[Cite as *State v. Lillo*, 2010-Ohio-6221.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

State of Ohio — Court of Appeals No. H-10-001

Appellee — Trial Court No. CRI-2009-0370

v.

Megan R. Lillo — **DECISION AND JUDGMENT**

Appellant — Decided: December 17, 2010

* * * * *

Russell V. Leffler, Huron County Prosecuting Attorney,
for appellee.

K. Ronald Bailey, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Megan R. Lillo, appeals the December 23, 2009 judgment of the Huron County Court of Common Pleas which, following a jury trial and multiple felony convictions, sentenced appellant to a total of nine years of imprisonment. For the reasons that follow, we affirm the trial court's judgment.

{¶ 2} On April 24, 2009, a six-count indictment was filed charging appellant with complicity to commit aggravated robbery, complicity to commit robbery, possession of Oxycodone, complicity to commit theft, conveying contraband into a detention facility, and tampering with evidence. The charges stemmed from the April 15, 2009 robbery of the Kaiser-Wells Pharmacy located in Norwalk, Huron County, Ohio. It is undisputed that appellant drove and waited in the car while her boyfriend, Kurtis DeWitt, robbed the store. Appellant entered not guilty pleas to the charges.

{¶ 3} During the course of the proceedings, appellant informed the state that she intended to raise the affirmative defense of duress and, specifically, battered-woman syndrome. On September 16, 2009, appellant filed a psychological evaluation report conducted by her expert, Dr. Kenneth Gruenfeld.

{¶ 4} On October 16, 2009, the state filed a motion in limine requesting that appellant's expert psychological testimony be excluded. Specifically, the state claimed that no Ohio case has permitted psychiatric or psychological testimony about battered-woman syndrome to support a duress defense. In opposition, appellant relied upon *State v. Haines*, 112 Ohio St.3d 393, 2006-Ohio-6711, wherein the Supreme Court of Ohio held that expert testimony regarding battered-woman syndrome may be admissible in the state's case-in-chief to aid the trier-of-fact in determining the victim's state of mind, where a victim's credibility is challenged upon cross-examination. Id. at ¶ 65.

{¶ 5} On October 29, 2009, appellant filed a motion in limine seeking to exclude the testimony of state's expert Dr. James Karpawich. Appellant contended that Dr.

Karpawich's proposed testimony was an impermissible legal opinion as to the application of battered-woman syndrome in Ohio. On that same basis, appellant also filed a motion in limine to exclude Dr. Karpawich's October 16, 2009 report.

{¶ 6} At trial, appellant presented the testimony of several lay witnesses with knowledge of appellant's and DeWitt's volatile relationship. Appellant testified regarding the abuse she had suffered, her drug dependency, and the details of the offense. Appellant's expert, Dr. Gruenfeld testified that, "within a reasonable degree of psychological certainty," appellant suffered from battered-woman syndrome and was under duress at the time of the offense.

{¶ 7} The state provided testimony that appellant was involved in prior criminal activity, that she was a heroin addict, and that, after she was in custody and safe from appellant, she smuggled Oxycodone into the county jail. The state submitted appellant's voluntary statement in which she explains that she did not want to drive DeWitt to rob the pharmacy but that "[she] did anyhow because of the way Kurt gets towards me when he is angry." Finally, during rebuttal, the state presented the expert testimony of Dr. Karpawich who testified that the MMPI (Minnesota Multiphasic Personality Inventory) test he administered to appellant was invalid due to her extreme exaggeration of her depression and anxiety. Dr. Karpawich diagnosed appellant with an opiate dependency.

{¶ 8} During cross-examination, Dr. Karpawich was questioned regarding appellant's and Kurtis DeWitt's appearance on the Dr. Phil television program approximately one month prior to the offense. Karpawich acknowledged that he

reviewed and considered the program transcript in his evaluation. The couple was on the program to discuss abusive relationships. Appellant's counsel reviewed the transcript with Dr. Karpawich but the court did not allow the videotape of the episode to be played for the jury.

{¶ 9} After the conclusion of the trial, the jury found appellant guilty of all the counts in the indictment. On December 23, 2009, appellant was sentenced to a total of nine years of imprisonment. This appeal followed.

{¶ 10} Appellant now raises the following three assignments of error for our review:

{¶ 11} "I. The trial court erred in excluding appellant's proposed jury instructions on battered woman syndrome regarding appellant's belief that she was in danger of death or great bodily harm.

{¶ 12} "II. The trial court erred in requiring appellant to testify before permitting any experts to testify on her behalf, in violation of the defendant's right against self-incrimination under the United States Constitution and the state constitution of Ohio.

{¶ 13} "III. The trial court erred in unduly and unlawfully restricting appellant's cross-examination of state's expert psychologist, Dr. James Karpawich."

{¶ 14} In appellant's first assignment of error, she contends that her proposed jury instructions regarding battered-woman syndrome were necessary in order for the jury to consider whether appellant had a subjective belief that she was in imminent danger. Conversely, the state argues that three of the four proposed instructions were not proper

statements of the law. The state admits that the one of the proposed instructions could have been given but that the language of the duress instruction was duplicative; thus, any error was harmless.

{¶ 15} Generally, requested jury instructions should be given if they are a correct statement of the law as applied to the facts in a given case. *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585. A court's instructions to a jury "should be addressed to the actual issues in the case as posited by the evidence and the pleadings." *State v. Guster* (1981), 66 Ohio St.2d 266, 271. Prejudicial error is found where, in a criminal case, a court refuses to give an instruction that is pertinent to the case, states the law correctly, and is not covered by the general charge. *State v. Sneed* (1992), 63 Ohio St.3d 3, 9. We review the trial court's decision to refuse the requested jury instructions for an abuse of discretion. *State v. Wolons* (1989), 44 Ohio St.3d 64, 68.

{¶ 16} In her proposed jury instructions, appellant, inter alia, requested that the jury be instructed as to the following:

{¶ 17} "PROPOSED JURY INSTRUCTION NO. 3

{¶ 18} "The General Assembly of Ohio has declared that it recognizes that Battered Woman Syndrome is currently recognized as a matter of commonly accepted scientific knowledge. R.C. 2901.06(A)(1), *State v. Haines* (2006), 112 Ohio St.3d 393.

{¶ 19} "PROPOSED JURY INSTRUCTION NO. 4.

{¶ 20} "The Ohio General Assembly recognizes that the subject matter of Battered Woman Syndrome and details of the syndrome are not within the general understanding

or experience of a person who is a member of the general populace and are not within the field of common knowledge. For that reason you were permitted to hear expert testimony explaining Battered Woman Syndrome. R.C. 2901.06(A)(2), *State v. Haines* (2006), 112 Ohio St.3d 393.

{¶ 21} "PROPOSED JURY INSTRUCTION NO. 5

{¶ 22} "Evidence of Battered Woman Syndrome is offered to assist the jury in determining whether the defendant acted out of a reasonable belief that she was in imminent danger of death or great bodily harm. *State v. Eng* (1994), 1994 Ohio App. LEXIS 4655.

{¶ 23} "PROPOSED JURY INSTRUCTION NO. 6

{¶ 24} "A battered woman is defined as any woman, in any form of an intimate relationship with a man, who is battered at least twice but remains in the situation. If you find that she is, you will, then, consider the other testimony on the battered woman syndrome and all the other evidence and determine whether the defendant acted out of an honest belief that she or another person was in imminent danger of death or great bodily harm and that participating in the crimes committed by Kurtis DeWitt was her only means of escaping from such danger or harm. *State v. Eng* (1994), 1994 Ohio App. LEXIS 4655."

{¶ 25} The court did not instruct the jury specifically regarding battered-woman syndrome; rather, the court gave the following duress instruction:

{¶ 26} "The defendant has asserted an affirmative defense known as duress. Finding that she acts out of fear for her life or great bodily harm, when a person is forced to participate in an offense against her will, because she honestly believes and has a good reason to believe that she is in immediate danger of death or great bodily harm, and that there was no reasonable opportunity to escape, she is entitled to be acquitted on the ground of duress. The defendant has claimed the affirmative defense of duress as to each of the six counts.

{¶ 27} "For any count in which you have determined that the state has proved all the essential elements of the offense charged you must consider and decide whether the defendant has proved the affirmative defense of duress. * * *."

{¶ 28} As set forth above, appellant's proposed jury instructions were chiefly derived from the Second Appellate District's case captioned *State v. Eng* (Sept. 30, 1994), 2d Dist. No. 14015. In *Eng*, the defendant asserted the affirmative defense of self-defense regarding the murder of her husband. In support of the self-defense argument, Eng argued that she was a battered woman and presented psychological testimony in support thereof. The state presented conflicting psychological testimony. The defendant's requested battered-woman instructions were not given by the court.

{¶ 29} On appeal, the Second Appellate District concluded that appellant's requested instructions, "tracking" the language in *State v. Koss* (1990), 49 Ohio St.3d 213, should have been given because they represented "a correct statement of Ohio law." Id.

{¶ 30} We first note that the above-cited cases dealt specifically with the defense of self-defense and not duress. Regarding appellant's proposed instructions, we agree with the state that Proposed Jury Instructions Nos. 3 and 4 are a recitation of the purpose for allowing the testimony but would not aid in the jury's understanding of the evidence presented. Proposed Jury Instruction No. 5 is a correct statement of law and, arguably, could have been given. We agree, however, that if the court's failure to give this instruction was error, it was harmless in that the duress instruction language is nearly identical. Finally, we cannot agree that Proposed Jury Instruction No. 6, which defines a battered woman, is a correct statement of law. This language was quoted in *Koss*, supra, and was quoted by the New Jersey Supreme Court in explaining why expert testimony on battered-woman syndrome was necessary to aid a jury. See *State v. Kelly* (N.J.1984), 478 A.2d 364, 371. The writing is from a work by a psychologist and prominent writer on the subject of battered-woman syndrome. It was a matter that was properly testified to during the course of this trial.

{¶ 31} Based on the foregoing, we find that the trial court did not err when it failed to instruct the jury on battered-woman syndrome. Appellant's first assignment of error is not well-taken.

{¶ 32} In appellant's second assignment of error, she asserts that the trial court violated her constitutional rights against self-incrimination by requiring that she testify prior to allowing the testimony of her expert, Dr. Kenneth Gruenfeld. The state argues

that appellant's tactical decision to present the affirmative defense of duress, made it likely that her testimony would be required to prove such a defense.

{¶ 33} In support of appellant's argument that her right against self-incrimination was violated, appellant cites *Brooks v. Tennessee* (1972), 406 U.S. 605. In *Brooks*, pursuant to a Tennessee statute, the defendant was required to testify prior to the presentation of any defense testimony. The purpose of the statute was to prevent the defendant from being improperly influenced by the other witnesses. Id. at 607. The court, in a divided decision, found that statute violated a defendant's privilege against self-incrimination. Upon review, we find that *Brooks* has little application to the present facts.

{¶ 34} Here, appellant was allowed to present several lay witnesses who testified regarding their knowledge of appellant's relationship with Kurtis DeWitt. However, statements that appellant made to these witnesses were objected to as hearsay. Appellant's counsel assured the court that appellant would testify during the trial. Appellant contends that she was prejudiced by testifying prior to her expert because her "trial strategy" was that she be the final defense witness so that "her testimony would be the freshest in the mind of the jurors."

{¶ 35} Upon review, we find that appellant's counsel represented during the course of the trial that appellant would testify. More importantly, the record is devoid of evidence demonstrating that the court required that appellant testify prior to her expert. Even if we assume that she was required to testify prior to her expert, the mere fact that

she desired to be the final witness does not rise to the level of prejudice necessary to find error. Appellant's second assignment of error is not well-taken.

{¶ 36} In appellant's third and final assignment of error, she argues that the trial court erred by unlawfully restricting defense counsel's cross-examination of the state's expert witness, Dr. James Karpawich. Specifically, appellant argues that the court improperly ruled that the transcript from the Dr. Phil television program could be used but that the videotape of the program could not be played for the jury.

{¶ 37} Initially, we note that the "'[t]he scope of cross-examination and the admissibility of evidence during cross-examination are matters which rest in the sound discretion of the trial judge.'" *State v. Lundgren* (1995), 73 Ohio St.3d 474, 487, quoting *O'Brien v. Angley* (1980), 63 Ohio St.2d 159, 163. Thus, when the trial court allows or disallows certain testimony, the ruling of the court will not be reversed absent a clear and prejudicial abuse of discretion. *O'Brien* at 163. An abuse of discretion is found only when it is determined that a trial court's attitude in reaching its judgment was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 38} During Dr. Karpawich's cross-examination, Karpawich acknowledged that he reviewed the transcript from the Dr. Phil program and that the transcript was a factor in his evaluation report. When defense counsel attempted to play the videotape of the Dr. Phil episode, the state objected and the following discussion took place:

{¶ 39} "MR. LEFFLER [prosecuting attorney]: Well, it's strictly entertainment value. Dr. Phil is a show. It's programmed. It's edited. The doctor said he never saw the

program. Dr. Phil isn't here to testify. He's not here to be cross-examined. It's irrelevant. What –

{¶ 40} "THE COURT: What's the purpose of showing the video?

{¶ 41} "MR. BAILEY [defense counsel]: It's evidence that he saw in making his, forming his opinion.

{¶ 42} "THE COURT: Read the transcript.

{¶ 43} "MR. BAILEY: He read the transcript. Well, I think the show is better than the transcript. I mean, as far as conveying it to the jury. I'd rather have the jury see the video. I think he should have to see the video, too. There's things conveyed in watching people that you don't always obtain in a dry manuscript.

{¶ 44} "THE COURT: How does it add to the testimony here on his evaluation of Megan to watch a television show?

{¶ 45} "MR. BAILEY: It's among what – he read the transcript, so it's part of him forming his opinion. I think I can cross-examine him on what formed his opinion, and if there is an addition, that there is another –

{¶ 46} "THE COURT: He didn't watch the show –

{¶ 47} "MR. BAILEY: I know he didn't.

{¶ 48} "THE COURT: -- to form his opinion. I'm going to deny it."

{¶ 49} In her brief, appellant correctly states that under Evid.R. 705, the basis of an expert's opinion is a proper subject of cross-examination. *Am. States Ins. Co. v. Caputo* (1998), 126 Ohio App.3d 401, 413. Thus, because Dr. Karpawich stated that he

reviewed the transcript and he considered it during his evaluation, the trial court properly allowed appellant's counsel to question Karpawich as to the contents of the transcript. In fact, appellant's counsel was given substantial leeway by the trial court and was essentially permitted to read the entire transcript. As set forth above, Dr. Karpawich did not review the videotape during his evaluation; thus, the trial court did not abuse its discretion when it denied appellant's request to play the tape for the jury. Appellant's third assignment of error is not well-taken.

{¶ 50} On consideration whereof, we find that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Huron County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is to pay the costs of this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE