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Criminal Law/Self-Defense - Should a Defendant Be Denied the Affirmative Defense of Self-Defense if the Criminal Act Was Not Intentional - Self-Defense of Defense for Self - Duran v. State, 990 P.2d 1005

Andrea L. Earhart

CASE NOTES

CRIMINAL LAW/SELF-DEFENSE—Should a Defendant be Denied the Affirmative Defense of Self-Defense if the Criminal Act was not Intentional? Self-Defense or Defense for Self? *Duran v. State*, 990 P.2d 1005 (Wyo. 1999).

INTRODUCTION

Self-defense and the related theory of battered woman syndrome are Cheryl Duran's justifications for the events that led to the death of Alfred Gutierrez. At her trial for vehicular homicide, the trial court refused to allow Duran to present a theory of defense centered on self-defense and battered woman syndrome.[1] The trial court based its decision on Wyoming's requirement that vehicular homicide result from reckless rather than intentional conduct. The Wyoming Supreme Court upheld the trial court's decision, and one word, "intent," changed both the course of the case and Cheryl Duran's life.

Duran, the mother of three, lived with her boyfriend, Alfred Gutierrez.[2] On the night of January 3, 1996, Duran and Gutierrez visited several drinking establishments in Cheyenne, Wyoming.[3] At some point, Gutierrez told Duran that he wanted to smoke marijuana with a friend.[4] Duran, upset by Gutierrez's plan, announced that she wanted to go home.[5] Gutierrez became angry when Duran started to walk home and threw Duran into her car, causing her to hit her head on either the gearshift or the parking break lever.[6] Duran managed to lock the car doors, but Gutierrez began pulling on a partially opened window in an attempt to forcibly enter the car.[7] Duran, frightened by Gutierrez's behavior, drove off with Gutierrez on the hood of the car.[8] Duran drove east from

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1. Duran v. State 990 P.2d 1005, 1006 (Wyo. 1999).
2. Brief of Respondent at 6, Duran v. State, 990 P.2d 1005 (Wyo. 1999) (No. 97-302) [hereinafter Respondent's Brief]. Duran and Gutierrez met in May of 1995. Gutierrez lived with Duran on and off from July of 1995. *Id.*
3. *Duran*, 990 P.2d. at 1007.
4. Respondent's Brief, *supra* note 2, at 7.
5. Brief of Appellant Cheryl Duran at 4, Duran v. State, 990 P.2d 1005 (Wyo. 1999) (No. 97-302) [hereinafter Appellant's Brief].
6. *Id.* at 4-5.
7. *Id.* at 5.
8. *Id.* Some discrepancy exists as to how Gutierrez got onto the hood of the car.

the intersection of Capitol and Lincolnway Avenues at speeds ranging from five to thirty-five miles per hour.[9] Eventually, the windshield wiper Gutierrez was holding onto broke, and when Duran slammed on the breaks, Gutierrez fell off of the hood of the car, suffering head injuries that resulted in his death.[10]

Following the incident, the trial court convicted Duran of aggravated vehicular homicide and sentenced her to a term of three to five years in the Woman's Correctional Facility in Lusk, Wyoming.[11] At trial, Duran requested instructions on self-defense, but the trial court refused the instructions because Duran stated that she did not intend to injure or cause the death of Gutierrez, but rather was trying to avoid further confrontation.[12] The trial court also denied Duran the opportunity to present testimony on battered woman syndrome.[13] The Wyoming Supreme Court affirmed the trial court's decision that the crime committed by Duran involved a reckless rather than an intentional act and that the affirmative defense of self-defense was not available to Duran.[14] In addition, the Wyoming Supreme Court affirmed the trial court's refusal to allow Duran to present expert testimony on battered woman syndrome.[15]

Duran stated that she was not sure but that she did not hit him with the car to propel him onto the hood. Respondent's Brief, *supra* note 2, at 8.

9. Respondent's Brief, *supra* note 2, at 9.

10. Appellant's Brief, *supra* note 5, at 6.

11. *Id.* at 2. Duran was charged and convicted of aggravated homicide by vehicle. *Id.* The applicable portion of criminal statute WYO. STAT. ANN. § 6-2-106(b)(ii) (LEXIS 1999) provides that a person guilty of aggravated homicide by vehicle shall be punished by imprisonment in the penitentiary for not more than twenty (20) years if he operates or drives a vehicle in a reckless manner, and his conduct is the proximate cause of the death of another person.

12. *Duran*, 990 P.2d at 1008. Based on a life of abuse at the hands of several different men, Duran feared serious injury from Gutierrez even though he had not physically abused her prior to that evening. Appellant's Brief, *supra* note 5, at 29.

13. *Duran*, 990 P.2d at 1008; WYO. STAT. ANN. § 6-1-104(a)(ix) (LEXIS 1999).

14. *Duran*, 990 P.2d at 1006. WYO. STAT. ANN. § 6-1-104(a)(ix) (LEXIS 1999) defines recklessly as the following conduct:

> A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that the harm he is accused of causing will occur, and the harm results. The risk shall be of such nature and degree that disregarding it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

15. *Duran*, 990 P.2d at 1009. Duran testified as to her history of abuse from two abusive relationships, a rape at the hands of two men, and a severe beating that left her hospitalized for several days. Appellant's Brief, *supra* note 5, at 29. Since Gutierrez had never struck Duran before the evening in question, she had to rely on expert testimony concerning battered woman syndrome to establish her defense and to explain that her conduct resulted from perceived imminent danger of serious bodily injury or death. Appellant's Brief, *supra* note 5, at 30. Imminent danger is defined as "an appearance of

The court found that Wyoming's statute allowing testimony on battered woman syndrome was not relevant after the instructions on self-defense were denied.[16]

Duran v. State presented an issue of first impression in Wyoming, addressing the question of whether an affirmative defense of self-defense is available to a defendant charged with a reckless act.[17] The Wyoming Supreme Court upheld the trial court's decision that an affirmative defense of self-defense is not available without the presence of intentional conduct.[18] Undoubtedly, Duran intended to do what was necessary to escape confrontation with Gutierrez. Thus, the problem that arises is that if Duran had merely said that she intended to do what was necessary to remove Gutierrez from the hood of the car, the fact scenario changes little, but Duran would probably have been allowed to present a defense that could have made a significant difference in the jury's decision.

The primary purpose of this case note is not to advocate Cheryl Duran's innocence but rather to argue that the Wyoming Supreme Court's decision creates confusion as to the applicability of the theory of self-defense. *Duran* suggests that in some instances the defense may be allowed if a person is willing to admit that she intended the resulting injury, but in others the defense will be denied if the defendant did not intend the specific result of her actions, even if the action and her motivation remained the same. This note also looks to the difficulty that the jury has in answering the questions before it without a complete foundation on which to draw a conclusion based on the unique circumstances of a particular case. This note further examines the structure of self-defense laws with respect to abused women. In addition, this note ad-

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threatened and impending injury as would put a reasonable and prudent man to his instant defense." BLACK'S LAW DICTIONARY 515 (6th ed. 1991). The New York case of People v. Goetz, 497 N.E.2d 41 (N.Y. 1986) is one of the first cases in which the defendant claimed that post-traumatic experiences led him to believe he was in imminent danger. If Gutierrez had struck Duran before the night in question, her actions would be more easily justified, because her belief of danger would have been based in part on Gutierrez's previous actions.

16. *Duran*, 990 P.2d at 1009 (citing WYO. STAT ANN. § 6-1-203 (LEXIS 1999)). Battered woman syndrome is used to explain the elements of self-defense, particularly to establish belief of imminent danger. WYO. STAT. ANN. § 6-1-203 (LEXIS 1999). The statute does not create a separate defense, but rather permits the introduction of expert testimony on battered woman syndrome when the affirmative defense of self-defense is raised. Witt v. State, 892 P.2d 132, 143 (Wyo. 1995).

17. *Duran*, 990 P.2d at 1007. The Wyoming Supreme Court had addressed the issue as it applied to involuntary manslaughter in Small v. State, 689 P.2d 420 (Wyo. 1984).

18. *Id.* at 1006.

dresses the negative repercussions, fundamental unfairness, and inconsistencies that will result because defendants who admit their intent to cause injury or death are given a chance to present their full defense, while others are not.

The Wyoming Supreme Court's decision fails to adequately consider situations involving an intentional act that yields an unintentional result. This note concludes that the majority creates unfairness by deciding that because a defendant's state of mind is less culpable, the defendant is denied any opportunity to demonstrate, based on her subjective belief, that her actions were justifiable and reasonable given the circumstances.

BACKGROUND

History of Self-Defense

Under early common law, justification for homicide extended only to acts done in the execution of the law, such as homicides performed in preventing felonies and making arrests.[19] Only homicides committed in self-defense were excusable.[20] The distinction between justifiable and excusable was important, because homicide in self-defense that was only excusable was not considered to be free of blame and thus resulted in forfeiture of one's goods.[21] With the passage of 24 Henry VIII, 1532, the basis of the justification was enlarged and the distinction between justifiable and excusable homicide largely disappeared.[22] The terms became frequently interchangeable to denote "a nonpunishable act, which entitles the accused to an acquittal."[23] Killing in self-protection constituted an excusable homicide based on the "great universal principle of self-preservation," which prompts every man to save his own life, preferably to that of another, where one of them must inevitably perish.[24]

Common law intent was defined to include not only those results that are the conscious object of the actor, but also those results that the actor knows are virtually certain to occur from his conduct.[25] The natu-

19. JOSHUA DRESSLER ET AL., CASES AND MATERIALS ON CRIMINAL LAW *at* 406 n.35 (1st ed. 1994).
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 186 (1769).
25. DRESSLER ET AL., *supra* note 19, at 109.

ral-and-probable-consequences doctrine, used by courts for determining whether someone acted intentionally, states that it is reasonable for a juror, as with anyone else, to infer that a person usually intends the foreseeable consequences of his actions.[26]

Several theories of justifiable homicide have been used to support the justification of self-defense. First, public duty is based on the underlying value of Blackstone's theory that a person acting to promote the public good or benefit the community should be commended for selfless conduct.[27] Second, the theory of moral forfeiture of right to life is based on the assertion that everyone has a right to life, but that right may be forfeited:[28]

> In the context of self-defense, an aggressor, threatening to violate another's right to life, loses her own right to life, or loses the right to assert her right to life. Consequently, when a defender kills her in self-defense, the defender is not violating any right of the aggressor because the aggressor has already forfeited that right through her own wrongful conduct.[29]

Third, the right to preserve personal autonomy is based on the right to the integrity and autonomy of one's body.[30] This theory finds support in John Locke's analogy that the standard self-defense situation, including an unlawful aggressor and an innocent victim, is comparable to the justifications underlying a state of war.[31] The lesser evils doctrine states that conduct considered blameworthy is justified when the greater good or the lesser evil results from the homicide, or when a superior interest is protected through homicide.[32] According to this doctrine, the harm avoided, harm that will occur unless something prevents it, should be weighed against the harm anticipated, harm that will result from the action taken.[33] When the harm avoided is greater than the harm anticipated, the homicide is justified.[34]

Today, a person acting in self-defense is simply defined as "a person who is not himself an aggressor if, at the time of its use, he rea-

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26. *Id.*
27. Nancy M. Omichinshi, *Applying the Theories of Justifiable Homicide to Conflicts in the Doctrine of Self-Defense*, 33 WAYNE L. REV. 1447, 1448-49 (1987).
28. *Id.* at 1450.
29. *Id.*
30. *Id.* at 1451.
31. *Id.* at 1452.
32. *Id.* at 1452-53; PAUL H. ROBINSON, CRIMINAL LAW DEFENSES 45-68 (1984).
33. Omichinshi, *supra* note 27, at 1453.
34. *Id.*

sonably believes such force is necessary to protect himself from death or great bodily harm."[35] This rudimentary definition often comes with the requirements that the use of force in self-defense must be proportional to the interest protected, the defender must use only the minimal amount of force necessary, and the defender must retreat if possible.[36]

Self-Defense Outside Wyoming

Other jurisdictions have addressed issues similar to those in *Duran*. In *Hanton v. State,* the Washington Supreme Court found that self-defense is an appropriate defense to homicide offenses based on "reckless" conduct.[37] The Court in *Hanton* allowed the defense of self-defense to a charge of manslaughter, which is considered a reckless offense, because the jury may consider the evidence of self-defense in determining whether the defendant was acting recklessly.[38] *State v. Hall*, a Connecticut Supreme Court case, held that where the evidence warrants, the trial court must instruct the jury on self-defense in cases involving manslaughter in the second degree, a reckless offense.[39] The court reasoned that the jury should have the benefit of as much information as would help them in reaching a just verdict.[40]

In contrast, in *Case v. People* the Colorado Supreme Court found that where the jury is properly instructed on the elements of reckless

35. *Id.* at 1454.

36. *Id.* at 1454-57. The duty to retreat is not usually required if the victim is in her home or is attempting an arrest.

37. 614 P.2d 1280 (Wash. 1980).

38. *Id.* at 1282. Hanton pulled out in front of the victim's car, which angered the victim. The victim followed closely behind Hanton's car until they stopped at the next stoplight. *Id.* The victim approached Hanton's car and attempted to pull him out. Hanton drew his pistol and shot the victim who died several days later. *Id.* Hanton was charged with and convicted of first-degree manslaughter. *Id.* The Supreme Court of Washington reversed the conviction, holding that the trial court's instructions improperly placed the burden of proving self-defense upon the defendant. *Id.*

39. 569 A.2d 534, 536-37 (Conn. 1990). The victim had requested a loan from the defendant, Hall, to cover money lost in an illegal gambling game. *Id.* The defendant did not comply with the request and later the victim provoked an argument that escalated into a physical confrontation, in which the victim cut the defendant with a knife. *Id.* The defendant followed the victim outside where he realized the victim was pointing a gun at him. *Id.* The defendant pulled out his gun and started firing shots that killed the victim. *Id.* The Supreme Court of Connecticut concluded that the trial court erred in refusing to instruct the jury that the defense of self-defense was applicable to the lesser included offense of manslaughter in the second degree. *Id.*

40. State v. Hall, 544 A.2d 746 (Conn. App. Ct. 1989) (Stroughton, J., dissenting). The dissent in the appellate court's opinion stated that a self-defense instruction should be given in a reckless manslaughter case if such an instruction is supported by evidence in the record. *Id.*

manslaughter, instructions of self-defense are not necessary because a finding of guilt based on recklessness amounts to an implied rejection of self-defense.[41]

Decisions from other states have also addressed the issue of whether there can be accidental self-defense. The question often becomes one based on the availability of alternative defenses. The Court of Appeals of Missouri in *State v. Houcks* found that asserting self-defense and accident as a defense are inconsistent:

> When claiming self-defense, one acknowledges intentionally inflicting injury or death on another person while asserting such conduct was necessary because of apprehension of great bodily harm or death. On the other hand, asserting that injury to another resulted from an accident includes the assertion that the causal connection was unintentional.[42]

The *Houcks* court would have allowed both defenses, despite their inconsistency, so long as both theories of defense had supporting evidence offered by the state or proved by third party witnesses for the defense, as the defendant cannot alone provide the basis for inconsistent defenses.[43]

Self-Defense in Wyoming

The law of self-defense in Wyoming requires that a defendant act reasonably, as determined by the application of both objective and subjective tests.[44] The jury is to determine:

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41. 774 P.2d 866 (Colo. 1989). This case is distinguishable from *Duran* in that Case was allowed to present evidence of self-defense during the trial. *Id.*

42. 954 S.W.2d 636, 638 (Mo. Ct. App. 1997). The defendant, Michelle Houcks, was separated from her husband when she returned to their home to remove some of her belongings and saw another woman in the home. *Id.* The defendant returned the following day and threw a cup of gasoline on her husband. *Id.* Her husband grabbed her by the wrists. *Id.* Houcks was holding a lighter that sparked, igniting both her and her husband. *Id.* The court did not allow a theory of self-defense, because no supporting evidence existed. *Id.*

43. *Id.* at 639.

44. Ramos v. State, 806 P.2d 822, 825 (Wyo. 1991). After the consumption of alcohol at Ramos's residence an argument ensued that resulted in Ramos fatally stabbing the victim. *Id.* The Wyoming Supreme Court upheld the conviction of second degree murder and held that Ramos's actions did not give rise to the defense of self-defense, because the evidence did not indicate that Ramos could have reasonably believed he was in immediate danger of losing his life or of suffering serious bodily injury. *Id.*

> (1) Whether a defendant believed, at the time of death, that she was in such immediate danger of losing her own life, or receiving serious bodily injury, as made it necessary to take the life of her assailant; and (2) whether the circumstances were such to warrant reasonable grounds for such belief in the mind of a reasonable man.[45]

Wyoming recognizes that homicide in self-defense exists only where the defendant believed at the time of the death that she was in imminent danger of serious bodily injury or death.[46] *Patterson v. State* summarizes the Wyoming cases dealing with self-defense as a defense to homicide:

> To excuse homicide on the grounds of self-defense, one must establish the following: (1) that the slayer was not at fault in bringing on the difficulty (2) that he believed, at the time of the killing, that he was in such immediate danger of losing his own life, or of receiving serious bodily injury, as made it necessary to take the life of his assailant (3) that the circumstances were such to warrant reasonable grounds for such belief in the mind of a reasonable man (4) that there was no other reasonable method of escaping or otherwise resolving conflict.[47]

The common law rule is similar to the rule in Wyoming in that the use of deadly force against another in self-defense is justifiable only if one reasonably believes that the other is about to inflict unlawful death or serious injury upon him and that deadly force is necessary to prevent infliction of death or injury to oneself.[48] Wyoming Statute Section 6-1-102 (b) states that common law defenses are retained unless otherwise provided.[49]

When viewing the evidence to determine whether an instruction of self-defense should be given, the evidence should be viewed in the light most favorable to the defendant and the defendant's testimony should be taken as entirely true.[50] To guarantee that the basic requirements of due process are met, the trial court must instruct the jury on the

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45. *Id.*
46. Best v. State, 736 P.2d 739, 746 (Wyo. 1987).
47. 682 P.2d 1049, 1052-53 (Wyo. 1984). *See also* Garcia v. State, 667 P.2d 1148 (Wyo. 1983).
48. LAFAVRE & SCOTT, SUBSTANTIVE CRIMINAL LAW § 5.7(b) at 652 (1986).
49. WYO. STAT. ANN. § 6-1-102 (LEXIS 1999).
50. Goodman v. State, 573 P.2d 400, 409 (Wyo. 1977); Patterson v. State, 682 P.2d 1049, 1050 (Wyo. 1984).

defendant's theory of the case.[51] The Sixth Amendment to the United States Constitution and Article I, Section 10 of the Wyoming Constitution guarantee a criminal defendant's right to present evidence in her defense.[52] Further, a defendant has the right to have the theory of her case affirmatively presented to the jury if there is competent evidence in the record to support her theory.[53] Evidence from the testimony of the defendant alone is enough to allow the jury to judge the weight and sufficiency of the evidence.[54]

The Wyoming Supreme Court has clearly indicated that most crimes are general intent crimes and do not require proof of intent to cause a specific harm.[55] General intent implies that the intent is not a separate element of the crime and requires only that the prohibited conduct be voluntarily undertaken.[56]

> When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, the fact that the defendant intended to do the proscribed act makes that crime a general criminal intent offense. When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent.[57]

In *Foley v. State,* the Wyoming Supreme Court stated that "it is perfectly evident that one may kill another in self-defense, yet without any intention or expectation that his assailant shall be killed."[58] *Foley* held that it is not a presumption of law nor is it a matter of fact that a person killing in self-defense intended to kill.[59] The court found that an instruction submitted to the jury was erroneous because the instruction stated that a claim of self-defense presupposes that the deceased was intentionally killed.[60]

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51. Blakely v. State, 474 P.2d 127, 129 (Wyo. 1970).

52. U.S. CONST. amend. VI; WYO. CONST. art. I, § 10.

53. Baier v. State, 891 P.2d 754, 756 (Wyo. 1995).

54. Garcia v. State, 667 P.2d 1148, 1150 (Wyo. 1983).

55. *See* Crozier v. State, 723 P.2d 42 (Wyo. 1986); Young v. State, 849 P.2d 754 (Wyo. 1993). These cases involve second-degree murder.

56. Specific intent means that the intent is or may be made an element of the crime, which must be proved beyond a reasonable doubt as any other fact in the case. Crozier v. State, 723 P.2d 42, 52 (Wyo. 1986).

57. Dean v. State, 668 P.2d 639, 641 (Wyo. 1983).

58. 72 P.2d 627, 628 (Wyo. 1903). The Supreme Court of Wyoming reversed the jury conviction for murder in the second degree. *Id.*

59. *Id.*

60. *Id.* If it is clear from the evidence that the killing was intentional it may not be

In *Baier v. State*, the Wyoming Supreme Court held that the defendant only needed to act reasonably, not intentionally, to warrant a self-defense instruction.[61] The right to defend oneself and the amount of force permitted is relative to what is necessary under the circumstances.[62] In *Baier,* whether the appellant's acts were reasonable became a question for the jury because, according to the court, the jury should determine whether a defendant perceived a threat of immediate injury under the circumstances and whether the defendant defended himself reasonably.[63]

Similarly, the defendant in *Small v. State* was charged with involuntary manslaughter, based on criminal recklessness, and the trial court gave eight instructions on self-defense.[64] In *Small,* the Wyoming Supreme Court arguably implied that instructions on self-defense are appropriate for any reckless offense by deciding self-defense instructions were appropriate for the reckless offense of involuntary manslaughter.[65] *Small* placed the burden on the state to prove the absence of self-defense beyond a reasonable doubt.[66]

Defense of Others in Wyoming

Shortly before *Duran*, the Wyoming Supreme Court expanded the scope of "defense of others" in *Duckett v. State.*[67] In *Duckett*, Steven Wayne Duckett was convicted of aggravated assault for stabbing a man in an altercation.[68] The Wyoming Supreme Court found that the district court erred in refusing to instruct the jury on defense of others as a legal

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prejudicial or reversible error.

61. 891 P.2d at 758. *Baier* was a case concerning an aggravated assault and battery not a homicide. Baier was charged and found guilty of aggravated assault and battery after he stabbed a man in the eye with a fork at the Village Inn restaurant in Cheyenne, Wyoming following a verbal confrontation. *Id.*

62. *Id.*

63. *Id.*

64. 689 P.2d 420, 422 (Wyo. 1984). Alcohol and racial slurs led to a fight that resulted in the death of Eddie Vigil. Small was convicted of involuntary manslaughter in violation of WYO. STAT. ANN. § 6-2-105 (a)(ii)(B) (LEXIS 1999). *Id.* The Wyoming Supreme Court found that the trial court properly instructed the jury on self-defense and the duty to retreat. *Id.* The jury should be properly instructed on self-defense and the element of recklessness, because a person acting in self-defense cannot be acting recklessly. *Id.* Thus if a jury is able to find that a defendant acted recklessly, it has already precluded a finding of self-defense. *Id.*

65. *Id.*

66. *Id.*

67. 966 P.2d 941 (Wyo. 1998).

68. *Id.*

justification for Duckett's actions.[69] The court stated, "defense of others as justification for the infliction of harm on another is applicable not only to an actual assailant, but also to those acting in concert with the assailant to the extent the defensive force is necessary and reasonable."[70]

Battered Woman Syndrome

Battered woman syndrome is defined as "a constellation of common characteristics which are manifested by women who have been abused physically and psychologically over a prolonged period of time by the dominant male in their lives."[71] Traditionally, courts did not accept evidence of abuse to justify the use of deadly force, because a defense based on abuse did not fit neatly into the traditional definition of self-defense.[72]

Relationships characterized by abuse often develop battering cycles.[73] Usually, the cycles consist of three distinct, repetitive states that vary in intensity and duration depending on the individuals involved.[74] *State v. Kelly* outlined the cycles of battering:

> Phase one of the battering cycle is referred to as the "tension building stage," during which the battering male engages in battering incidents and verbal abuse while the woman, beset by fear and tension, attempts to be as placating and passive as possible in order to stave off more serious violence.
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> Phase two of the battering cycle is the "acute battering incident." At some point during phase one, the tension between the battered woman and the batterer becomes more intolerable and more violence is inevitable. The triggering event that initiates phase two is most often an internal or external event in the life of the bat-

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69. *Id.* at 943. Duckett and his wife were at the home of Mary Carlson recording music in the garage with several friends. Fighting began and Carlson asked the Ducketts to leave, but the Ducketts had to return to the garage to retrieve the tapes containing Duckett's uncopyrighted original material. *Id.* Carlson pushed Duckett's wife away when she reached for the music. *Id.* Carlson was on top of Duckett's wife slamming her head on the ground, when Duckett stabbed Hetler, Carlson's boyfriend, because Hetler would not release Duckett so he could help his wife who was screaming that Carlson was trying to kill her. *Id.*

70. *Id.* at 948.

71. Elizabeth L. Turk, *Abuses and Syndromes: Excuses or Justifications?* 18 WHITTIER L. REV. 901, 907 (1997).

72. *Id.*

73. *Id.*

74. *Id.*

> tering male, but provocation for more severe violence is sometimes provided by the woman who can no longer tolerate her phase-one anger and anxiety.
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> Phase three of the battering cycle is characterized by extreme contrition and loving behavior on the part of the battering male. During this period the man will often mix his pleas for forgiveness and protestations of devotion with promises to seek professional help, to stop drinking, and to refrain from further violence.[75]

However, a "cycle of violence" is not a necessary component of a battering relationship, because scientific literature does not support a universal "cycle of violence" pattern in all battering relationships.[76]

A battered woman is one who is repeatedly subjected to forceful behavior by a man in order to coerce her to do something he wants her to do without concern for her rights.[77] The effects experienced by many battered women may be "similar or identical to those for post-traumatic stress disorder: learned helplessness, re-experiencing of the trauma, intrusive recollections, generalized anxiety, lowered self-esteem, and social withdrawal."[78]

Battered woman syndrome seeks to explain the reactions of particular women to trauma and the threats of trauma and has been characterized as a subset of post-traumatic stress disorder.[79] The symptoms of post-traumatic stress disorder include the intrusion of a traumatic memory into the individual's consciousness and avoidance of feelings and

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75. 478 A.2d 364, 372-78 (N. J. 1984).

76. MARY ANN DUTTON, Ph.D, VALIDITY OF AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS 18. (Malcom Gordon, Ph.D ed., 1996). (This is a report responding to section 40507 of the Violence Against Women Act, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, U.S. Department of Health and Human Services, National Institute of Mental Health). At the time of the incident, the "cycle of violence" does not seem to be present in Duran and Gutierrez's relationship, unless the cycle is in stage one.

77. LENORE E. WALKER, THE BATTERED WOMAN XV (1979).

78. DONALD G. DUTTON, THE DOMESTIC ASSAULT OF WOMEN: PSYCHOLOGICAL AND CRIMINAL JUSTICE PROSPECTIVES 200 (1995). The essential feature of post-traumatic stress disorder is the development of characteristic symptoms following a psychologically distressing event outside of the range of usual human experience. *Id.* Certain behaviors or events can lead a woman to believe that a prior severe act of violence against her is reoccurring even if it is not. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 199-200 (1995). Learned helplessness helps explain why battered women may not leave abusive relationships. *Id.*

79. DUTTON, *supra* note 76, at 19.

thoughts associated with the experience or decreasing general responsiveness.[80] Restricting the definition of battered woman syndrome to post-traumatic stress disorder alone may exclude other potentially relevant and important information that may be instrumental to factfinders in considering the various issues of a case by providing a more complete foundation for which to view a defendant's actions.[81]

In applicable case law, the Supreme Court of Washington in *State v. Wanrow* held in a self-defense case that the woman defendant was "entitled to have the jury consider her actions in light of her own perceptions of the situation."[82] In *State v. Kelly*, the New Jersey Supreme Court became the first state supreme court to admit expert testimony of battered woman syndrome to help prove self-defense.[83] In addition to using battered woman syndrome in support of a defense of self-defense, battered woman syndrome is now also considered relevant in support of a defense of insanity or duress.[84] Battered woman syndrome is also used to support mitigating factors in charging and sentencing and to explain misconceptions related to domestic violence.[85]

Battered Woman Syndrome in Wyoming

Before Wyoming enacted its battered woman syndrome statute, Wyoming Statute Section 6-1-203, Wyoming courts did not allow expert testimony concerning battered woman syndrome.[86] In *Buhrle v. State*, for example, the Wyoming Supreme Court held that battered woman syndrome was only recognized by a few people actively engaged in research and that research on the subject was in its early stages.[87] The court continued that expert testimony on battered woman syndrome would not be of use to the jury.[88] In *Buhrle*, the Wyoming Supreme Court found that the defendant did not create an adequate foundation for

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80. *Id.*

81. *Id.*

82. 559 P.2d 548, 559 (Wash. 1977).

83. 478 A.2d 364, 368 (N.J. 1984). Kelly stabbed her husband with a pair of scissors, and he died soon after. The trial court ruled that the testimony on battered woman syndrome inadmissible, but the New Jersey Supreme Court held that Kelly could introduce expert testimony on BWS to prove self-defense. *Id.*

84. DUTTON, *supra* note 76, at 1-3.

85. *Id.* at 2-3.

86. Buhrle v. State, 627 P.2d 1374, 1377 (Wyo. 1981).

87. 627 P.2d 1374, 1377 (Wyo. 1981). The defendant and the victim were married. The victim abused the defendant. *Id.* The defendant shot the victim through a partially shut door, because she claimed he was reaching for a gun he kept under his bed. *Id.* The Wyoming Supreme Court refused testimony on battered woman syndrome. *Id.*

88. *Id.*

the expert's testimony, but did not hold that testimony regarding battered woman syndrome was always inadmissible.[89]

The Wyoming Supreme Court held in *Witt v. State* that "Wyoming Statute Section 6-1-203 does not permit expert testimony on the accused's state of mind at the time of the violent act, and the district court did not abuse its discretion in excluding such testimony as unhelpful to the trier of fact."[90] Under *Witt,* a battered woman has the right to have experts testify about battered woman syndrome to substantiate a self-defense claim, but not to have experts testify as to her state of mind at the time she committed the crime.[91] This theory was extended in *Ryan v. State,* where the Wyoming Supreme Court held that expert testimony on separation violence common in abusive relationships was inadmissible as character evidence.[92]

The Wyoming Supreme Court was more willing to allow evidence in support of battered woman syndrome in *Trujillo v. State.*[93] In that case the court held that testimony on domestic violence and battered woman syndrome should have been admissible because the testimony could have helped the jury understand the victim's behavior and was based on recognized syndromes.[94]

Under Wyoming's statute, battered woman syndrome is not a defense in itself but rather serves as evidence that may be relevant to a self-defense claim.[95] The Wyoming battered woman statute does not purport to explain actions that are done with the intent to kill, but the statute does explain the use of force to a threat based on the belief of imminent danger.[96]

PRINCIPAL CASE

In *Duran v. State,* the Wyoming Supreme Court identified four issues that Cheryl Duran raised on appeal.[97] This case note focuses on

89. *Id.* at 1378.

90. 892 P.2d 132, 138 (Wyo. 1995).

91. *Id.*

92. 88 P.2d 46, 56 (Wyo. 1999). Separation violence is the term used to describe the violence that occurs when a batterer attempts to prevent a battered woman from leaving. *Id.*

93. 953 P.2d 1182 (Wyo. 1998).

94. *Id.*

95. Witt v. State, 892 P.2d 132, 143 (Wyo. 1995).

96. WYO. STAT. ANN. § 6-1-203 (LEXIS 1999); *see supra* note 15.

97. 990 P.2d 1005, 1006 (Wyo. 1999). The four issues raised on appeal by the petitioner were: (1) whether the district court committed reversible error when it refused

two of these issues: the issue regarding self-defense instructions and the issue concerning expert testimony on battered woman syndrome.

In *Duran,* the Wyoming Supreme Court held that the affirmative defense of self-defense was not available to Duran because she was charged with a crime based on a reckless act rather than an intentional act.[98] The Wyoming Supreme Court first considered whether the trial court erred in refusing to instruct the jury on self-defense. Duran argued that *Small v. State* was controlling because *Small* implied that self-defense was an appropriate defense to criminal recklessness, which is an element for vehicular homicide.[99] The *Duran* court stated, however, that "rather than implying that self-defense is a proper defense to criminal recklessness, *Small* implies that self-defense instructions were not necessary because a finding of recklessness precludes a finding of self-defense."[100]

Because *Duran* presented an issue of first impression in Wyoming as to whether self-defense is an appropriate affirmative defense to a crime involving recklessness rather than an intentional act, the Wyoming Supreme Court looked to other jurisdictions for guidance. The court followed the view of the majority of jurisdictions holding that self-defense requires intentional conduct, and that a claim of self-defense necessarily serves as an admission that the conduct was intentional.[101] The Wyoming Supreme Court rejected the views of the Indiana and Pennsylvania courts that self-defense encompasses both intentional and accidental killings.[102] Ultimately, the Wyoming Supreme Court held that self-defense requires intentional conduct, and recklessness involves an unintentional act.[103] The court claimed that the jury had the applicable

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Appellant's instructions on her theory of self-defense; (2) whether the district court erred in refusing expert testimony on battered woman syndrome; (3) whether Appellant was denied effective assistance of counsel because counsel failed to give notice of intent to introduce expert testimony on battered woman syndrome; (4) whether the trial court erred by admitting evidence about the victim's character for peacefulness before Appellant showed the victim was the first aggressor. *Id.* On appeal, the Wyoming Supreme Court did not find for Duran on any of the issues and held that the trial court did not commit reversible error. *Id.* at 1011.

98. *Id.*

99. *Id.* at 1009.

100. *Id.*

101. State v. Blanks, 712 A.2d 698, 703 (N. J. 1998).

102. *Id.* Self-defense may be asserted when the accused exerts proper force against the assailant whose death resulted accidentally. Shackelford v. State, 486 N.E.2d 1014, 1016 (Ind. 1986). A self-defense charge is appropriate in cases involving accidental injury when the accidental injury or death occurred while the defendant was defending himself. Commonwealth v. McFadden, 587 A.2d 740, 742 (Pa. 1991).

103. *Duran*, 990 P.2d at 1009.

law without the instruction on self-defense, because the jury had instructions on the elements of the offense and the definitions of "recklessness" and "proximate cause."[104]

The next issue the Wyoming Supreme Court addressed was Duran's argument that the trial court erred when it refused to admit expert testimony concerning battered woman syndrome.[105] Duran argued that expert testimony was needed to explain her history of abuse and to show that her actions were based on a reasonably perceived danger of bodily injury or death.[106] In rejecting Duran's claim the court reasoned that "once the trial court determined that self-defense was not an appropriate defense in this case, and this Court agrees with that determination, reliance on the statute was misplaced."[107]

The Wyoming Supreme Court thought that the primary purpose of Duran's desire to use expert testimony was to establish that Duran's actions on the night in question were reasonable and concluded that the trial court did not err in refusing the expert testimony on battered woman syndrome.[108] The court, relying on its previous decision in *Witt v. State,* held that Wyoming Statute Section 6-1-203 does not permit expert testimony as to the state of mind of the accused when the crime was committed.[109] The court stated:

> Testimony on the accused's state of mind at the time of the violent act, however, would not be helpful to the jury. An expert has no basis for evaluating the accused's state of mind when she committed the crime, and such testimony would usurp the function of the jury. Testimony on the accused's state of mind at the time of the crime would constitute an opinion on the accused's credibility and guilt because it would be comment upon what the accused actually believed.[110]

Chief Justice Lehman's Dissent

In dissent, Chief Justice Lehman disputed the majority's notion that "a charge of recklessness involves an unintentional act," because

104. *Id.*
105. *Id.* at 1008.
106. *Id.* at 1010.
107. *Id.* at 1009.
108. *Id.* at 1010. The court also reviewed the issues of ineffective counsel, Rule 404(a)(2) testimony on the first aggressor, and W.R.E. 611 on testimony order to determine if the trial court erred. *Id.* at 1010-11.
109. *Id.* at 1010.
110. *Id.* (quoting Witt v. State, 892 P.2d 132, 138 (Wyo. 1995)).

that is not always the case.[111] Chief Justice Lehman argued that there was no question that Duran intended to dislodge the victim from the hood of the car and to do what was necessary to escape further confrontation with her attacker.[112] "In fact," Chief Justice Lehman wrote, "she intentionally slammed on her breaks to forcibly remove her attacker and allow her escape."[113] While she did not intend to hurt him, Chief Justice Lehman argued, she voluntarily chose to use whatever force the situation demanded.[114] In his dissent Chief Justice Lehman illustrated an inherent problem with the majority's decision: "The question before the jury was whether that intention was a conscious disregard of a 'substantial and *unjustifiable* risk' and her actions constituted a gross deviation from the standard of conduct that a *reasonable person* would observe in the situation."[115]

Chief Justice Lehman noted that a fine line exists between those cases in which the court will allow the theory of self-defense and those cases in which the theory is prohibited. He stated, "I cannot distinguish this scenario from those in which we allow a criminal defendant to claim self-defense."[116] His dissent continued that had Duran stated that she intended to harm her attacker and the prosecutor had charged her with intentional homicide, the jury would have considered the reasonableness of her actions given the basis for her subjective belief of immediate danger.[117] According to Chief Justice Lehman, the majority denied Duran the opportunity to show that her subjective belief created a situation in which her conduct was reasonable and justified, simply because her state of mind was less culpable, or at least labeled such by the prosecutor.[118]

In summary, Chief Justice Lehman considered *Duran* an illustration of "the fundamental unfairness caused by confusing 'an unintentional act' with what really is an unintended consequence."[119] Duran's actions, he concluded, were not unintentional, but rather the victim's death was unintentional.[120]

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111. *Id.* at 1011 (Lehman, C.J., dissenting).
112. *Id.* (Lehman, C.J., dissenting).
113. *Id.* (Lehman, C.J., dissenting).
114. *Id.* (Lehman, C.J., dissenting).
115. *Id.* (Lehman, C.J., dissenting) (citing WYO. STAT. ANN. § 6-1-104(a)(ix) (Michie Cum. Supp. 1995)).
116. *Id.* at 1012 (Lehman, C.J., dissenting).
117. *Id.* (Lehman, C.J., dissenting).
118. *Id.* (Lehman, C.J., dissenting).
119. *Id.* (Lehman, C.J., dissenting).
120. To further illustrate the point Chief Justice Lehman used a hypothetical situation.

ANALYSIS

In *Duran*, the Wyoming Supreme Court not only limited the scope of self-defense, but created confusion as to the theory's applicability by allowing its use only when the actor has committed or is accused of committing an intentional act. The Wyoming Supreme Court reveals a fundamental unfairness by deciding that because the defendant's state of mind is labeled less culpable, the defendant is not given the opportunity to present a defense that may demonstrate to the jury that her actions are justifiable and reasonable given the underlying circumstances. Another potential unfairness that exists for women results from the structure of self-defense laws.

The source of the confusion comes from the Wyoming Supreme Court's failure to consider that there can be an intentional act yielding an unintentional result.[121] Cheryl Duran intended to do whatever was necessary to escape further confrontation with Gutierrez.[122] The law of self-defense states that the defender must retreat if possible to avoid using unnecessary force, but Duran could not retreat with Gutierrez on the hood of the car.[123] Duran may not have intended to hurt the victim, but she did intend to do what was required to dislodge him from the hood of the car so that she could escape.[124] By classifying Duran's actions as reckless, an unintentional act was mistaken for what actually was an unintentional consequence.[125]

The existing confusion is also a result of the Wyoming Supreme

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> Imagine the defendant is faced with a deadly assailant and, in response, the intended victim points and shoots the gun at the attacker's legs, meaning to incapacitate him. However, the defendant's lack of skill causes the bullet to enter the assailant's heart, instantly killing him. Should the prosecutor choose to charge him with manslaughter under Wyo. Stat. § 6-2-105 (a)(ii), will we deny a claim of self-defense at trial? Under the majority holding, we do.

Id. (Lehman, C.J., dissenting).

121. *Id.* at 1012 (Lehman, C.J., dissenting).

122. *Id.* at 1011 (Lehman, C.J., dissenting); Respondent's Brief, *supra* note 2, at 8-9.

123. *See* Omichinshi, *supra* note 27, at 1457-58. Note that Duran attempted to retreat both by walking home and by driving off in the car, but the aggressor attached himself to the hood making retreat difficult, if not impossible. Appellant's Brief, *supra* note 5, at 4-5. Wyoming relies on a common law duty to retreat and does not have a statutory definition to this effect. Garcia v. State, 667 P.2d 1148, 1153 (Wyo. 1983).

124. Duran slammed on her brakes, swerved the car, and varied her speed in an attempt to remove her attacker from the hood. Respondent's Brief, *supra* note 2, at 8-9.

125. *Duran*, 990 P.2d at 1012 (Lehman, C.J., dissenting). The early Wyoming case of *Foley v. State* recognized that "it is perfectly evident that one may kill another in self-defense, yet without any intention or expectation that his assailant will be killed." 72 P.2d 627, 629 (Wyo. 1903).

Court's limited explanation of its decision. The decision did not adequately address why the jury should not be allowed to hear the circumstances surrounding the incident or to consider the validity of Duran's reasons for her actions. Duran may deserve to be held responsible for her actions, but certainly she should have been allowed to present her theory of defense based on self-defense and battered woman syndrome to the jury. The jury could then sort through the reasoning and establish whether or not the theory of defense was valid and make a rational decision based on all of the facts.[126]

Under Wyoming Statute Section 6-1-104(a)(ix) the question before the jury was whether Duran's intention was a conscious disregard of a "substantial and unjustifiable risk" and whether her actions constituted "a gross deviation from the standard of conduct that a reasonable person would observe in the situation."[127] The Wyoming Supreme Court failed to acknowledge the difficulty a jury has in determining whether the risk is substantial and unjustifiable and whether the conduct differs from that of a reasonable person if the entire defense is not allowed. Expert testimony on battered woman syndrome and a defense based on self-defense could have aided the jury in their determination of whether Duran's actions were reasonable and justifiable. Also, instructions on self-defense could assist the jury in determining whether the actions were reckless.

The jury is entitled to all of the applicable information before arriving at an informed decision.[128] The jury, not the court, has the duty of determining whether Duran's acts were reasonable, as the jury determines whether the perceived threat of imminent danger and the actions used in defense were reasonable.[129]

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126. The question of reasonableness of the defendant's state of belief is, of course, for the jury. Patterson v. State, 682 P.2d 1049, 1054 (Wyo. 1984).

127. *Duran*, 990 P.2d at 1012 (Lehman, C. J., dissenting). Chief Justice Lehman cites WYO. STAT. ANN. § 6-1-104 (a)(ix) (Michie Cum. Supp. 1995) that is the same as WYO. STAT. ANN § 6-1-104 (LEXIS 1999).

128. The reasoning behind the decision that instructions on self-defense were applicable in *State v. Hall*, was that the jury should have the benefit of as much information as possible to help them in reaching a just verdict. 544 A.2d 746 (Conn. App. Ct. 1989).

129. *Baier*, 891 P.2d 754, 756 (Wyo. 1995). In Wyoming, self-defense requires a jury finding that a defendant's actions were reasonable. Garcia v. State, 667 P.2d 1148, 1152-53 (Wyo. 1983). It is for the jury to determine whether a defendant believed at the time of the death that she was in such immediate danger of losing her own life or receiving bodily injury that it was necessary to take the life of the assailant. Ramos v. State, 806 P.2d 822, 825 (Wyo. 1991). It is also for the jury to determine whether the circumstances provided reasonable grounds for such belief in the mind of a reasonable person. *Id.*

Among the negative repercussions that will result from the Wyoming Supreme Court's decisions are the inevitable inconsistencies that will occur depending on whether or not a theory of self-defense is allowed. If Duran had merely said that she intended to injure Gutierrez, Duran would have been allowed to present her entire theory of defense and possibly change the outcome of the trial.[130] Duran would have presented the justification for her actions under a theory of self-defense and expert testimony on battered woman syndrome, which was essential for her showing of imminent harm. Arguably, this decision may encourage "defense for self" in trial planning in that a defendant may say she intended the harm or death, even if she did not, and face greater charges in order to have a chance to present her entire defense to the jury, resulting in a stronger case. As unlikely as it may seem, the idea of admitting to doing something more culpable for a chance to show that one's actions are justified may be a reasonable decision when faced with the less promising option of being forced to present a case without a true theory of defense.

In his dissent, Chief Justice Lehman stated, "I cannot distinguish this scenario from those in which we allow a criminal defendant to claim self-defense."[131] With this existing confusion between an intentional act and an unintentional result, decisions are likely to vary despite the similarity of the facts, thus creating a fundamental unfairness grounded in ambiguity. Part of the ambiguity is derived from the understanding of the meaning of intent. The court chose to look to the intentional act rather than the unintentional consequence to make its decision. As Chief Justice Lehman acknowledges in his dissent, "the majority holds that the theory of self-defense is unavailable to one who is charged with recklessly causing a result because a charge of recklessness always involves an unintentional act. This is not always the case as Ms. Duran's dilemma illustrates."[132]

The classification of Duran's state of mind was based on her statement that she did not intend the death of Gutierrez, not on the basis that she did intend to do whatever was necessary to distance herself from Gutierrez to prevent further physical abuse. Because the prosecutor

130. "Whether a killing was necessary is a question of fact," and juries should be allowed to "realistically consider, given the totality of the facts of any given situation, whether the use of defensive force was necessary." Jeffrey B. Murdoch, *Is Imminence Really Necessity? Reconciling Traditional Self-Defense Doctrine with the Battered Woman Syndrome*, 20 N. ILL. U. L. REV. 191, 217 (2000) (arguing for elimination of imminence requirement for self-defense).

131. *Duran*, 990 P.2d at 1012 (Lehman, C.J., dissenting).

132. *Id.* at 1011 (Lehman, C.J., dissenting).

chose to label her act as less culpable, she was denied the opportunity to present a justification for her actions based on her perceived danger under the circumstances. Had the prosecutor labeled her actions based on her intent to dislodge Gutierrez from the hood rather than her intent to kill him, the case could have had a dramatically different result.[133]

Further adding to the confusion, the Wyoming Supreme Court's decisions on related issues are inconsistent with its holding in *Duran*. In *Small v. State,* the court implied that self-defense instructions were appropriate for the reckless offense of involuntary manslaughter.[134] Involuntary manslaughter and aggravated vehicular homicide are both reckless offenses and should be treated similarly with respect to the use of self-defense as an affirmative defense. The *Small* court stated, "henceforth, when self-defense is properly raised the jury should be specifically instructed that the state has the burden to prove the absence of self-defense beyond a reasonable doubt."[135] Arguably, if self-defense instructions are permitted for one reckless offense, the same should be true of another, thus leaving the crucial questions of reasonableness and legitimacy to the jury. The inconsistency created by this rigid line drawing seems unjust. The court in *Duran* based its decision on the premise that Duran had committed a reckless act and therefore self-defense was not available to her. If a distinction truly exists as to why a self-defense instruction is permitted for involuntary manslaughter but not vehicular homicide, the *Duran* court should have premised its distinction on the act committed, not on the elements of the act committed.

The inconsistency surrounding the Wyoming Supreme Court's decision continues when *Duran* is compared with *Duckett v. State,* where

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133. This argument brings up a compelling related issue of prosecutorial discretion. Ultimately, the prosecutor decided what to charge Duran with. The prosecutor should have considered self-defense and battered woman syndrome as a possible part of the fact scenario but likely based the decision solely on the fact that Duran stated that she did not intend to kill Gutierrez. The irony here is that Duran was charged with a lesser offense but had she been charged with a greater offense, she arguably would have stood a better chance for acquittal through the support of the theory of self-defense. A potential for abusive use of prosecutorial discretion exists in that a prosecutor may charge a reckless offense to avoid having to deal with self-defense. In State v. Isom, the defendant stated that he did not intend to kill the victim and the court stated that such a statement was not determinative of whether or not an involuntary manslaughter instruction was authorized. 906 S.W.2d 870, 876 (Mo. Ct. App. 1995). The court in Isom held that the testimony must be measured against the facts, and a testimonial denial of intent to kill may not authorize an instruction on involuntary manslaughter where the defendant's conduct was likely to produce death. *Id.*

134. Appellant's Brief, *supra* note 5, at 16.

135. Small v. State, 689 P.2d 420, 423 (Wyo. 1984).

the court expanded the scope of "defense of others."[136] Both self-defense and defense of others have derived from the same common goal of seeking justification for one's actions; however the court's decisions in the two cases are inconsistent despite their common origin.[137] The inconsistency arises from the court's willingness to expand the application of defense of others and then limit the use of self-defense, despite the similar purpose of explaining one's actions.

Not only is a fundamental unfairness apparent in the absence of a distinction between an intentional act and an unintentional result, but also in the structure of self-defense laws as related to abused women.[138] Although women kill less frequently than men do, it is significant that when women do kill, the victims are often men they knew well, such as husbands or lovers.[139] A question exists as to whether a woman is more privileged to use more force, such as deadly force, than her male attacker.[140] "To expect or demand that women, who are likely to be smaller and less adept with their fists than most men, respond like schoolboys in the yard when attacked may leave them utterly without defenses."[141] According to one scholar:

> Women have been disadvantaged severely in their attempts to gain acquittal on the grounds of self-defense because a woman's reasonable response to physical violence is likely different from a man's because of her size, [and] strength . . . . Even more problematic is the fact that the traditionally male-conceived notion of necessity does not include the kind of circumstances that women face in the context of a battering relationship.[142]

The Wyoming Supreme Court's decision failed to realize the no win situation that Duran was in on the night in question and illustrates the disadvantages a woman confronts when faced with defending herself. If Duran remained in the car, the facts suggest that Gutierrez would have gotten in, as he was pulling on the partially opened window.[143] Duran's

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136. Duckett v. State, 966 P.3d 941 (Wyo. 1998); *see supra* note 69.

137. Commonwealth v. Martin, 341 N.E.2d. 885, 891 (Mass. 1976). The court considered the claim of self-defense to be a less esoteric justification than defense of others.

138. Steffani J. Saitow, *Battered Woman Syndrome: Does the "Reasonable Battered Woman" Exist?* 19 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 329, 346-47 (1993).

139. Deborah Kochan, *Beyond Battered Woman Syndrome: An Argument for Development of New Standards and the Incorporation of a Feminine Approach to Ethics,* 1 HASTINGS WOMEN'S L.J. 89, 95-96 (1989).

140. Susan Estrich, *Defending Women*, 88 MICH. L. REV. 1430, 1432 (1990).

141. *Id.*

142. Kochan, *supra* note 139, at 98.

143. Appellant's Brief, *supra* note 5, at 5.

only legitimate option may have been to attempt to escape further confrontation, but Gutierrez made that impossible when he attached himself to the hood of the car.[144] As one author stated, "Since necessity does not contemplate living with physical abuse, the possibility of a fundamental right to live free from abuse never enters into the equation that balances the rights of the attacker against the rights of a woman to preserve her physical integrity."[145]

A different standard of self-defense for women is one potential way to eliminate or reduce the unfairness. A blanket generalization seems the best starting place because no two men or women are alike. But then all of the relevant factors must be included for the jury to consider the applicability of self-defense as it applies to a given situation and the given individual. The respective sizes and sex of the assailant and defendant must be taken into account in determining the amount of force that was appropriate for the situation.[146] Duran did what she felt she had to do in order to prevent further injury to herself. Given her history of abuse, Duran may have been justified in her belief that she was in danger of injury or death, but the jury was not allowed to consider the reasonableness of such a justification.[147]

In *State v Wanrow,* the Washington Supreme Court held that a woman defending herself should be allowed to have the jury consider her actions in light of her own perceptions of the situation.[148] Wyoming should adopt this subjective analysis which would allow the defendant to better reach the jury in her explanation of her actions by asking the jury to see the situation through her eyes, given her history and the overriding circumstances.[149]

> An attempt to fit a battered woman into a perfect self-defense doctrine utilizing a reasonable person standard is analogous to trying to fit a square peg into a round hole. The battered woman is not a reasonably prudent person. Her characteristics and personality have been severely affected by the abuse which she has endured. She should not be punished for being a victim of that abuse. Considering her acts only in the light of a reasonable per-

144. *Id.*
145. Kochan, *supra* note 139, at 97-98.
146. Turk, *supra* note 71, at 906.
147. *See supra* note 15.
148. 559 P.2d 548 (Wash. 1977).
149. *See* Saitow, *supra* note 138, at 350-51.

> son, when through no fault of her own she does not qualify as one, is in essence condemning her suffering.[150]

The *Duran* court hastily concluded that the only purpose to be served by allowing the expert testimony on battered woman syndrome in *Duran* was to establish her state of mind on the night in controversy. However, expert testimony on battered woman syndrome was needed to educate the jury on battering and its effects so that the jurors could see the interplay between Duran's actions and the claim of self-defense.[151] In order for a jury to understand whether Duran reasonably believed she was in imminent danger of death or serious injury, the jury needed to perceive the situation from Duran's perspective—that of a battered woman.[152]

Duran would have benefited from expert testimony, because it would have explained "the common experiences of, and the impact of repeated abuse on, battered women."[153] This would have helped the jury understand the context of Duran's actions.[154] Even if only general expert testimony were permitted in *Duran*, the jury would have had a better framework from which to decide whether Duran's actions were reasonable and justifiable.[155] Additionally, expert testimony might have cleared up any misconceptions that existed in the minds of the jury and might have given more validity to the serious effects of battering.[156] Misconceptions held by triers of fact can negate either the occurrence or seriousness of violence and the victim's response of fear and intimidation.[157] Expert testimony can also help the factfinders understand the

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150. *Id.* at 367.

151. Kochan, *supra* note 139, at 97-98.

152. Turk, *supra* note 71, at 946.

153. E.M. Schneider, *Describing and Changing: Women's self-defense work and the problem of expert testimony on battering,* 9 WOMEN'S RTS. L. REP. 195, 198 (1986).

154. This type of expert testimony is often referred to as social framework testimony as it employs "social science research to provide a social and psychological context in which the trier can understand and evaluate claims about the ultimate fact." N. VIDMAR and R.A. SCHULLER, *Juries and Expert Evidence: Social Framework Testimony.* LAW AND CONTEMPORARY PROBLEMS 133 (1989).

155. General testimony is based on scientific and clinical knowledge about domestic violence and its effects on battered women. Dutton, *supra* note 76, at 21. With this testimony, the expert does not form opinions or conclusions related to the specific case. *Id.* Case-specific testimony provides information about a particular battered woman and the context in which the domestic violence occurred. *Id.*

156. DUTTON, *supra* note 76, at 20.

157. *Id.* at 3-4.

battered woman's appraisal of a threat and her response to that threat.[158] Additionally, expert testimony as to Duran's history of abuse would be significant. A battered woman who suffers from posttraumatic stress disorder may perceive a situation as dangerous because she reexperiences prior trauma through flashbacks.[159]

Notwithstanding the Wyoming battered woman statute, battered woman syndrome was relevant to whether Duran's risk was justifiable and whether Duran's conduct was a gross deviation from what was reasonable under the circumstances.[160] Given the need to establish the reasonableness and justifiability of a person's actions, testimony on battered woman syndrome could help the jury more accurately evaluate far more than the battered woman aspect of the case.[161]

Granted controversy surrounds a number of the existing defenses that can be raised in an attempt to avoid punishment for crimes committed. One scholar notes that the "abuse excuse—the legal tactic by which criminal defendants claim a history of abuse as an excuse for violent retaliation—is quickly becoming a license to kill."[162] Battered woman syndrome may have stretched the boundaries of self-defense and may not fit within the traditional framework of a self-defense theory, because historically the standard for determining a reasonable amount of force or reasonable belief of imminent danger was based on a reasonable "man."[163] The jury, however, should be the ultimate judge of whether or not the particular defendant before them is using the "abuse excuse" as a "license to kill" or whether the defense provides a justified basis for ac-

158. *Id.* at 8. The nature of the threat can be objectively determined from the disparity between the two individuals in size, weight, strength and/or skill in using physical force. *Id.*

159. *Id.* at 11.

160. Consideration should be given to whether Wyoming's battered woman syndrome statute, WYO. STAT. ANN § 6-1-203 (LEXIS 1999), may need updating given the greater, more accurate data that is now available on the subject. Dutton states that the term battered woman syndrome is not adequate to refer to the scientific and clinical knowledge concerning battering and its effects applicable to criminal cases involving battered women. DUTTON, *supra* note 76, at 17-20.

161. The Wyoming Supreme Court in other circumstances has been more willing to allow evidence on battered woman syndrome. In Trujillo v. State, 953 P.2d 1182 (Wyo. 1998) the Wyoming Supreme Court admitted expert testimony on domestic violence and battered woman syndrome to help the jury understand the victim's behavior. However, in Ryan v. State, 988 P.2d 46 (Wyo. 1999) testimony related to battered woman syndrome was found to be inadmissible as character evidence.

162. ALAN M. DERSHOWITZ, THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES AND EVASIONS OF RESPONSIBILITIES 3 (1994).

163. Kochan, *supra* note 139, at 99.

quittal.[164] The variation of facts among cases using battered woman syndrome as a defense warrants a more subjective analysis of the circumstances of each specific case and the interplay of such circumstance with the applicable law.

Guidance From Other Jurisdictions

Other jurisdictions have found that self-defense is an appropriate defense to homicide offenses based on reckless conduct. In *Hanton v. State,* the Washington Supreme Court approved self-defense as a defense to a charge of manslaughter, a reckless offense.[165] The *Hanton* court stated that since an act performed in self-defense is not a wrongful act, it cannot be a gross deviation from the conduct that a reasonable man would exercise in the same situation.[166] The Washington Supreme Court concluded that a person acting in self-defense could not be acting recklessly.[167] Under the logic of *Hanton,* evidence of self-defense should have been permitted in *Duran* to refute the existence of the "reckless" element.[168] The fundamental unfairness in *Duran* is that because Duran's actions were labeled reckless and less culpable, she was denied consideration of whether she was acting in self-defense.

In *State v. Hall,* the Connecticut Supreme Court held that a self-defense instruction should be given in cases involving manslaughter in the second degree, a reckless offense.[169] The *Hall* court based its decision on two lines of reasoning. First, the court recognized the difficulty in reconciling the concepts of "reckless" and "self-defense," but stated that "the jury should have the benefit of as much information and instruction as will aid them in arriving at a just verdict."[170] Second, under Connecticut's definition of self-defense, the justifiability of a defendant's actions is measured from the subjective perspective of what the

164. DERSHOWITZ, *supra* note 162; *see* Patterson v. State, 682 P.2d 1049, 1054 (Wyo. 1984).

165. Hanton v. State, 614 P.2d 1280, 1282 (Wash. 1980).

166. *Id.*

167. *Id.* Acting recklessly requires a "gross deviation from the standard of conduct that a reasonable person would observe" but acting in self-defense when the situation merits is considered reasonable. *Id.* Duran should have been allowed to use self-defense to show she was acting reasonably and therefore not recklessly. Duran tried to act reasonably by trying to escape first by leaving to avoid confrontation with Gutierrez and then by trying to remove Gutierrez from the hood. Appellant's Brief, *supra* note 5, at 4-5.

168. *Id.* Wyoming's definition of recklessly is substantially similar to Washington's definition of recklessness.

169. 569 A.2d 534, 536-37 (Conn. 1990).

170. *Id.* at 536.

defendant reasonably believes.[171] The reckless offense, however, requires the justifiability of the defendant's action to be viewed from an objective perspective of a reasonable person.[172] The court in *Hall* concluded that "the conduct may be a gross deviation from the standard of conduct that a reasonable person would observe in the situation . . . but at the same time, may be wholly justified if the defendant's beliefs are reasonable from the perspective of that defendant."[173] The Wyoming Supreme Court should have followed the reasoning in *Hanton* and *Hall,* which more effectively confronts the fundamental unfairness that exists as a result of the questionable compatibility of a reckless offense and of self-defense.

In order to remedy the dangerous precedent set by *Duran*, the legislature or the Wyoming Supreme Court should refine the definition of "intent" in a way that recognizes the difference between an intentional act and an unintentional consequence. The issue of act versus consequence needs to be settled by determining whether "intent" applies to the act or to the consequence. This issue merits a second look that acknowledges the differences in circumstances and the negative repercussions that result from a failure to recognize the difference between the act and the consequence. By acknowledging the necessary distinction, the inconsistency of decisions and the existing fundamental unfairness can be remedied.

In cases based on a reckless offense similar to *Duran,* justice would better be served with more jury involvement to weigh the applicability and validity of the theory of self-defense and its related components.[174] If Duran had simply stated that she intended to harm Gutierrez, then the jury, not the prosecutor in labeling the charges as less culpable, would have decided the applicability of the defense theories promoted by Duran.

CONCLUSION

The Wyoming Supreme Court in *Duran* does not adequately consider the existing tension between an intentional act and an unintentional consequence. In this case, Duran should have had the opportunity to demonstrate to the jury, given her subjective belief at the time, that the risk she took was justifiable and that the conduct she engaged in to protect herself from what she perceived to be a dangerous situation was

171. *Id.* at 537-38.
172. *Id.*
173. *Id.*
174. *See* Hanton v. State, 614 P.2d 1280 (Wash. 1980).

reasonable given all of the circumstances. The outcome of her case could have differed dramatically had she been allowed to present her theory of defense based on self-defense and battered woman syndrome. This decision has limited self-defense in a way that may generate a greater demand for 'defense of self' against limitations that allow self-defense for more culpable acts while denying the same defense for a less culpable act.

ANDREA L. EARHART