175; see, also, *State v. Lindsey* (2000), 87 Ohio St.3d 479, 483.

{¶132} Furthermore, we must give deference to the trier of fact's credibility determinations. "'It is the trier of fact's role to determine what evidence is the most credible and convincing. The fact finder is charged with the duty of choosing between two competing versions of events, both of which are plausible and have some factual support. Our role is simply to insure the decision is based upon reason and fact. We do not second guess a decision that has some basis in these two factors, even if we might see matters differently.' We leave the issues of weight and credibility of the evidence to the fact finder, as long as there

is a rational basis in the record for their decision. We defer to the fact finder on these issues because the fact finder '"is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of proffered testimony."' (internal cites omitted.) *State v. Babu*, Athens 07CA36, 2008-Ohio-5298, ¶31.

{¶133} Here, substantial evidence supports the trial court's decision that Goff failed to prove that she shot the victim in self-defense.

{¶134} Self-defense is an affirmative defense that the defendant must prove by a preponderance of the evidence. R.C. 2901.05(A); *State v. Palmer* (1997), 80 Ohio St.3d 543, 563; *State v. Martin* (1986), 21 Ohio St.3d 91, syllabus, aff'd *Martin v. Ohio* (1987), 480 U.S. 228. To prove self-defense, the evidence must show that: (1) the accused was not at fault in creating the situation that gave rise to the situation; (2) the accused had a bona fide belief that she was in imminent danger of harm and that her only means of escape from such danger was by the use of force; and (3) the defendant must not have violated any duty to retreat or to avoid the danger. *State v. Williford* (1990), 49 Ohio St.3d 247, 249; *State v. Robbins* (1979), 58 Ohio St.2d 74, paragraph two of the syllabus. Self-defense "is placed on the grounds of the bona fides of defendant's belief, and reasonableness therefor, and whether, under the circumstances, he exercised a careful and proper use of his own faculties." *State v. Sheets* (1926), 115 Ohio St. 308, 310. Because of the third element, in most cases, "a person may not kill in self-defense if he has available a reasonable means of retreat from the

confrontation." *Williford* at 250, citing *State v. Jackson* (1986), 22 Ohio St.3d 281; *Robbins* at 79-81; *Marts v. State* (1875), 26 Ohio St. 162, 167-168.

{¶135} Here, the trial court's finding that Goff failed to prove, by a preponderance of the evidence, that she acted in self-defense is not against the manifest weight of the evidence. Although Goff devotes much of her argument recounting the allegedly horrific conditions she endured throughout her marriage to establish that she was in imminent fear of bodily harm to herself or her children, she neglects to argue whether she was at fault in creating the situation or whether she violated a duty to retreat. Substantial evidence supports the trial court's finding that Goff was at fault in creating the situation. She chose to go to the victim's home on the night of the shooting, knowing that the victim was not expecting her. The trial court was free to disbelieve her testimony that she needed to go to the victim's home so that she could protect the children from being killed. The trial court justifiably could have discredited all of her testimony that the victim had been threatening to kill her and the children. Without such evidence, Goff had no justifiable reason to confront the victim on the night of the shooting. She had no reason to be at his home. Thus, she was at fault in creating the situation. She could have chosen not to go to his house with two loaded weapons.

{¶136} Furthermore, substantial evidence supports the trial court's finding that Goff violated a duty to retreat or to avoid the danger. As we previously recognized, Goff had a duty to retreat because she was not attacked in her own home. Instead, she went to her estranged husband's home. Goff claimed that

once inside the home, she thought the victim was going to kill her. However, law enforcement officers previously had removed all guns from his home and no weapons were found inside his home after the shooting. Moreover, Goff did not claim to see a gun on the victim before she shot him.

{¶137} All in all, the evidence does not substantiate Goff's claim of a helpless woman caught in a situation with no escape. The trial court found much of Goff's testimony, especially the victim's alleged animal mutilation, incredible. Additionally, the state discredited Goff's story by noting inconsistencies in her various accounts of the reason she shot the victim and by discrediting her testimony. In finding that Goff did not act in self-defense, the trial court apparently discredited much of her testimony. The exact reason for Goff's shooting may never be known, but the credible evidence does not reasonably support a finding that she shot the victim in self-defense.

{¶138} Accordingly, we overrule Goff's sixth assignment of error.

VIII.

{¶139} Goff contends in her seventh assignment of error that the record does not contain sufficient evidence to support her conviction. Specifically, she claims that the state failed to prove, beyond a reasonable doubt, that "Goff employed a specific scheme to implement a calculated decision to kill her husband." Goff asserts that simply because she was armed on the night of the shooting does not mean that she acted with prior calculation and design.

{¶140} The function of an appellate court when reviewing a case to determine whether the record contains sufficient evidence to support a criminal conviction

"is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Smith*, Pickaway App. No. 06CA7, 2007-Ohio-502, ¶33, citing *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, superseded by constitutional amendment on other grounds; see, also, *Jackson v. Virginia* (1979), 443 U.S. 307, 319.

{¶141} The sufficiency-of-the-evidence test "raises a question of law and does not allow us to weigh the evidence." *Smith* at ¶34, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Instead, the sufficiency-of-the-evidence test "gives full play to the responsibility of the trier of fact to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Id., citing *Jackson* at 319. This court will "reserve the issues of the weight given to the evidence and the credibility of witnesses for the trier of fact." Id., citing *State v. Thomas* (1982), 70 Ohio St.2d 79, 79-80; *DeHass* at paragraph one of the syllabus.

{¶142} R.C. 2903.01 defines the offense of aggravated murder: "No person shall purposely, and with prior calculation and design, cause the death of another[.]"

{¶143} "There is no bright-line test to determine whether prior calculation and design are present. Rather, each case must be decided on a case-by-case

basis." *State v. Braden*, 98 Ohio St.3d 354, 2003-Ohio-1325, ¶61. "Where evidence adduced at trial reveals the presence of sufficient time and opportunity for the planning of an act of homicide to constitute prior calculation, and the circumstances surrounding the homicide show a scheme designed to implement the calculated decision to kill, a finding by the trier of fact of prior calculation and design is justified." *State v. Cotton* (1978), 56 Ohio St.2d 8, paragraph three of the syllabus.

{¶144} While '"[n]either the degree of care nor the length of time the offender takes to ponder the crime beforehand are critical factors in themselves,"' momentary deliberation is insufficient. *State v. D'Ambrosio* (1993), 67 Ohio St.3d 185, 196[,] quoting the 1973 Legislative Service Commission Comment to R.C. 2903.01. Prior calculation and design "embod[ies] the classic concept of the planned, cold-blooded killing while discarding the notion that only an instant's prior deliberation is necessary." *State v. Taylor* (1997), 78 Ohio St.3d 15, 19, 1997-Ohio-243, certiorari denied, 522 U.S. 851. Rather than instantaneous deliberation, prior calculation and design requires a scheme designed to implement the calculated design to kill. *Cotton* at 11. "Prior calculation and design requires 'some kind of studied analysis with its object being the means by which to kill.'" *State v. Ellenwood* (Sept. 16, 1999), Franklin App. No. 98AP-978, quoting *State v. Jenkins* (1976), 48 Ohio App.2d 99, 102.

{¶145} The state can prove "prior calculation and design" from the circumstances surrounding a murder in several ways: (1) evidence of a preconceived plan leading up to the murder, (2) evidence of the perpetrator's

relationship with the victim, including evidence of any strains in that relationship, or (3) evidence that the murder was executed in such a manner that circumstantially proved the defendant had a preconceived plan to kill. See, e.g., *Taylor,* supra, at 19; *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, certiorari denied (2003), 537 U.S. 1235; *State v. Goodwin* (1999), 84 Ohio St.3d 331; *State v. Campbell* (2000), 90 Ohio St.3d 320. "[P]rior calculation and design can be found even when the killer quickly conceived and executed the plan to kill within a few minutes." *State v. Coley* (2001), 93 Ohio St.3d 253, 264, citing *State v. Palmer* (1997), 80 Ohio St.3d 543, 567-568, and *Taylor* at 20-23.

{¶146} Here, the State presented sufficient evidence to prove that Goff acted with prior calculation and design. The day before the shooting, Goff went to her mother's home to obtain a second weapon. At least several hours before the shooting, Goff had planned to go, unannounced, to the victim's house. Although she claims that she planned to go there so that he would not kill her or the children, the trial court rightly could have discredited this testimony, especially given her conflicting reasons for going to the victim's house. She claimed that she went there so that he would just kill her and not the children, so that she could talk him out of killing her and the children, and so that she could scare him. However, she ended up doing none of these things, but instead fatally shot him fifteen times and did not miss a single shot. Moreover, she and the victim had a strained relationship. This evidence is more than sufficient to prove prior calculation and design. Circumstantially, the evidence tends to show that Goff gave more than momentary deliberation to shooting the victim.

{¶147} Therefore, we find that, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime of aggravated murder proven beyond a reasonable doubt.

{¶148} Accordingly, we overrule Goff's seventh assignment of error.

IX.

{¶149} Goff contends in her eighth assignment of error that she did not receive effective assistance of counsel. She claims that counsel rendered ineffective assistance of counsel in five respects: (1) counsel failed to request Crim.R. 16(B)(1)(g) material; (2) counsel failed to file a Crim.R. 29 motion at the close of the case; (3) counsel failed to object to hearsay testimony; (4) trial counsel joined in the state's motion finding that as a result of Goff's husband's death, the attorney-client privilege was waived and her husband's domestic attorney could testify; and (5) counsel failed to object to the prosecutor's improper closing argument.

{¶150} "An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." *Wiggins v. Smith* (2003), 539 U.S. 510, 511, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687; see, also, *State v. Bradley* (1989), 42 Ohio St.3d 136. "If one prong of the *Strickland* test disposes of a claim of ineffective assistance of counsel, we need not address both aspects." *State v. Dickess*, 174 Ohio App.3d 658, 678, 2008-Ohio-39, ¶63, *State v. Martin*, Scioto App. No. 06CA3110, 2007-Ohio-4258.

{¶151} "To establish deficient performance, a petitioner must demonstrate that counsel's representation 'fell below an objective standard of reasonableness.'" *Wiggins* at 521, quoting *Strickland* at 688. The United States Supreme Court has refrained from "articulat[ing] specific guidelines for appropriate attorney conduct and instead ha[s] emphasized that '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Id., quoting *Strickland* at 688. Thus, debatable trial tactics and strategies do not constitute ineffective assistance of counsel. See, e.g., *State v. Clayton* (1980), 62 Ohio St.2d 45, 49, certiorari denied (1980), 449 U.S. 879.

{¶152} Moreover, when addressing an ineffective assistance of counsel claim, the reviewing court should not consider what, in hindsight, may have been a more appropriate course of action. See *State v. Phillips* (1995), 74 Ohio St.3d 72, 85, (a reviewing court must assess the reasonableness of the defense counsel's decisions at the time they are made). Rather, the reviewing court "must be highly deferential." *Strickland* at 689. As the *Strickland* court stated, a reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689.

{¶153} In evaluating whether claimed deficient performance prejudiced the defense, the relevant inquiry is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686. Thus, "[t]he defendant must show that

there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694; see, also, *Bradley* at paragraph three of the syllabus ("To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different").

{¶154} Here, Goff does not specifically assert how any of the alleged deficiencies prejudiced her. Rather, she simply lists the five claimed instances of ineffective assistance of counsel, without any substantive argument. She cites no authority in support of the five instances of ineffective assistance of counsel. Under these circumstances, we decline to address the claims in detail. Instead, we find that even if any of the five instances constituted deficient performance, counsel's allegedly deficient performance did not prejudice Goff's defense. The record shows that Goff received a fair trial and that the result was reliable. Nothing in the record indicates that the outcome of the trial would have been any different but for counsel's alleged errors.

{¶155} Accordingly, we overrule Goff's eighth assignment of error.

X.

{¶156} Finally, Goff contends in her ninth assignment of error that the trial court erred by failing to record all the proceedings in the case.

{¶157} Under Crim.R. 22, "[i]n serious offense cases all proceedings shall be recorded." However, a trial court's failure to adhere to the Crim.R. 22 recording

requirements does not require an automatic reversal of a criminal defendant's conviction. See, e.g., *State v. Palmer* (1997), 80 Ohio St.3d 543, 554. A reviewing court will not reverse a defendant's conviction even though a trial court failed to adhere to Crim.R. 22 unless the defendant demonstrates on appeal that: (1) he or she either requested that the trial court record the proceeding at issue or objected to the trial court's failure to comply with the recording requirements; (2) he or she made an effort on appeal "to comply with App.R. 9 and to reconstruct what occurred or to establish its importance"; and (3) "material prejudice resulted from" the trial court's failure to record the proceedings at issue. *Palmer* at 554. The Ohio Supreme Court has "repeatedly refused to reverse convictions or sentences on the basis of unrecorded conferences when a defendant has not taken these steps." *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, ¶160, citing *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, ¶¶182-184; *State v. Nields* (2001), 93 Ohio St.3d 6, 27; *Goodwin,* supra, at 340.

{¶158} Here, Goff has not demonstrated that: (1) she either requested that the trial court record the proceedings at issue or objected to the trial court's failure to comply with the recording requirements; (2) she made an effort on appeal "to comply with App.R. 9 and to reconstruct what occurred or to establish its importance"; or (3) "material prejudice resulted from" the trial court's failure to record the proceedings at issue. Consequently, because she failed to establish any of the foregoing three factors, we will not reverse her conviction due to the trial court's failure to record certain proceedings.

{¶159} Accordingly, we overrule Goff's ninth assignment of error.

XI.

{¶160} In conclusion, we overrule all nine of Goff's assignments of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and Appellant pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Harsha, J.: Concurs in Judgment and Opinion as to remainder of Opinion.
Concurs in Judgment Only as to Assignment of Error I, Part C.
Abele, J.: Concurs in Judgment and Opinion.

For the Court

BY: _____
Roger L. Kline, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

APPENDIX

On April 30, 2007, a twelve-day bench trial began. Lawrence County Sheriff's Detective Aaron Bollinger testified that he responded to the Goff residence on the date of the fatal shooting. He spoke with Goff on two separate occasions: (1) before he viewed the inside of the residence where Goff had shot the victim; and (2) following his inspection of the residence. Detective Bollinger stated that upon his initial interaction with Goff, Goff appeared upset and "was making some sounds," but he never saw her shed any tears. Goff told the detective that she shot the victim because she did not want the victim "to hurt the kids."

Detective Bollinger asked Goff to explain to him what had led to the shooting. Goff stated that the victim called her the day before the shooting and told her that he had discovered where she and the children had been hiding during the two months that the parties had been separated. She claimed that since the parties' separation, she has been "running all over the place trying to get away from him." Goff told the detective that she had obtained a protection order, but the victim still kept calling her. She stated that the victim told her that he had found her and that he was going to kill her and the children on the following Monday.

Goff told the detective that she last talked to the victim the night before the shooting. She stated that he called her two times and tried to persuade her to "drop the charges and come back cause then he said he wouldn't kill us." She

told him that she would not do that. She claimed that he had been telling her "for years" that he was going to kill the children.

Goff stated that during the second phone call, at approximately 9:30 p.m., the victim stated that he wanted to meet with her and the children. She attempted to persuade him to meet with her alone, and not the children. He told Goff that he could not "do that," but instead he needed to meet "all three at the same time." Goff pleaded with him to not "hurt [the children], just hurt me." She claimed the victim "said no." Goff then explained to Detective Bollinger that the victim told her he knew where she was and "he said he was going to kill me on Monday. That he was going to find me, that he was off work, and he said he was going to kill me, it didn't matter where I went because he was going [to] spend all day and he was going to kill me. * * * * He said nobody would do anything because he had called and they hadn't done anything and he had all those guns in the house and they hadn't done anything and he had hurt the baby and they hadn't done anything and he had hurt me and they hadn't done anything and he said he had found me at the shelters and they hadn't done anything. He said you know I'm going to do it. * * * * He said he wouldn't pay child support again because there wouldn't be any children to pay it to. I said why would you say that about your babies? He said he didn't care about them. He said he just wanted his house. He said why didn't, why didn't I just not have kids? He said why didn't we just leave it like it was? I said Bill, they're here. I said don't you love your kids? He said I just need to see you all three together. I said no. Just meet me, just take me. He said no, I know where you're at and I'm going to kill

you. Oh my God. I kept telling him the last call when I called him back please, please meet just me. He kept saying I can't. I can't, I can't. I got to meet all three of you together. I can't meet just you. I said anywhere, Bill. I'll even come to the house. I said I know that's stupid and you'll probably kill me but I'll even come to the house. Please just don't hurt the kids. He kept saying I can't, I can't. Oh my God."

Goff told the detective that she decided to go to the victim's residence the evening of the shooting so that he would just kill her and so the children would be safe. She thought that law enforcement officers would arrest him for killing her before he could locate the children and kill them. Goff informed Detective Bollinger that she left the children at her grandparents' house and then drove her grandparents' car to her father's house, which is next door to the victim's residence. She stated that she parked the car under her father's carport and took two loaded weapons with her to the victim's residence. She claimed that the victim had told her throughout the marriage that she should always carry two guns "because one might jam." Goff thought that she would arrive at the victim's residence before he returned home from work, but when she arrived, he already was home. She stated that she was scared and thought: "I'll just park at dad's house and I'll walk over because then maybe I'll have time to knock on the door before he gets a gun and shoots me. Then I thought no, I can't just walk over there because he'll shoot me in the middle of the grass."

She walked to the victim's house and knocked on the front door. Goff stated that the victim opened the door and stated: "[H]ell, I can't believe you

have the guts to come to the house. I didn't think you'd really do it. He said get in here. So I walk in and he shut the door and he stood in front of the door and he said you know I'm going to kill you. He said you know I'm going to kill you and I know you're [sic] kids are at your grandparents[‘] house right now and then I'm going to go kill them and there's nothing you can do about it. So, I thought, oh my God, he's really going to do it. I pulled out the gun * * * * and I like held it down at my side and I said just let me leave. I said if you're really that serious about killing us just let me leave and he said you know I'm not going to let you out of here. He laughed and he said you won't shoot me, you won't kill me, you don't have the guts. I lifted up the gun and I shot it and I tried to pull the trigger again and it wouldn't pull. It was just like he said. It was just like he said, he told me that's what would happen. I pulled as hard as I could and it wouldn't shoot." Goff stated that the gun discharged the first time, but she was not sure what she hit. She pulled the other gun out of her left pocket and pulled the trigger. She kept shooting until "it wouldn't shoot anymore." She stated that she then did not know what to do, so she picked up the other gun and pulled it back "and something came out of it." She kept shooting the gun until it stopped working. She saw the victim laying on the floor. She was not sure if he was moving and she was scared. She used the phone to dial 911 "because I was afraid he was going to get up and shoot me and I knew I didn't have anymore bullets." She did not see the victim with a gun, but he had a leather case on the side of his pants. After she called 911, she placed the guns on the piano bench. Although she did not see him moving, she was still frightened that he could harm her. Goff

explained that the victim had told her "that if anything ever happened he'd play dead and he'd get me and he'd kill me."

Detective Bollinger then ended the conversation and went to view the crime scene. After viewing the crime scene, he returned to ask Goff additional questions. Goff told the detective that when she first shot the victim, he was standing with his back to the door and had his hand on the door knob. She is not sure where the first shot hit him, but she thought "it must have hit up kind of high-ish because he didn't go down, he kind of went, his arms went up I think. And he turned and he stepped so that he was then facing the double window there. He turned over into that corner. Because the gun wouldn't fire again." Goff stated that she had been standing close to the kitchen door and piano when shooting the victim. She stated that she was trying to walk towards the door. When she started shooting with the second gun, the one that worked, the victim had his back to the window and his arm towards the door. She thinks he fell to the ground after the first or second shot. After he fell to the ground, she remained standing in the same place and emptied the first gun. She then used the second gun and emptied it. She told the detective that the victim had told him that if anyone ever shot him, he'd play dead and then, when the shooter attempted to step over him, he would grab the shooter's ankles and kill him or her. She thought that the victim was simply playing dead. She told the detective that her intention that evening had been "to get [the victim] to either calm down and not hurt my babies or just hurt me so that you, the police, would know he was serious and my babies would be safe." Goff explained that the victim stated "he was

going to kill me first and he did laugh at me and say that I knew that he wasn't going to let me go and that I knew he was going to kill those babies. And that's when I pulled the gun out and held it down. And he laughed at me and told me I didn't have the guts to shoot him. He said you know you won't shoot me, you know you won't kill me, you don't have the guts. So I lifted the gun up and he was laughing in my face. Telling me he was going to kill the kids. And that's when I pulled the first time and then it wouldn't pull again."

Earl P. Schilling, who lives two miles from the Goff residence, testified that he knew the victim and his family well and had a good relationship with the victim. Schilling testified that he never knew the victim to be quick to anger and that he was shocked when he heard that the victim had been arrested for domestic violence. He stated that the victim never raised his voice and he never saw him angry at anyone. Schilling did not believe that the victim dominated Goff, but instead thought that Goff "was boss."

Schilling testified that on March 17, 2006, the victim called him and asked if he could stay at his house for a while. The victim explained to Schilling that Goff wanted to meet with him, but he did not want to for fear of violating the protection order. Schilling obliged and allowed the victim to park his vehicle in the garage so that it would be out of sight from Goff, should she happen to be in the area looking for him. Schilling stated that the victim remained at his home until 10:30 p.m., and that during that time, Goff called twice. Schilling testified that the victim did not answer the phone the first time Goff called, but decided to speak with her the second time. Although Schilling did not hear the victim make

any threats to Goff, he did not hear the entire conversation. Schilling stated that when Goff called the second time, the victim excused himself from the room and continued the conversation out of Schilling's presence.

After the victim finished the phone conversation, he returned to the room with Schilling. The victim told Schilling that Goff wanted to meet with him. He stated that Goff requested the victim to take the following day off from work so that they could meet. The victim told Goff that he had to work and he indicated to Schilling that she was "very" disappointed he would not meet with her. The victim also told Schilling that Goff had been driving up and down the road looking for him that evening and that while they had been talking, she had been sitting in his driveway.

Schilling testified that the victim stayed at his house until approximately 10:30 p.m. At that time, Schilling drove the victim to his home to make sure Goff was not waiting for him and then drove him back to pick up his car to take home.

Don Fraley, a life-long friend to the victim, testified that the victim was not an argumentative person and that he never saw him acting mean toward another person. He stated that the victim was "an even keel kind of guy."

James Turner, a close family friend to the victim, testified that he thought Goff was the dominant figure in the marriage. Turner stated that after the alleged domestic violence incident, he visited the victim at his home. Turner knew that the victim no longer had any guns and offered to give the victim a gun for protection. Turner stated that the victim refused his gun offer and told Turner that the protection order prohibited him from possessing a gun.

Frederick Fisher--an attorney with Mark McCown, who represented the victim in the domestic violence and divorce proceedings--testified that the victim contacted him late in the afternoon on March 17, 2006, to inquire whether he could fulfill Goff's request to meet without violating the protective order. Fisher advised him not to meet with Goff until Fisher could contact her attorney.

Jesse Holcomb testified that he lives in the house next door to the victim and has known the victim since he was a young boy. Holcomb believed Goff and the victim to be a happy, normal couple. He stated that he did not notice any behavior to indicate Goff was frightened of the victim. He testified that he observed the victim playing with the children outside and that he played with them like any father would. Holcomb believed that the victim enjoyed the children. Holcomb testified that he had observed Goff leave the house without the victim on more than one occasion. Holcomb's wife, Mona, likewise testified that Goff did not seem afraid of the victim and that she came and went as she pleased.

The state then presented the testimony of a forensic expert who examined the guns. He test-fired the two guns Goff used in the shootings and did not detect any problems. Following his testimony, the state rested and Goff moved for a judgment of acquittal. She argued that the state failed to introduce any evidence regarding prior calculation and design. The state asserted that evidence that she took two loaded guns to the house she no longer lived in and fired fifteen rounds sufficiently showed prior calculation and design. The court overruled the motion.

In her defense, Goff did not dispute that she shot the victim, but claimed that she did so in self-defense. She claimed that because she suffered from the battered woman syndrome, she reasonably believed that she was in imminent danger at the time she shot the victim. She further presented testimony suggesting that the victim had been poisoning her with some substance that caused her to suffer from various unexplained medical conditions.

Goff's mother, Karen Gearheart, stated that shortly after she and her family moved to the house next door to the victim, Goff began experiencing unexplained medical problems that continued into Goff's marriage. Gearheart explained that one time, the victim had offered her a Mountain Dew, something that he had never done before. Later that day while driving home, she started feeling car sick. Upon arriving home, she became violently ill. Gearheart also claimed that the victim poisoned some of her animals with anti-freeze.

Gearheart stated that on January 18, 2006, Goff called her and was crying. Goff told Gearheart that the victim had threatened to kill her and the children. Goff further told Gearheart that the victim had kicked the youngest child (who had recently had abdominal surgery) in the stomach, causing the child to fly across the room. Goff informed Gearheart that the victim previously had stated that he would kill Goff, but stated that he had never before threatened to kill the children. Gearheart testified that she told Goff to call the police. Gearheart stated that at first, Goff resisted calling the police, but she eventually relented.

Gearheart then went to the house to help Goff. When she arrived, a sheriff's deputy had already arrived and Goff was upset. Gearheart stated that

the officers searched the home and discovered sixty-three guns. She stated that the officers initially placed the guns in Deputy Collins' police cruiser. However, a sergeant later directed the law enforcement officers not to confiscate the guns. Instead of returning them to the victim's house, Gearheart placed them in the trunk of her car and took them home.

Later that evening, Goff and the children checked into Safe Harbor, a domestic violence shelter. Gearheart stated that Goff wanted to go somewhere safe and was worried that the victim would find her if she stayed with relatives.

On cross-examination, Gearheart explained how Goff described the alleged domestic violence incident: "She told me that [the victim] had come downstairs. He had a doctor's appointment that morning and my mother was going to go over and watch the children. He had come downstairs, he was being harsh with the children. He had shoved Lauren away from him two or three times. She had told him, 'If you're going to talk to the kids like that, just go on back upstairs.' He wouldn't go back upstairs. Repeated efforts. She finally told him that if he was going to act like that, that she was going to get the camcorder out and he could see that he did act like that, because he denied it in the past. He then got up, yelled at Lauren, came after Megan, was shaking her, bouncing her head off the couch, the wall behind the couch, trying to take the camcorder away from her, telling her * * * * The baby was behind [the victim], headed toward his mother. [The victim] looked back, saw the baby and back kicked the baby across the living room." Gearheart stated that Goff had represented to her

that she had been videotaping the victim, but Goff told Deputy Collins that she had been videotaping the children when the alleged violence erupted.

Ross County Sheriff's Deputy Wes Collins, formerly with the Lawrence County Sheriff's Office, testified that he responded to the January 18, 2006 alleged domestic violence incident at the Goff residence. He stated that upon his arrival, Goff seemed rather frantic. Deputy Collins thought Goff seemed frightened and concerned for her and her children's safety. Goff claimed that the victim assaulted her and one of her children and that he had threatened to kill her and the children. Goff told the deputy that the victim stated he had a bomb in the garage and would blow up the house.

Deputy Collins stated that upon searching the house, he located four firearms in the living room and kitchen. Deputy Collins related Goff's explanation of the alleged domestic incident as follows: "She described it as she was sitting on the couch with him and the children was [sic] playing and she was video taping, and that he was somewhat groggy, sleepy and the children was being kind of loud, and at that point she described it that he became irate and violent. There was a confrontation between her and him over the video tape. I believe it says in my narrative, she says she was grabbed in a manner that made her fear her safety is the way she described it to me, and that I believe the youngest child, who she stated she was in fear of the fact that he had surgery, was kicked in the stomach actually is what she stated to me." She stated that the victim "shook her violently and then also started making some threats."

Deputy Collins testified that after officers recovered the guns, he intended to "route them as evidence due to the fact that [the victim] had made threats to use a firearm, at least for safe keeping until the court case went to trial." Deputy Collins then spoke with Sergeant Goodall, the on-duty supervisor, who told him not to "route them," because they were marital assets. The deputy testified that the sergeant told him he could release the guns to Goff.

Deputy Collins stated that he discovered approximately twelve loaded firearms throughout the living area of the home that would have been easily accessible to the victim and that the entire search yielded sixty-three firearms. The deputy testified that Goff did not seem comfortable with the firearms and asked him to unload them.

Deputy Collins stated that due to Goff's demeanor and the number of firearms recovered, he arranged for Goff to meet with a domestic violence counselor, something he does not normally do.

Goff told the deputy that after the alleged domestic incident, she drove the victim to the hospital to receive treatment for fungal meningitis. Goff's mother agreed to pick up the victim at the hospital and to then help law enforcement officers arrest him. Deputy Collins later arrested the victim for the alleged domestic violence. He stated that the victim was cooperative following his arrest and that he seemed "taken aback by being arrested."

On cross-examination, it was revealed that just before the deputy arrived on the scene, Goff videotaped the contents of the house and narrated it. During the videotape, Goff apparently was calm and collected, in contrast to her

demeanor when the deputy arrived. The alleged incident had happened hours before the deputy's arrival, yet when he arrived she was frantic. Additionally, even though Goff claimed to be terrified of the victim, she nevertheless drove him to the hospital after the incident. She claimed that she wanted to get him out of the house so she could contact the police.

Sarah Cox, a domestic violence counselor at Safe Harbor, met with Goff following the January 18, 2006 incident. She testified that she believed Goff to be genuinely fearful of the victim.

Bernie Wrubel, the former director of client services and the in-house therapist at Safe Harbor, likewise testified that Goff appeared fearful of her husband throughout her stay at Safe Harbor.

Jennifer Posey, another employee at Safe Harbor, testified that when she first met with Goff on January 18, she thought Goff appeared "erratic." Posey stated that Goff remained at the shelter for eight days, and that during that time, Posey and other employees observed a male walking around the shelter grounds. She believed the male looked similar to the victim, but she was unable to state with any certainty that it was the victim.

Jeannie Gearheart (Jeannie), Goff's grandmother, testified that on January 18, 2006, she planned to babysit the children so that Goff could take the victim to a doctor's appointment. When Jeannie arrived at the house, Goff told her about the alleged domestic incident and showed her what she had taped on the camera. According to Jeannie, the videotape showed the victim shaking Goff

and hitting her head on the arm of the couch. Jeannie stated that she could also hear Lauren yelling, “Leave my Mommy alone.”

Doctor William Boykin, Jr., a urologist, testified that Goff suffered from kidney stones. He stated that a substance in antifreeze can cause the type of kidney stones Goff had, but also admitted that she had the most common type of kidney stones, and that the cause could be from any number of factors.

Rachael Nance, Goff’s cousin and best friend, testified that in the six months before the January 2006 alleged domestic violence incident, Goff seemed distant. Goff had never told her about any other domestic violence incidents. In November of 2005, Goff told her that the victim told Goff that if she ever left him, he would kill her, the children, and himself.

Goff testified and painted a disturbing picture of her relationship with the victim. She claimed that he controlled her actions, that he refused to let her leave the house without him, that he would not allow the children to play outside, and that he tortured, killed, and abused animals in front of her and the little girl, beginning when the child was two and one-half years old. She claimed that he tortured the animals in front of the little girl either to punish her or so that she would obey him. Goff stated that the victim mutilated cats, pulled kittens out of a pregnant cat’s belly and smashed their heads, shot a bird, and ripped the top of turtle shells in two pieces. Although the victim allegedly tortured or killed the animals, Goff still kept bringing stray and orphaned animals home.

Goff testified that at night, the victim would point a gun at her and warn her not to wake him or else he could not be “responsible for his actions.” She stated

that he left the gun on the bedside table and kept his hand on it throughout the night. Goff stated that throughout their marriage, the victim would shake her and scream in her face, but he never actually hit her. Goff admitted that despite her claimed fear that the victim would use a gun on her, she gave him a gun for a Christmas gift approximately two years before the alleged domestic incident.

Goff alleged that the victim had been hunting her down after the alleged domestic violence incident. She claimed that the day after she had a new phone number installed, the victim somehow found her new phone number and called her the next day. Goff explained that her little girl must have dialed the victim's number and that the victim then retrieved her new phone number from his caller identification.

Goff testified that she called the victim on March 4, 2006, and, with the victim's knowledge, tape recorded part of the ninety-minute phone conversation. During the recorded part of the conversation, the victim did not threaten her. However, Goff claimed that after she stopped recording the call, he became threatening. At one point during the taped conversation, Goff asked the victim if he was going to kill her. The victim responded, "You have absolutely nothing to fear. That's absurd. I would rather get in a box and live under a bridge than lay a hand on any of you."

Goff next spoke with the victim on March 17, 2006. She claimed that the victim called her first, but the victim's cell phone records show that a calling card number Goff previously had used called the victim first. Goff vehemently denied making this call. Goff stated that the victim called her around 6:00 p.m., on

March 17, while he was at work. She claimed that during this conversation, he again told her that he was going to kill her and the children on that following Monday. Later that evening, she went to her mother's home to retrieve a gun.

Goff explained that on the day of the shooting, March 18, she went to the Olive Garden with family to celebrate her mother's birthday. She stated that she did not tell any of her family members how distraught she was over her phone calls with the victim or that she planned to go to his house with two loaded weapons. Instead, she told them that she was going to meet some friends.

At trial, she claimed that when she arrived at the victim's house, he grabbed her arm and pulled her in the house. However, on the night of the shooting, she did not tell Detective Bollinger that the victim pulled her in the house. Rather, she stated that she walked in the door.

Goff offered differing explanations as to why she went to the victim's house on March 18. She once explained that she went there so that he would just kill her and not the children. However, on cross-examination, the prosecutor asked her that if that had been her intention, then why did she take two loaded guns to the victim's house. Goff stated that she thought she would bring the guns in case she needed to scare him.

Goff had also explained that she went to the house because she thought that she could talk the victim out of killing her and the children. She further stated that she might just shoot the gun in the air if things became violent. She stated: "If it got down to that point that I felt there was no other way out, I thought that if I shot the gun up in the air that it would startle him." However, Goff

admitted that none of the fifteen shots that she fired ended up in the air. Instead, all fifteen shots were fired into the victim's head and chest area. Goff stated that when she went to the victim's house, she did not think he would be harmed.

Goff next presented her expert witness, Dr. Bobby Miller, to testify regarding the battered woman syndrome. Dr. Miller testified that a battered woman need not necessarily suffer physical abuse, but the abuse also could be psychological. Dr. Miller stated that based upon his evaluation of Goff, he believed that she had been subjected to psychological torture for seven years of her marriage.

Defense counsel asked Dr. Miller if he had an opinion regarding Goff's state of mind at the time of the offense, and he stated: "At the time of the alleged offense, as a consequence of Mrs. Goff's being a victim of marital abuse, she had reason to believe and reasonably believed that she and her children were in imminent danger of death or serious physical injury."

Dr. Miller stated that to the extent inconsistencies existed in Goff's account of the shooting, her screaming during the 911 call explained them. He stated that based upon her reaction, he would not trust her recollection of the events before the shooting. Dr. Miller noted that the state's psychiatric expert found inconsistencies and agreed that he found the same ones, but stated that "those inconsistencies are inside that scream."

The state then presented its forensic psychiatrist, Dr. Phillip Resnick, in rebuttal. Before Dr. Resnick took the stand, Goff renewed her objection to his testimony, claiming that the compelled examination violated her right against self-

incrimination. The trial court overruled her objection, noting that it was "not fully advised as [to] what the law is." Nonetheless, the court relied on the previous trial judge's ruling. Goff further objected to Dr. Resnick's testimony because his report noted that he was unable to reach an opinion within a reasonable degree of medical certainty. She asserted that "in order to rebut something, you have to have an opinion about it." The state asserted that Dr. Resnick's inability to reach a conclusion is a different opinion than the defense expert's opinion. The court overruled Goff's objection.

Dr. Resnick, whose credentials are beyond dispute, testified that he questioned Goff about her spontaneous account of the shooting and then reviewed her statements to law enforcement officers to determine whether any inconsistencies existed. If he found inconsistencies, he then questioned Goff regarding them. Goff's counsel did not object to this line of questioning. Dr. Resnick then explained that he found the following inconsistencies: "[T]here is some dispute between her versions of events and other versions of events. For example, she told me that Mr. Goff had threatened to kill her and the children on multiple occasions. Mr. Goff, when interviewed by the police on January 18, denied that he had threatened her. Ms. Goff reported to me that on March 17, Mr. Goff explicitly threatened to kill her during a 6:00 P.M. phone call. I asked, I said, 'Are you sure that might've been the earlier call?' She said that she was certain that he had explicitly threatened to kill her and the children at the 6:00 P.M. phone call. There were witnesses to that 6:00 P.M. phone call who reported that Mr. Goff did not make any threats. Additional inconsistencies had

to do with statements she gave the police on March 18 compared to the events she told me on August 18. The first, there were two of these inconsistencies. The first was that she said that in the statement to the police she did not indicate that her intention was to miss and only scare her husband by not shooting to hit him. In the account she gave to me, she said that the first two shots she fired her goal was to scare him and not to hit his body. In reality, all fifteen shots she fired based on autopsy did strike her husband. Final inconsistency had to do with the statement she gave to the police on March 18. In that time she said that she fired when her husband turned around toward the window after the first shot. In the account she gave me, she said that after the first shot her husband was walking toward her as an explanation for why she continued to shoot."

Dr. Resnick stated that he found some factors that led him to conclude that Goff "was intensely fearful of her husband, but there were four items which caused [him] to question the degree of the intensity of her fear. The first of these was that when Mr. Goff was alleged to make new threats on March 17, one day before the homicide, that he planned to kill her and the children on the following Monday, which would be March 20. That rather than involve the police or notify the police of these new threats in violation of the Protection Order, she instead decided that she would alone go to her husband's home to try and talk him out of it. That does not seem consistent with being terrified of him. Secondly, rather than involve her family and get their advice or protection, she instead consciously lied to her grandmother, left the children with them and then secretly went to her husband's home alone. Thirdly, she said she initially planned to approach the

home unarmed, even though she told me that two weeks earlier she had spied on her husband from her father's house and had seen him carry two rifles into the home. Finally, Ms. Goff said that when she was on the porch, knocking on the door about to enter on March 18, that she heard a creaking sound which she assumed was her husband getting a gun out of a gun safe. Rather than flee, she continued and proceeded with the confrontation." Dr. Resnick further noted that she did not mention to the law enforcement officers that (1) she had heard a noise like the safe tumbling; (2) she had seen the victim two weeks earlier with a long rifle; or (3) the victim grabbed her by the arm on the night of the shooting. Dr. Resnick also reviewed the videotape Goff made of the January 18, 2006 alleged domestic violence incident. Dr. Resnick did not find that the videotape substantiated her claim of domestic violence.

Dr. Resnick explained why he could not reach an opinion within a reasonable degree of medical certainty: "One was it would depend upon whether Ms. Goff was believed about whether she was actually terrified of her husband, and I did not feel that I was in the best position to make that judgment. His Honor will have the benefit of hearing other testimony that I will not have. So I did not feel I could reach an opinion. So what I did was simply try and lay out in as clearly as I could different ways to look at the case to allow the ultimate trier of fact to make the proper decision. I tried to synthesize the various what she had told me, what the record showed and give some potential explanations, but to which of those is true, I could not conclude with reasonable medical certainty."

The prosecutor then sought to question Dr. Resnick regarding the possible reasons Goff shot the victim. Goff's counsel objected. The prosecutor asserted that Goff's own expert reviewed and testified about Dr. Resnick's possible theories regarding why Goff shot her husband. The court overruled the objection.

Dr. Resnick then explained the possible reasons Goff shot her husband: "Ms. Goff may have acted in anger because the moment she fired she said her husband was laughing at her and telling her that she lacked the guts to shoot him. Specifically, she said in her statement to the police that her husband said, 'You know you won't shoot me. You won't shoot me. You don't have the guts. So I lifted the gun up and he was laughing in my face, telling me he was going to kill the kids and that's when I pulled the first time and then it wouldn't pull again.' She said that every [sic] since she was a little girl, she was told she didn't have the guts and she also had brought in from her earlier molester when she was a child also laughed at her when she was in pain. So, I think one possibility is that rather than being actually imminent fear at the time, she was just so angry and so challenged and so ridiculed that she chose to fire because he was laughing at her and challenging her as opposed to being in fear. I do have, Number 6 is, another possibility is that she was actually in fear of being immediately harmed. The second possibility is that she described, if her account is taken at face value, her husband, she may have shot her husband in anger because he had engaged in controlling behavior and allegedly made previous threats toward her and the children. In other words, that it was anger as opposed to imminent fear. The

third possibility also involved anger because she found herself in a helpless position and this reminded her when she felt that she was in a helpless position while being molested at gun point as a child. The fourth possibility is a preemptive strike, that is that is separate, not being in imminent fear, but just deciding that even though she believed that her husband was going to come after her two days later on Monday, she just decided that she would go ahead and kill her husband at that time, rather than being in imminent fear. Then the final one is the possibility that she in deed [sic] was in the belief that she was in immediate fear and that, as she described it, that her husband would take the gun if she didn't shoot him and that she would be killed."

Dr. Resnick explained that he could not form an opinion within a reasonable degree of medical certainty partly because he could not determine Goff's credibility. He stated that his entire report rested upon the credibility of Goff's statements. He noted that Goff initially explained that she went to the victim's house to let him kill her and that she took the two weapons simply to scare him, if needed. He testified that "the fact that she went to [the victim's] home, that she initiated some of the exchanges of phone calls and the tone of the conversation on the March 4 taped portion of the call does not suggest that she is terrified of him. She speaks in a fairly assertive way and the fact that she goes to his home, as I already said, doesn't seem to suggest that she is a terrified as she reports."

Dr. Resnick stated that he believes it to be "quite unusual" for a battered woman who frees herself from the relationship to then return two months later, as

Goff did, if the woman is "genuinely fearful." He opined that leaving the batterer and then returning is "atypical behavior" of a battered woman.

On cross-examination, defense counsel questioned Dr. Resnick regarding the inconsistencies he found. Defense counsel attempted to have Dr. Resnick admit that Goff's behavior in going to the house on the day of the shooting was not unusual behavior if she truly was a battered woman. Dr. Resnick would do no such thing. He suggested that Goff's better course of action would have been to seek aid from law enforcement officers. Defense counsel asked him if he would have the same response if Goff, hypothetically, had been dissatisfied with the law enforcement officers' response to her case and believed that she could face the victim and try to talk to him. Dr. Resnick stated: "Well, if she were able to control [the victim], why would she have allowed him to make those threats over all those years? No, it does not make sense that she would believe she could control him * * *."

On re-direct, Dr. Resnick explained his inability to form an opinion as follows: "The critical issue is the believability of Ms. Goff herself. Secondly, there is just, we really have only her version of it, coupled with the potential contrary information that she said she was intensely fearful, yet put herself in harms [sic] way, just left me not feeling I could reach a firm conclusion either way." On re-cross examination, Dr. Resnick agreed that if everything Goff stated about her husband's behavior were true, then he would agree that she had been psychologically abused and would have had reason to be fearful. Dr. Resnick

then responded on re-direct that he did not believe that he had sufficient evidence to reach an opinion "either way."

The state next presented testimony from James Sunderland, one of the victim's co-workers. He stated that on March 17, around 4:00 p.m., he heard the victim talking on his cell phone. After the victim ended the call, he advised Sunderland that he had been speaking to Goff. The victim then used the phone at work to return the call to Goff. He explained that Goff's cell phone was running out of minutes. After the victim completed his second call to Goff, he and another co-worker, Roger Lovett, spoke with the victim about calling his attorney to discuss the protective order. Sunderland stated that he was concerned that the victim might be violating the order. After the victim called his attorney, he then requested Sunderland and another co-worker to sit in on a phone call at 6:00 p.m. that Goff requested him to make. The victim advised them that he wanted to have witnesses to the conversation. Sunderland stated that he and the other co-worker agreed to listen to the conversation. He stated at no point during the 6:00 p.m. phone call did he hear the victim threaten to kill Goff and her children. He explained that he heard the victim tell Goff that he loved her a couple of times and "[t]hen it went in to [sic] almost a broken record of him saying, 'I'm not going to meet with you,' 'I'm not going to meet with you,' 'I can not meet with you,' 'I won't meet with you,' 'I can't meet with you because of this Restraining Order,' I can't,' 'I won't,' and it was constant." Sunderland testified that the victim never stated that he would meet with her, whether alone or with the children. Sunderland stated that he and the other co-worker were concerned,

based upon the tenor of the victim's conversation with Goff, that Goff would show up at his house. They thus told the victim that he could stay at one of their homes or that he should call his friend who lives down the street, Schilling.

Roger Lovett testified similarly to Sunderland. He stated that on March 17, the victim stated that Goff had called him and "he was real[ly] excited. He was hoping that they might be able to work things out, and that she had ran out of phone minutes or something and he was going to have to call her back." Lovett stated that later that day, the victim asked him and Sunderland to listen to a phone call between him and Goff. He did not hear the victim threaten Goff in any manner during the phone call. Instead, during the conversation, the victim told Goff that "he cared about her, he loved her, he wanted to get back together, that he couldn't meet with her because that would break his Restraining Order. That was expressed over and over again." He and Sunderland reported these events to Detective Bollinger within a few days of the victim's death.

The defense then recalled Goff. Goff testified that she had previously stated that she could not recall phoning the victim first on March 17, as Sunderland and Lovett testified. She again repeated that she did not make that phone call. She explained that during the 6:00 p.m. phone call that Sunderland and Lovett overheard, the following conversation occurred on her end: "I had asked him, he was talking and said that he wanted me to drop the charges, which is what one of the guys said. So obviously, that was the 6:00 call. Along with that, he had said that he wanted to meet me at the Prosecutor's Office on Monday, and that he would meet with all three of us. I actually think the way the

conversation went exactly is he said, 'Drop the charges and go up to the Prosecutor's Office.' I said, 'You expect to meet you?' He said, 'Yes.' I said, 'I'm not going to do that.' I said, 'What am I supposed to do with the kids?' He said, 'Bring them.' I said, 'No.' He said for me to just bring them. He didn't say, 'Meet me with the kids' exactly that way. I was saying that on my end. I said, 'Just meet me,' 'Just take me.'" Goff then claimed that the victim responded: "'I can't,' 'I can't,' 'I won't,' 'You know I can't do that.' [Goff] was [stating], 'Please just meet me. Please don't take the kids. Just take me.' He kept saying, 'I can't,' 'I can't.' He kept saying it and I kept begging and begging and begging, 'Just take me.'"

When defense counsel asked Goff whether the victim made any threats during the 6:00 phone call, she stated: "I had never been able to remember for sure exactly what was said on which call. I know that per my side of the conversation with me asking him to 'Just meet me,' 'Don't take the kids, just take me,' that I took it as a threat, that I took it as he was threatening to kill us still because he had already mentioned it."

On cross-examination, the prosecutor questioned Goff about her prior testimony when she stated that when the victim called her at 6:00, "[h]e was pretty mad as soon as the phone rang." She thought she had stated that she was "not one hundred percent sure if it was the 6:00 call." The prosecutor also questioned her about her prior testimony when she stated that during that phone call, she stated that the victim told her that "[h]e was going to shoot us. He was going to kill us all Monday." She explained this testimony as: "Yes. When I was asking for him to not kill us, to not, and he kept saying 'I can't just meet just you.' I said, 'Just take me.'"