

1 THE STATE OF OHIO, APPELLANT, v. DAWS, APPELLEE.

2 [Cite as *State v. Daws* (1996), ___ Ohio St.3d ____.]

3 *Appeal dismissed as improvidently allowed.*

4 (No. 94-1621 -- Submitted November 14, 1995 -- Decided February 7,
5 1996.)

6 APPEAL from the Court of Appeals for Montgomery County, No. 13914.

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8 *Mathias H. Heck, Jr.*, Montgomery County Prosecuting Attorney, and

9 *George A. Katchmer, Jr.*, Assistant Prosecuting Attorney, for appellant.

10 *David A. Chicarelli* and *Ronald W. Ruppert*, for appellee.

11 *David H. Bodiker*, Ohio Public Defender, and *John Fenlon*, Assistant Public

12 Defender, urging affirmance for *amicus curiae*, Ohio Public Defender

13 Commission.

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15 The appeal is dismissed, sua sponte, as having been improvidently allowed.

16 DOUGLAS, WRIGHT, RESNICK, F.E. SWEENEY and COOK, JJ., concur.

17 MOYER, C.J., and PFEIFER, J., dissent.

1 PFEIFER, J., dissenting. Because this court, through an opinion, should
2 define the proper instructions to be given to juries concerning battered woman
3 syndrome, I dissent from this court's decision to dismiss this case as having been
4 improvidently allowed.

5 I would instruct the trial court that when it retries this case, it should
6 provide instructions that mirror the language of our opinion in State v. Koss
7 (1990), 49 Ohio St.3d 213, 551 N.E.2d 970. In State v. Koss, this court stated
8 that:

9 “* * * In Ohio, to prove self-defense it must be established that the person
10 asserting this defense had ‘* * * a bona fide belief that he [she] was in imminent
11 danger of death or great bodily harm and that his [her] only means of escape from
12 such danger was in the use of such force.’ (Emphasis added.) * * *”

13 “* * *

14 “Expert testimony regarding the battered woman syndrome can be admitted
15 to help the jury not only to understand the battered woman syndrome but also to
16 determine whether the defendant had reasonable grounds for an honest belief that
17 she was in imminent danger when considering the issue of self-defense. ***

18 “* * *

1 “Thus, admission of expert testimony regarding the battered woman
2 syndrome does not establish a new defense or justification. Rather, it is to assist
3 the trier of fact in determining whether the defendant acted out of an honest belief
4 that she was in imminent danger of death or great bodily harm and that the use of
5 such force was her only means of escape. ***

6 “* * *

7 “* * * Where the evidence establishes that a woman is a battered woman,
8 and when an expert is qualified to testify about the battered woman syndrome,
9 expert testimony concerning the syndrome may be admitted to assist the trier of
10 fact in determining whether the defendant acted in self-defense.” *Id.* at 215-218,
11 551 N.E.2d at 973-975.

12 Daws’ proffered jury instructions were improper because they could have
13 been construed by the jury to mean that battered woman syndrome was in itself a
14 defense. The proffered instructions stated, in part that:

15 “However, a person is justified in the use of [sic] which is intended or likely
16 to cause death or great bodily harm only if she reasonably believes as a Battered
17 Woman that such force is necessary to prevent imminent death or great bodily
18 harm to herself or the commission of a forcible felony.”

1 Daws’ proffered instruction asks the jury to consider what she “reasonably
2 believe[d] as a Battered Woman.” This instruction implies that Daws’ status as a
3 battered woman could justify her use of force. This instruction tends to elevate the
4 battered woman syndrome to the level of an independent affirmative defense
5 rather than informing the jury that evidence of the syndrome is merely one factor
6 to consider in evaluating Daws’ self-defense claim. Because an instruction that
7 may lead the jury to conclude that battered woman syndrome is itself a defense is
8 contrary to Koss, the trial court properly excluded the proposed instruction. The
9 court of appeals properly overruled Daws’ contention that this decision by the trial
10 court was improper.

11 MOYER, C.J., concurs in the foregoing dissenting opinion.

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