

Violence Against Women Newsletter

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Herb Tanner, Jr. Editor



Overcoming The Consent Defense

by Teresa P. Scalzo, Esquire¹

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Many Americans believe that rape² is only committed by strangers who use lethal force or the threat of it, and that victims always suffer from serious physical injury. As a result, many jurors rush to the judgment that a rape victim who does not fit the stereotype of a "real" rape victim is not credible and must have consented to intercourse, especially when the defendant does not fit the stereotype of a "real" rapist. The reality of rape is often quite different from the myth of "real rape,"³ and frequently involves an acquaintance of the victim claiming consent by the victim as a defense to the charge of rape. The prosecutor can overcome the consent defense with a two-pronged strategy. First, the prosecutor must show the jury why the victim is credible, and therefore, a "real" victim. Second, he or she should show the jury why the defendant is a "real" rapist.

PROVING VICTIM CREDIBILITY

Jurors' negative perceptions of victims' credibility can be a significant barrier to success. In rape cases, credibility of the victim and provability of the case are inherently intertwined, in large part because rape is a crime of secrecy. There are almost never eyewitnesses to a rape. Moreover, rape cases rarely have physical evidence that conclusively proves that a rape occurred. Prosecutors

are left with the victim's word, which means that jurors must find the victim credible before they will convict the defendant.⁴ To be found credible, a victim must testify well in the eyes of the jury. Prosecutors can do three things to assist the victim in testifying in a competent and credible manner: (1) support, (2) protect, and (3) prepare the victim. Additional strategies that will corroborate the victim's testimony and therefore bolster her credibility include: (4) present witnesses in an order that builds a victim's credibility; (5) explain any injuries or lack thereof; (6) explain any counterintuitive behavior exhibited by the victim; and (7) explain any inconsistencies in the victim's testimony. These strategies are discussed *ad seriatim*.

Show the jury why the defendant is a real rapist

Support the Victim

Support can be provided in a number of ways. For example, a multidisciplinary Sexual Assault Response Team (SART)⁵ can support and comfort the victim, especially when the team includes victim advocates who can work with prosecutors to ensure that the victim is comfortable on the witness stand. A SART can empower the victim and give her the support she⁶ needs to make it through the investigation and

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trial process. If a SART does not exist in your community, consider starting one. Other ways to support the victim include: creating a Sexual Assault Nurse Examiner (SANE)⁷ program, working with victim advocates, and providing a safe and comfortable place for the victim to wait to testify. A victim who feels supported is more likely to feel comfortable on the witness stand, which will enable the jury to focus on her credibility.

Protect the Victim

Protect the victim to the best of your ability. A victim who feels protected through the process is less likely to become defensive or angry on the witness stand. When a victim becomes angry or defensive, jurors are likely to believe that she has something to hide, rather than recognizing these reactions as normal human behavior.

- *Utilize pretrial motions to protect the victim's physical safety and privacy.* For example, file a motion to revoke bond if the defendant contacts the victim or file a motion to clear the courtroom of individuals who might threaten or attempt to intimidate the victim. You may not always succeed, but the victim will see that you are fighting to protect her.
- *Do your best to protect the victim's identity.* If possible, use her initials and date of birth in court documents as opposed to her full name.
- *Oppose frivolous defense motions intended to harass and intimidate the victim.* For example, oppose motions requesting a psychological examination of the victim or asking for the victim's counseling records.

- *Oppose attempts to pierce the rape shield law in your jurisdiction.*⁸
- *Finally, if the victim is afraid for her physical safety, do your best to protect her.* For example, request extra deputies for the courtroom or arrange for a deputy or police officer to escort her between her car and the courthouse before and after any hearings. The defendant or his friends or family frequently take these opportunities to intimidate the victim.

Prepare the Victim

Testifying in court can be as traumatic as the original rape because the victim is forced to relive the rape mentally.⁹ Prepare victims not only for direct examination but also for the harsh reality of cross-examination. To prepare a victim, discuss her substantive testimony as well as basic rules for testifying. Tell the victim that the most important rule for her to follow in the courtroom is to be truthful. Tell her to be honest about all details

***Using an offender
focused approach
can overcome
common challenges***

of the event, even if the details are embarrassing. Explain to the victim that if she attempts to hide or exaggerate small details, the defense will probably be able to show this on cross examination. The defense will then argue in closing that the victim is a liar and cannot be believed about the rape if she cannot be believed about the small details. Instruct the victim on the importance of accuracy. For example, a victim may be inclined to say that the defendant "ripped" her panties off, when in fact, he pulled them off, but did not rip them. The slightest

Did you know..

the VAW Project offers technical assistance to prosecutors in any domestic violence or sexual assault case? The VAW Project can help with evidentiary, procedural or statutory issues at any point in your case.

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imprecision opens the door for cross-examination and may call the victim's credibility into question. Ask her to try to stay calm, since a victim who becomes angry will be unable to think clearly. Working with victim advocates can make the preparation for testifying more comfortable for the victim and thus, more productive for the prosecutor.

In cases where the consent defense is used, cross-examination may be particularly harsh. Victims who are prepared in advance for the challenge of the experience will be better witnesses when they testify. It will also be easier for them to endure the trial process if they understand that they are not being asked difficult questions because they are a bad person or because they did something wrong. Instead, if they are being cross-examined harshly, it is because the defense attorney is protecting his or her client. An advocate may be extremely helpful to the victim and to the prosecutor by being present during preparation for cross-examination and during the trial itself.

Think Carefully About Witness Order

Witnesses do not necessarily need to be presented in chronological order. If there is a witness who supports the victim's testimony in a way that makes the victim appear more credible, present that witness before the victim. With this approach, when the jury hears the victim's testimony, they will already be inclined to find her credible. For example, consider starting with a witness who saw the victim immediately after the incident in a highly emotional state or a medical witness who treated an injury.¹⁰

Explain Any Injuries or Lack Thereof

Many jurors believe that all women who are raped sustain serious physical injuries. They do not understand how a

rape can occur without injury. The reality is that very few rape victims sustain any physical injuries other than the rape itself.¹¹ When a medical examination is done, it is important to present it thoroughly, even if it shows that no injury occurred. If a sexual assault forensic examination was done, do not stipulate to testimony about the exam. Have the nurse or doctor who performed it explain it in as much detail as possible. The procedure is long and very invasive. Jurors who understand what the victim had to endure in order to prosecute the case will be more likely to find her credible. If the jurisdiction allows, corroborate the victim's statement about her reaction to the rape by having the nurse or doctor testify to the victim's demeanor throughout the exam. The nurse or doctor will have spent hours with the patient in many cases, due to the length of the exam.

In addition to explaining the details of the examination, it is important to present expert testimony explaining any injury or lack thereof.¹² When injury exists, use an expert to explain that the victim's description of how the injury occurred is consistent with the examiner's findings. If there is no injury, use the expert to explain how it is possible that a woman could be raped but have no physical injuries. Have the expert testify that in his/her training, practice and experience, significant physical injury from a rape is extremely rare.

It must be remembered that rape victims who do not suffer immediately apparent injury may still suffer severe long-term consequences. "A number of long-lasting symptoms and illnesses have been associated with sexual victimization including chronic pelvic pain; premenstrual syndrome; gastrointestinal

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Thank You...



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disorders; and a variety of chronic pain disorders, including headache, back pain, and facial pain."¹³ If any of these symptoms or illnesses are present by the time the case goes to trial, evidence of them may be presented.

*Explain Any Counterintuitive Behavior*¹⁴

Victims often behave in ways that are counterintuitive to jurors' expectations. Jurors expect "real" rape victims to resist their attackers to the utmost of their ability, report the rape immediately and be hysterical in court. In reality, victims behave in any number of ways, many of them counterintuitive.¹⁵ When victims do not behave in ways that are consistent with jurors' expectations, jurors tend to assume that the victims are lying. To explain a victim's counterintuitive response to rape to a jury, the prosecutor must first understand it. Identify any behaviors that appear counterintuitive, such as not screaming during the rape, failing to immediately report the rape, or continuing to socialize with the rapist. Work with the victim and any of her counselors or advocates to understand these behaviors. For example, if a victim delayed in reporting the rape to the police, ask her why. Remember that it is not uncommon for victims to recognize that something horrible happened to them without labeling it as rape.¹⁶ Often, a victim may not acknowledge the traumatic experience as rape until after a discussion with a friend, law enforcement officer or medical personnel. When explaining any counterintuitive behavior to a jury, a prosecutor must present the jury with enough evidence of the victim's background to enable them to understand that her reaction, while counterintuitive to them, was absolutely natural to many rape victims. Consider the example of a college student who was using cocaine on the night she was raped and who delayed in reporting because she knew she would lose her scholarship if her

college found out that she was using cocaine. Before explaining the cocaine use to the jury, explain that the victim was the first in her family to attend college and that, without her scholarship, she would have been unable to afford to continue her schooling. When the jurors appreciate the impact of losing the scholarship, they will be more likely to understand why she did not report a rape.

Finally, consider presenting expert testimony to explain the victim's counterintuitive reactions. An experienced expert can explain behaviors a jury might otherwise not understand. An expert need not be expensive. For example, a community-based victim advocate who has worked with many victims and can articulate the various behaviors victims commonly engage in, including those that are counterintuitive, would be a competent expert who might not charge a large fee for testifying.¹⁷

Explain Any Inconsistencies in the Victim's Testimony

In rape cases, inconsistencies in the victim's statements and testimony tend to take on gigantic proportions. Members of the public who are unwilling to admit that they believe that women lie about rape will often freely admit that they would hesitate to convict a defendant of rape without some form of corroboration, even though this is not required for a conviction. Prosecutors must review all victim statements, identify any inconsistencies or partial revelations and address them with the victim and other witnesses prior to trial. Prepare the victim to answer the defense's inevitable questions about the inconsistencies. When the jurors understand that the inconsistencies were not deliberate lies on the part of the victim, they will be more likely to find her credible.

SHOWING THE JURY THE DEFENDANT IS A "REAL RAPIST"

To overcome the consent defense, the prosecutor must not only convince the

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jury that the rape victim is a “real” victim; he/she also must convince the jury that the defendant is a “real” rapist. To do so, the prosecutor must prove to the jury that the behavior attributed to the defendant was not normal sexual behavior; rather, it was rape.¹⁸ The prosecutor should begin by conducting an offender-focused investigation and prosecution. Next, the prosecutor should introduce prior bad acts whenever possible. Finally, the prosecutor can show the jury how the defendant became a stranger to the victim. These strategies are discussed ad seriatim.

Conduct an Offender-focused Investigation and Prosecution

Utilizing an offender-focused investigation and prosecution can show a jury why the defendant before them is a predator as opposed to a nice guy caught through no fault of his own in a bad predicament.¹⁹ Although prosecutors generally focus on the offender when trying any other criminal case, they tend to focus on the victim and any of the victim's flaws or vulnerabilities in rape cases. Rape cases must be tried in the same way that other criminal cases are tried—with a focus on the offender. Instead of viewing a victim's vulnerabilities as weaknesses, show the jury why a predator would target a person with those vulnerabilities. Generally, the worse a victim initially appears to be as a witness, the better a target the victim probably was for the predator who raped her. For example, an offender might select a victim voluntarily under the influence of drugs because the offender recognizes that drug users are going to be less credible in the criminal justice system. Remind the jury that defendants select their victims with the intention of not getting caught.

Using an offender-focused approach to the investigation and prosecution of sex crimes can overcome a number of common challenges in rape cases. For example, a prosecutor may be able to

explain how a defendant was able to rape a victim without using a traditional weapon. Jurors generally expect that a rapist will use a weapon, or at least use some form of excessive force. However, in 2004, only 8% of rapes involved the use of a knife or other weapon.²⁰ Nonstranger rapists generally use only the force necessary to overcome the victim's resistance. In many cases, this may equate to nothing more than lying on top of the victim and pinning her arms down. Nonstranger rapists are also far more likely to gain control of their victims through the use of deception, manipulation, planning, premeditation, and betraying their trust. One of the most common tools used by nonstranger rapists is alcohol²¹ Look for evidence of all of these tools. Did the defendant lie to the victim by promising her a safe ride home and then driving her to a field where he raped her? Did he trick her by asking to come inside her home to use the bathroom? Did he buy her drinks, or convince her to keep drinking when she wanted to stop?

Another challenge that can be overcome with an offender-focused prosecution is delayed reporting by the victim. Rather than viewing the delayed report as vulnerability on the part of the victim, consider whether the defendant played a role in delaying the report. Did the defendant do something as part of his “exit strategy”²² to keep the victim quiet? Did he threaten her, either with force or blackmail (by threatening to get her into trouble for any bad decisions she made that he took advantage of)? Did he make her question her own judgment by telling her she had led him on, thereby causing him to rape her? If so, explain the delayed report in terms of the defendant's exit strategy and how it was almost successful in keeping the victim quiet. In these kinds of situations, the prosecutor could argue, “He tried to shame her into silence.”

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Look for Prior Bad Acts

All too often, in nonstranger rape cases, the investigation looks only at the current case and does not look for prior rapes. When possible, ask police officers to interview the defendant's friends, prior girlfriends, and others who might know about prior acts. Although these people may have a reason to lie, they may also be willing to assist. If the defendant has any prior cases, review those cases, even if they were dismissed. Further investigation might be warranted. Do not only look for completed rapes; also look for evidence that can be used to demonstrate the defendant's pattern of behavior towards women. Prior bad acts stopping short of actual rape may support the argument that he deceived the victim, manipulated her, or planned and premeditated the rape.²³

Show the Jury How the Defendant Became a Stranger to the Victim

The myth of "real rape" portrays the rapist as a stranger to the victim. However, in reality, most victims know their rapists.²⁴ As a result, it is common for a victim of nonstranger rape to be with the defendant voluntarily at the time of the rape. Prior to the rape, the defendant was not a stranger, so it was not unreasonable to trust him. Because she trusted the defendant, the victim did not recognize the danger until it was too late. Prosecutors must show the jury why the victim initially trusted the defendant and how he was able to trick her and take advantage of her trust. At what moment did the victim recognize that she was in danger? Very often, victims do not

recognize the danger until it is too late because they perceive the defendant to be safe.

At trial, first have the victim explain who the defendant appeared to be, and then explain who he really was. Ask her to describe for the jury the moment she realized that she was in danger and that he was going to rape her. Ask her to describe any changes in his demeanor, speech or behavior. The contrast will show the jurors that although the defendant did not initially fit their stereotype of a "real" rapist, he is, nevertheless, guilty. Show the jury that it was the defendant who tricked the victim into believing that he was someone who would not hurt her. Argue that the defendant became a stranger to the victim when he raped her.

CONCLUSION

Overcoming the consent defense is extremely difficult, especially when the jury believes in the myth of "real rape." The two-pronged strategy provided in this article will allow the prosecutor to rebut the myth and show jurors that the defendant is guilty of rape, regardless of whether the victim fits their stereotype of a "real" victim or the defendant fits their stereotype of a "real" rapist. As a result, the prosecutor will be able to overcome the consent defense and move the jury from searching for doubt to believing the victim.

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2. In this article, the terms rape and sexual assault are used interchangeably.
3. The term "real rape" was originally defined by Susan Estrich as the stereotype of an assault committed by an armed stranger with a great deal of force. Susan Estrich, *Real Rape* (1988).
4. Note that a victim's word need not be corroborated in a rape case before the defendant can be convicted.
5. A multidisciplinary SART should include Prosecutors, police officers, victim advocates, and Sexual Assault Nurse/Forensic Examiners, among others. These allied professionals must be involved from the beginning of the case.
6. From 1992 to 2000, females accounted for 94% of the victims of all completed rapes, 91% of the victims of all attempted rapes, and 89% of the victims of all completed and attempted sexual assaults. In single-offender rapes and sexual assaults, the percentage of male offenders is nearly 99%. Lawrence A. Greenfeld, U.S. Dep't of Justice, Bureau of Justice Statistics, *Sex Offenses and Offenders 4* (1997). For this reason, the pronoun *she* is used when referring to a victim and the pronoun *he* is used to refer to the perpetrator; however, the principles discussed apply regardless of the sex of the victim or the perpetrator.
7. SANE programs, have different names, including Sexual Assault Forensic Examiner Program. For the purpose of this article, the abbreviation SANE is used.
8. Prosecutors are encouraged to be proactive in filing motions to preclude information barred by rape shield laws. A sample motion can be obtained from NCPVAW's Prosecution Toolkit at http://www.ndaa.org/phpdocs/prosecution_toolkit.html.
9. The public setting, the presence of the offender and the difficulty of cross-examination may be very stressful and can return a victim to state of crisis. Robert R. Hazelwood & Ann Wolbert Burgess. *Practical Aspects of Rape Investigation: A Multidisciplinary Approach 39* (3rd ed. 2001). Looking at the perpetrator may remind a sexual assault victim of the circumstances underlying the crime and may thereby produce psychological trauma Richard P. Wiebe. *The Mental Health Implications of Crime Victims' Rights*, in *Law in a Therapeutic Key: Developments of Therapeutic Jurisprudence 216* (David B. Wexler & Bruce J Winnick eds., 1996).
10. If the prosecutor intends to introduce any statements through this witness, he or she should be prepared to overcome potential hearsay objections.
11. From 1992-2000, approximately 67% of victims of completed rapes sustained no physical injury other than the rape itself, and only 5% sustained severe physical injuries. Callie Marie Rennison; U.S. Dep't of Justice, Bureau of Justice Statistics, *Rape and Sexual Assault: Reporting to the Police and Medical Attention. 1992-2000* (2002).
12. If the court will not accept the medical person who performed the exam as an expert, bring in a separate medical expert to explain the victim injuries or lack thereof.
13. National Research Council, *Understanding Violence Against Women 77* (Nancy A. Crowell & Ann W. Burgess eds. 1997).
14. See, Jennifer Long, *Working with Experts to Explain Counterintuitive Behavior in Domestic Violence and Sexual Assault Cases*, *The Voice*, vol 1, Issue 4 (APRI). To request a copy, please contact APRI's National Center for the Prosecution of Violence Against Women at ncpvaw@ndaa.org or 703.549.4253.
15. 16% of rape victims report being raped to the police. Approximately 25% of the rapes reported were reported over 24 hours after the assault. National Victims Center & Crime Victims Research & Treatment Center. *Rape in America: A Report to the Nation* (1992).
16. The National College Women Sexual Victimization Survey showed that almost half of the women who were characterized as victims of a completed rape did not consider themselves to be victims of rape. Michael Rand & Callie Rennison, U.S. Dep't of Justice, Nat'l Inst. of Justice, *How Much Violence Against Women is There? 8* (NCJ 199701) (Bonnie S. Fisher ed., 2004).
17. Do not use an advocate who has worked with the victim. Instead, consider calling an advocate from the state coalition or another local rape crisis center.
18. Note that although the focus of the investigation and trial should be on the offender's actions, the response to sexual assault must remain victim-centered.
19. To ensure that the evidence enables them to conduct an offender-focused prosecution, prosecutors should train police to conduct offender-focused investigations in rape cases.
20. Shannan M. Catalano, U.S. Dep't of Justice, Bureau of Justice Statistics, *Crime Victimization, 2004 4* (2005).
21. In a study that assessed 1,882 men for acts of interpersonal violence. 120 of the men self-reported acts that met the legal definitions of rape or attempted rape but were not prosecuted by criminal justice authorities, "A majority of these

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men, 80.8%, reported committing rapes of women who were incapacitated because of drugs or alcohol; 17.5% reported using threats or overt force in attempted rapes; 9.2% reported using threats or overt force to coerce sexual intercourse and 10% reported using threats or overt force to coerce oral sex." David Lisak & Paul Miller, Repeat Rape and Multiple Offending Among Undetected Rapist, 17 Violence and Victims, No. 1, 78 (2002).

22. "Exit strategy" refers to the defendant's plan for getting away with the crime. It includes steps he takes to keep the victim quiet and to destroy evidence, as well as anything else done to preclude getting caught.

23. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It

may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of the evidence it intends to introduce at trial." Fed R. Evid. 404(b).

24. In 2004, 67% of rapes/sexual assaults against women were perpetrated by someone known to the victim, Catalano, supra note 20. 90% of college women who are victims of rape or attempted rape know their assailant. Bonnie S. Fisher & Francis T. Cullen & Michael G. Turner, US Dep't of Justice, Nat'l Inst. of Justice, The Sexual Victimization of College Women 17 (2000).

Who is Teresa Scalzo?

Teresa Scalzo is the Senior Policy Advisor for the Sexual Assault Prevention and Response Office (SAPRO), the Department of Defense's single point of accountability for sexual assault policy. SAPRO develops policy and programs to improve prevention efforts, enhance victim support, and increase offender accountability, and it collaborates closely with the four Military Services to implement those policies and programs.

Prior to joining SAPRO, she served at the National District Attorneys Association, first as Policy Attorney and then as the Director of the National Center for the Prosecution of Violence Against Women (NCPVAW). She supervised the creation of the *National Institute on the Prosecution of Domestic Violence* and the *National Institute on the Prosecution of*



Sexual Violence. She designed the curricula for *Evidence Based Prosecution* and *Sexual Assault Trial Advocacy* for the National Advocacy Center and the *Sexual Assault Prevention and Response Advanced Training for JAG Officers* for the Department of Defense. She has also

provided technical assistance and trial support to criminal justice professionals throughout the nation and has served on several national committees dealing with sexual assault and domestic violence.

Ms. Scalzo began her law career as a clerk to the Honorable Jack A. Panella of the

Northampton County (PA) Court of Common Pleas. She then served as an Assistant Public Defender in Northampton County and maintained a

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private law practice. Next, Ms. Scalzo served as an Assistant District Attorney in Northampton County (PA), where she held various positions, including Chief of the Sexual Assault Unit and Coordinator of Police Training. As Chief of the Sexual Assault Unit, she drafted a protocol for investigating and prosecuting sexual assault cases and trained local police officers in the handling of sexual assault matters.

Ms. Scalzo authored *Preliminary Hearings: A Manual for Pennsylvania Prosecutors* for the Pennsylvania District Attorneys Association and was a contributing author for the *Pennsylvania Benchbook on Crimes of Sexual Violence*. Additionally, she has authored numerous articles for *The Prosecutor*, the

magazine of the National District Attorneys Association and *The Voice*, NCPVAW's newsletter. She has also served as an adjunct professor at the Fogelsville Campus of Penn State University and Northampton County Community College.

In 2001, Ms. Scalzo received the Allied Professional Award for Outstanding Commitment to Victims' Services from the Crime Victims Council of the Lehigh Valley.

Ms. Scalzo graduated from Trinity College in Hartford, Connecticut with a major in economics and *cum laude* from Temple Law School in Philadelphia, Pennsylvania. She is a member of the Pennsylvania bar, the Eastern District of Pennsylvania bar and the Third Circuit Court of Appeals bar.

4-Year-Old's Statement Admitted As Dying Declaration

Can a 4-year-old child's hearsay statements be admitted as a dying declaration? The Michigan Supreme Court recently answered yes to that question in *People v. Michael William Stamper*, SC No. 132887, decided December 27, 2007.

Jake was "passing out" after his bath, and his mother tried to revive him by asking him to open his eyes. Jake responded, "Mom, I can't, I'm dead." He also said, "don't bother me, I'm already dead."

Jake was admitted to the hospital with bruises on his neck, arms, chest, abdomen, groin, testicles and legs. A nurse asked how he got his injuries, and Jake answered "from Mike." Another nurse asked who Mike was, and he said "Mom's wife." Jake died shortly after that from internal injuries likely caused, according to the testimony of a pathologist, by an adult male fist or blunt object.

Jake's statements identifying the defendant as the cause of his injuries were admitted as dying declarations under MRE 802(b)(2). Defendant appealed, arguing a 4-year-old cannot be aware of his impending death.

The Court disagreed. Before admitting a dying declaration, a trial court must make a preliminary investigation of the facts and circumstances surrounding the making of the statement. If the circumstances show the declarant believed death was impending, the court can admit the offered statements.

All of the predicates necessary under MRE 802(b)(2) were present: Jake was unavailable and the statement was made while he believed his death was imminent. His statement, "Mom, I can't, I'm dead," together with his injuries prove his belief. The declarant's age alone does not preclude admission.

When *She* Hits Him: Why the Institutional Response Deserves Reconsideration

by Lisa Young Larence, MSW, LCSW, LMSW Catholic Social Services of Washtenaw County

Women are capable of violence. Those of us in the United States are familiar with reports of women who have drowned their children, hazed sorority sisters, and abused prisoners of war – to name just a few. But the question advocates, practitioners, child protective service personnel, and criminal justice system staff must ask is not whether women are capable of intimate partner violence – but whether women’s force directed toward their intimate male¹ partners is the equivalent of men’s force directed toward intimate female partners in terms of context, motivation, and impact (Dasgupta, 2002). Answering this question is critical (Miller, 2005) because many institutions currently use a gender-neutral approach (Miller, Gregory, and Iovanni, 2005) when responding to women who use force (WWUF) in intimate heterosexual relationships – a gender-specific problem. By doing so, women arrested on domestic violence charges are often ordered to attend intervention programs developed to address male battering behavior (Miller, 2005). Women referred for batterer intervention receive inappropriate services rather than the contextualized assessment, advocacy, education, and supportive intervention they need (Larence, 2006). Through lack of attention to the contextual factors surrounding the incident, not only do these interventions fail to meet the needs of WWUF, but in doing so, may fail to meet the goal of the referring agency – to prevent a recurrence of use of force through lack of attention to the contextual factors surrounding the incident. This article’s purpose is to use the author’s practice experience working

with men and women² in anti-domestic violence intervention programs to explain this issue’s complexity in terms of the need for: contextual analysis, (re)defined language, gendered distinctions in forceful behavior, and appropriate intervention strategies.

Contextualizing the Issue

In the early 1990s, not long after proarrest laws were enacted across the United States, those in the anti-domestic violence movement began to notice an apparent rise in the individual and dual arrest rates (Dasgupta, 2002; House, 2001; Miller, 2005) among women arrested for domestic violence offenses. This, along with decontextualized Conflict Tactics Scale (Straus, 1979) based research, led to the erroneous analysis that women were as violent as men and, in some cases, more violent (Archer, 2000; Dasgupta, 2002; House, 2001; Miller, 2005). When researchers and practitioners took the motivation, intent, and impact of women’s and men’s forceful actions into consideration they concluded women and men do not use force equally and that the majority of women who use force in their intimate heterosexual relationships are survivors of domestic violence (Dasgupta, 2002; Miller, 2005; Larence, 2006; Miller, 2005; Saunders, 2002).

(Re)defining Language

Until there is a better understanding of who did what to whom, why it was done, and what impact it had, we must be especially cautious about the language used when describing actions and actors in forceful intimate partner situations. Language is powerful. It determines how the community perceives

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WWUF, how the referral process is set into motion, the tone for program development, and ultimately shapes how WWUF view themselves. Thorough contextualized assessments, rather than fixed categories, should chart the course for the referral process and program design.

“Use of force” is used in this article as an “umbrella term that refers to physically, verbally, and emotionally detrimental behaviors used by a woman toward her intimate partner” (Larance, 2006, p. 624). Use of force is a desirable term because it accurately describes “use of physical strength to accomplish a task – but does not imply the same degree of wrong doing or harmful intent as [the term ‘violence’]” (House, 2001, p. 2). It is used here to describe women who have used both primary and retaliatory aggression toward their intimate male partners.

The term “violence” is often chosen to describe the unjust, intentional infliction of physical pain or injury by one partner against another (House, 2001). But be careful. By this definition, “violence” could be anything from slapping someone on the knee to knocking someone unconscious with the full force of one’s fist. Ideally, concise descriptions such as “she was violent” will be abandoned in favor of the more explanatory (Larance, 2006) “she was/was not a survivor of domestic violence in her relationship for 9 years before resorting to physical force by throwing objects at her partner with the objective of making him change his behavior that she perceived as threatening.” The latter description is more time consuming, but its specificity calls for a nuanced intervention approach.

Determining whether or not someone is a batterer is a particularly challenging process, and it should be, be-

cause “[b]attering is far more than a single event...it teaches a profound lesson about who controls a relationship and how that control will be exercised” (Schechter, 1982, p. 17). It is helpful to recognize that battering behavior does not necessarily include physical violence. Instead, battering is a pattern of cumulative, coercively controlling (Stark, 2007) actions and behaviors that have the power to instill fear and intimidate the victim for the purpose of long-term behavioral change and relationship control. A batterer can hold the victim hostage mentally – whether or not the batterer is in the same room or city.

Furthermore, the language used needs to recognize that “domestic violence” is not really “domestic” at all. “Domestic violence” has evolved into a term that erroneously refers to force used between intimate partners within their

home (Pence and Dasgupta, 2006). When one person seeks to instill fear and control a partner over the relationship’s long term, those actions infiltrate all space and time in both people’s lives. By no means is that control restricted to the confines of a given living space. In the “violence” focused, incident based criminal justice system, the coercively controlling aspect of battering is not a crime punishable by law, whereas the response typically is. Sadia was the member of an intervention group I facilitated. Her situation illustrates this conundrum:

Sadia and Rohit had an arranged marriage in their home country. Rohit promised Sadia’s parents that Sadia would receive the best education and opportunities that life in America could offer. Upon their return to the U.S., Rohit would punch, hit, or slap Sadia when she was not “obedient.” Rohit prohibited Sadia from talking to the neighbors, driving, enrolling in the community

*A hit is not a hit is
not a hit. Context
matters. A lot.
A whole lot.*

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college, or doing anything he perceived outside the realm of her domestic duties. In the meantime, Rohit was actively having affairs with women he met at work and on the internet – and spent their savings doing so. Ten years and three children later, Rohit continued to tell Sadia that she was “trash,” would be “nothing” without him, and there was absolutely nothing she could do to stop his affairs. One morning Sadia decided she could do something. During his morning shower Sadia stabbed Rohit in the back.

Sadia committed a crime when she stabbed Rohit. But is Sadia a “batterer”? Would she benefit from batterer services? I don’t think so. Sadia needed intervention that balanced exploration of viable nonviolent responses and personal responsibility-taking with traditional survivors’ support including, at the very least, safety-planning and community resources. For the purpose of this article it is helpful to note that stabbing Rohit only escalated Rohit’s forceful, coercively controlling behavior against Sadia. He routinely chased Sadia to her court-

mandated intervention group – threatening what he would do to her if she sought a divorce. But the court declined Sadia’s request for a Restraining Order due to her criminal history.

This example is not meant to minimize what Sadia chose to do to Rohit with the knife. It is meant to point out that a decontextualized, incident-based approach does not provide an accurate picture of inter-partner aggression. Such a picture is critical because it dictates the institutional response when the law is broken. According to Osthoff, “Not everyone who hits [her] partner is a batterer. A hit is not a hit is not a hit. Context matters. A lot. A whole lot” (2002, p.1540). In other words, much more needs to be known about the context of relationship dynamics before institutions can effectively intervene in the most private aspects of people’s lives.

The process of identifying someone who is battering a partner includes formulating multiple questions that need to be asked, asked again, and answered thoroughly (Larance, 2006; Osthoff, 2002; Pence and Dasgupta, 2006). It is a time-intensive process that includes collateral contacts, time to build trust, the opportunity to reframe the same question in many different ways, and time for awareness to be cultivated in the woman receiving services. For example, what was different for her about the referring incident? Do her actions instill fear in her partner? Are they meant to? Is she able to change his behavior over the relationship’s long-term by what she does to him, how she does it, and when she does it? Is she afraid of him in ways that other people do not seem to understand and, if so, what is it that she believes he can do to her? After she answers these questions, assess his answers to the same questions.

Alison’s situation illustrates how challenging it can be to know who is *really* battering whom and what the nonphysical impact of those actions may be:

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Alison was referred for services by child protective services for allegations, by her partner of 13 years, Brad, that she was abusing Brad and the children. When Alison's child protective services worker was contacted for more information about Alison's situation the response was, "Alison? Oh Alison, now *she* wears the pants in that relationship!" Because Alison was physically bigger than Brad, the only one of the two who worked outside their home, had sole access to the ATM card and family car, Alison had been identified as the "batterer" in the relationship. But wait. It turns out that 3 years into the partnership Brad claimed he was physically unable to work due to back problems. Alison opted to be the sole breadwinner rather than seek public assistance. Alison limited Brad's access to the ATM card because he had gambled their \$20,000 savings away only 5 years prior. And as for access to the car? Brad had lost his license due to a DUI. Was Alison afraid of Brad? No, she stated, because Alison was confident Brad could not physically hurt her. Did Alison believe there was something Brad could do to Alison that did not necessarily involve physical harm? According to Alison, Brad had routinely threatened her with loss of the children if she did not comply with his demands. So how had Alison been noncompliant this time? Alison had refused to pick Brad up, at the bar, at 2 a.m. when Alison had to be at work by 7 a.m.

Yes, Alison admitted, she had

pushed Brad at different times during their relationship and had threatened to leave the relationship if things did not get better. But the impact of her actions seemed to put Alison at a greater risk of Brad's coercively controlling behavior rather than present any risk to Brad's safety.

Are there female batterers? At this point in my practice I believe "batterer" is a gender specific term that refers to coercively controlling tactics exhibited by men in intimate heterosexual relationships. I have not worked with a woman in a heterosexual relationship who has had the capacity to effectively instill fear or intimidate her partner in a way which has changed his behavior over the relationship's long term. According to Pence and Dasgupta, "...it is exceptional for [a woman] to achieve the kind of dominance over her male partner that characterizes battering. Social conditions, which do not condone women's use of violence, patterns of socialization, as well as the typical physical disparities...make the woman 'batterer' an anomaly" (2006, p. 6). Margie was a woman whom I served in an intervention program who initially presented as a batterer:

Margie and Jim had been married for 11 years and, when angry, Margie was prone to grabbing anything close enough and throwing it at Jim. Why was Margie so angry? Well, Margie liked the dishwasher to be loaded a certain way or the bathtub to be drained within a certain time frame after the kids' baths. In short, Margie wanted Jim to do things Margie's way and if he didn't, she let him know it.

But did Margie instill fear in Jim? No. After Margie threw their china collection at him, Jim only grimaced and encouraged her to seek help. Was she

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able to change Jim's behavior or intimidate him through her actions? No. He continued to load the dishwasher how he wanted and drain the water when he remembered. After weeks of group work Margie disclosed that she had been adopted at 13 in exchange for money her family desperately needed. She believed she was still working out her anger but Margie acknowledged she was doing so inappropriately and on Jim. Margie was angry, volatile, and violent toward Jim. Margie was not a batterer.

Making Distinctions

Distinguishing between the force a WWUF uses and the force and coercively controlling tactics a batterer uses is not intended to excuse her behavior or vilify his. It is meant to expose a dynamic that has multiple repercussions for both individuals. The men I have worked with use power, control, and force in order to intimidate and instill fear in their partners for long-term relationship control. If these men acknowledge their behavior during the group process, they often state a belief that their tactics have been effective at controlling their female partners but consistently minimize and deny their actions. Most of the women I have worked with, in contrast, take responsibility for their behavior at the time they call for an intake and are eager to seek help for their partners as well. The women's stated motivations for using force include: the desire to defend their self-respect against their partners' verbal and/or emotional attacks; to defend their children; a refusal to be victimized again; being passive did not work so maybe using violence will; and to gain short-term control over a chaotic/abusive situation (Larance, 2006; for similar findings refer to Dasgupta, 2002; House, 2001; Kernsmith, 2005; Miller, 2005). By using force, these women have not successfully controlled their partners' behaviors. Instead, their use of

force has put the women at increased risk of physical injury and escalated the violence against them.

A glimpse of what happened at the scene of one domestic violence arrest, when a woman used force and her partner was a batterer, is instructive of how the differences between her behavior and his can shape the turn of events – for those being helped and those sent to help.

Tonya had been waiting for George all night. He had not come home and she was worried that he was hurt. When George came home Tonya yelled at him and demanded to know where he had been. George picked Tonya up and threw her against the wall. She responded by grabbing her purse and hitting George with it. Upon impact the purse's zipper scratched George's face. George grabbed Tonya and threw her against the opposite wall. Tonya called the police to have George removed from the home. When the police arrived Tonya was crying and "hysterical." George was calm. Tonya immediately told the police what she had done and why she had done it. George also told the police what *Tonya* had done – taking no responsibility for his own behavior. Tonya did not disclose what George had done to her out of a fear of what he may do to her the next time. Tonya was arrested. George was not.

Physically hurting someone with the use of non-self-defensive physical force is a crime. However, Tonya's call for police intervention is the first clue that this is not a "level playing field." But law enforcement's decontextualized response treats the situation as though it were. Law enforcement's response is

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driven by an incident based approach to justice in which mandatory arrest laws dictate that, in the words of the responding officer, “Because this is a DV call someone is going to jail.” From that perspective the police officers’ assumptions of what the “good” vs. “bad” victim looks and sounds like, during those few moments of intervention, can have far-reaching consequences. Often a “good victim” is perceived as compliant, quiet, passive, bruised, sympathetic, and white. Tonya presented as none of those. Furthermore, Tonya’s voluntary statement of responsibility made further investigation seem unnecessary because the statement made it “clear” to the police who was going to jail and who was not.

The scene is also indicative of how a batterer can intentionally try to manipulate law enforcement officers’ response. At the scene, George was calm. After all, he had expended much of his energy throwing Tonya across the room (similar to Miller’s 2005 findings). Tonya was crying and screaming. George capitalized on his outward calm in a way that, in Tonya’s words, “seemed to draw attention to” Tonya’s “hysterical” and “out of control” behavior. Furthermore, George’s visible wound from the impact of Tonya’s purse served him in a way that Tonya’s tendency for latent bruising did not. Tonya was shocked that her call for help resulted in *her* designation as “the perpetrator” and his designation as “the victim.” The short-term result was that Tonya had to immediately leave the home she owned, was unwelcome at the county’s battered women’s shelter that does not serve “perpetrators,” and spent the weekend in jail. Tonya’s situation is similar to Rajah and colleagues’ (2006) findings that, due to a decontextualized approach, many survivors who are assigned the “perpetrator” role when they are arrested are later denied job training opportunities, safe shelter,

employment options, and issuance of restraining orders.

Similar to Susan Miller’s (2005) findings, the partners of the women I have worked with have used the women’s “perpetrator” status against the women. The partners of these women have: threatened the women with loss of custody if the women refused to waive their rights to trial or drop divorce proceedings; encouraged the women to violate orders of protection in order to show they “really loved” them; self-inflicted wounds after battering their female partners but before the police arrived to appear “victimized”; threatened to call to the police if the women refused to have sex with them; destroyed property, called the police, and then wrongly accused the women of destroying property based on prior “evidence” that the women were the primary aggressors.

What happens if a woman is not assessed to be a domestic violence survivor in the present relationship? After all, not all WWUF are survivors. However, for the sake of thorough assessment I encourage a closer look. Dasgupta warns, “the history of women’s experiences of abuse, which may stretch across several consecutive relationships, is an important consideration because it may influence their perceptions of danger (2002, p. 1374)” in the present relationship – whether their partners are abusive or not. In Hazel’s case it was difficult to understand why she had resorted to force when her husband was neither threatening nor controlling. Further assessment brought clarity to how her history had largely motivated her present behavior:

Hazel had been married for just two years and couldn’t figure out why she would “just lose it” with her husband, Eric. Every time Eric voiced a desire to do

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something with someone other than Hazel, she would respond with verbal attacks and would throw objects at Eric. Hazel denied a history of domestic violence survivorship. But after 11 weeks in group Hazel was discussing a “challenging situation.” At that time, Hazel noted that her first marriage ended because “we had different ideas” about marriage. She noted that five days a week, for nearly 16 years, Hazel’s first husband had come home to eat the lunch he had instructed Hazel to prepare – and then went upstairs and slept with his secretary in the couple’s marital bed. Hazel “endured” because, among other things, he threatened to leave her with three children and no money. Hazel didn’t believe she had options at that time but now she felt an unfamiliar level of safety in an intimate relationship for the first time.

Hazel’s feelings of safety in her nonabusive second marriage provided space for decades of anger and abandonment to surface – but in a way that put Hazel and Eric at risk of injury. Hazel’s forceful actions did not change Eric’s behavior nor did her actions put Eric in fear or intimidate him. However, Hazel’s actions had damaged their relationship and the way Hazel viewed herself. Hazel needed contextualized intervention tailored to her complex history.

Unintended Consequences

At the time of sentencing, women’s tendency to not only admit to their actions but initiate a statement of full-responsibility – and male batterer’s denial about what happened during the incident – does not serve women. Many women have told me, “I believed if I just told the whole truth then everything

would be okay.” As a result prosecuting attorneys often charge WWUF to the full extent of the law, while the male batterers’ denial and minimization are often rewarded with plea bargains. Many of the women I have worked with also state that they “just wanted to get home to the kids” so they agreed to “whatever” their attorneys offered them, not considering the long-term consequences of this choice. Because these women were identified as “perpetrators” they did not have the benefit of victim-witness advocate advice to raise their awareness of other options. Many women have followed their attorney’s advice because, in the words of one woman’s attorney, “You don’t really want to go through a long trial and spend money you don’t have when you will probably lose anyway.” The end result is a record of criminal history which, in many cases, has meant the loss of jobs or ineligibility for employment for beauticians, nurses, teachers, and others, whose professional licenses are revoked due to domestic violence charges.

Appropriate Interventions

When women resort to non-self-defensive physical force in their intimate heterosexual relationships, they are without what they recognize as viable behavioral options. Proactive anti-domestic violence intervention, focused on the contextual analysis of women’s use of force, needs to be an integral component of middle and high school curricula; teen dating violence prevention programming; and domestic violence survivors’ services. Effective proactive interventions for girls and women will raise their awareness of healthy relationship dynamics; viable nonforceful responses to abusive partners; and short- and long-term consequences of resorting to nonself-defensive physical force in intimate relationships.

By using force, women are putting themselves and others at increased risk of harm and physical injury (Kernsmith,

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2005; Larance, 2006; Miller, 2005; Stark, 2007). According to Pence and Dasgupta, “A woman who believes that there is no recourse or one who cannot access any resource, may use violence as a method of self protection more readily than those who can access alternative recourses and resources” (2006, p. 11). Therefore, it is critical that attention be focused on reactive interventions as well. From my experience, effective micro-level intervention is a mix of thorough contextualized assessment, targeted advocacy, relevant education, and emotional support in a group setting (Refer to Larance, 2006 and Larance and Hoffman, forthcoming for a more detailed explanation). Assessment needs to be viewed as an ongoing process, at all points of agency contact, rather than a time-limited interview and/or completion of finite paperwork. “By thoroughly analyzing the history and dynamics of the relationship, the intent, purpose and effect of the violent act can be better understood. The deeper understanding of the nature of the violence that comes from the analysis” (Miles, 2007, p. 3) allows for a more effective institutional response.

Providing WWUF with relevant educational information and emotional support in a group setting, can be a bridge between many women’s chaotic pasts and/or current relationship dynamics, toward possibilities for the future. This “bridge” should consist of opportunities to:

- process possible victimization and plan for their safety;
- identify appropriate levels of responsibility for their actions;
- address the shame felt for their actions;
- raise awareness of what they view as viable nonviolent behaviors in their relationships; and
- build social networks with other group members that have the potential to sustain the women long after they

have left the agency setting (Larance and Porter, 2004).

Those from referring agencies may not understand the women’s complex circumstances that led to their choices to use force or that “change” may not happen at the pace or in the manner the referring agencies desire. Therefore, advocating for WWUF by communicating the complexities of this process is critical to effective service provision.

The Duluth Abuse Intervention Project in Duluth, Minnesota, used a coordinated community response to design an innovative macro-level approach to addressing women’s use of force. The City Attorney’s Office created a provision for victims who were arrested for the first time that referred the women to an education and advocacy program (Pence and Dasgupta, 2006). Likewise, the police department drafted a “predominant aggressor policy” in which officers avoid arresting victims of ongoing abuse who have retaliated against their abusers (Pence and Dasgupta, 2006). The combination of both programs has resulted in an impressive reduction in the recidivism rates of survivors of DV using force against their partners.

In general, women’s forceful behaviors toward their intimate male partners can be thought of as “pushing back” against their male partners’ coercively-controlling battering tactics that “push down” on the women – an “ascending” vs. “descending” power dynamic. Therefore, interventions and policies developed to address women’s use of force should not be considered panaceas for eradicating domestic violence. Instead they should be understood to be additional responses to the core problem of men who batter women.

Summary

Intervening in the intimate lives of others is a time-sensitive opportunity for lasting change. Misjudging who is

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“battering” whom and intervening incorrectly could mean an opportunity lost and, in some cases, the “difference between life and death” (Pence and Dasgupta, 2006, p. 16). Recognizing that women’s use of force in intimate heterosexual relationships is a gender-specific issue that requires contextualized questions and answers is the first step in appropriately tailoring the institutional response. By doing so, women who use force and male batterers will receive appropriate intervention. An informed institutional response has the potential to contribute to the goal of encouraging nonviolence through personal responsibility, survivor support, and true batterer accountability.

Endnotes

1 The author focuses on heterosexual relationships because homosexual relationship dynamics and societal responses to those relationships are unique and therefore warrant a separate discussion.

2 All intervention program group participant names have been changed and defining case details have been omitted to promote the individuals’ anonymity.

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Crawford Watch:

Where do we go from here?

After making some advances in Confrontation Clause jurisprudence, albeit in fits and starts, the Michigan courts issued few published opinions of note on the issue. Unresolved questions abound, not least being the breadth and depth of the "primary purpose" test for determining whether or not a hearsay statement is testimonial.

Extra-judicial testimonial statements admitted for a purpose other than to prove the truth of the matter do not implicate the Confrontation Clause

In *People v. Chambers*, 277 Mich App 1 (2007), the defendant was convicted of multiple felonies including armed robbery. His victim went to an ATM and made a withdrawal from her account. While she was waiting for her receipt, the defendant came from behind and demanded the cash. The victim turned over the money and defendant knocked her down and repeatedly kicked her, all the while demanding her purse. When the victim saw that the defendant had a gun, she said her purse was in her car. The defendant kicked her once more before walking to the victim's car.

The police obtained from the ATM's video surveillance camera three photos of the as yet unidentified perpetrator. The photos were aired on TV. An FBI agent later called police and said that one of his informants identified the defendant as the robber from the pictures on TV. Armed with that knowledge the police staked out the defendant's home, and arrested him when he returned. He was wearing a jacket similar to the one worn by the perpetrator on the ATM surveillance tape, and police found a hat matching the description of the one worn by the robber.

At trial the lead investigator was allowed to testify that he received a phone call from the FBI agent telling him that one of the agent's informants had seen the pictures and identified the defendant. The defendant did not object to the testimony, but did appeal his conviction arguing admission of that testimony violated his right to confront the witnesses against him.

The Court of Appeals disagreed. Generally, a statement by a confidential informant to authorities is testimonial. The Confrontation Clause does not bar, however, the use of such statements for purposes other than establishing the truth of the matter asserted. In this case, the testimony was not offered to prove the defendant's identity as the robber. Rather, the testimony was offered to establish why the police had maintained surveillance on the defendant's house and how he came to be arrested for the crime.

Editor's Note: That out of court statements can be admitted for a purpose other than to prove the truth of the matter asserted in them is not earthshaking news. Offering such statements to show their effect on the hearer does not violate the Confrontation Clause. Caution, however, is in order. Using out of court statements in that way eliminates your ability to argue the statements as substantive evidence, and may come with a cautionary instruction. No doubt trial judges and defense lawyers will be on the look out for an attempt to enter hearsay under the guise of proving its effect on the hearer, when the argument for admission is weak and the temptation to argue the truth of the matter in closing argument is strong.

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6th Circuit decides on a narrow application of the primary purpose test

The 6th Circuit has gone farther in deciding the limits of the primary purpose test than have Michigan courts. In *U.S. v. Powers*, No. 06-1684 (6th Cir. 09/12/2007) the Court considered a Confrontation Clause challenge to hearsay from an undercover "Source of Information" or SOI.

Powers was convicted in federal court of possession with the intent to distribute a kilo of cocaine. A multi-agency task force received information from the SOI about Powers' background as a drug dealer. The task force had the SOI arrange a drug deal, wired him, and kept him under surveillance. During the surveillance, the SOI identified the defendant's vehicle and identified the defendant.

The SOI did not testify at trial. Over Confrontation Clause and hearsay objections, a police officer testified to the background information that the SOI provided, the SOI's identification of the defendant's van, and the SOI's identification of the defendant.

The 6th Circuit held that all three categories of statements were testimonial, and thus admitted in violation of Powers' right of confrontation. Before reaching that conclusion, the Court had to reconcile its holding in *U.S. v. Cromer*, 389 F.3d 662 (6th Cir. 2004) and the U.S. Supreme Court's holding in *Davis v. Washington*, 126 S.Ct. 2266(2006). In *Cromer*, the 6th Circuit applied an expansive "made in circumstances in which a reasonable person would realize that it likely would be used in investigation or prosecution of a crime" test to find that a confidential informant's statements were testimonial hearsay (See, Winter 2004 Violence Against Women Newsletter, Vol. 1, Issue 2 for a more expansive explanation of the *Cromer* decision.) In *Davis* the U.S. Supreme Court announced a new, primary purpose, test for deter-

mining when statements are testimonial.

The 6th Circuit found that there was no conflict between the two cases.

Davis, the 6th Circuit said, announces a test to be applied only in "the narrow factual scenarios involving an ongoing emergency where the safety of a declarant is in danger of imminent physical harm." The facts in Powers' case were, to the 6th Circuit, more analogous to *Cromer*. Without a rigorous application of the test from *Cromer*, the 6th Circuit found the three categories of statements in Powers were testimonial. Even though the admission of the SOI's statements was a violation of the Confrontation Clause, the admission was harmless.

Editor's Note: The "made in circumstances in which a reasonable person would realize that it likely would be used in investigation or prosecution of a crime" may still have continued vitality, at least in the 6th Circuit. The same result, however, seems likely when you look at the primary purpose of the statements admitted in this case. Limiting Davis to emergencies seems too crabbed and cramped a reading of the case.

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Michigan Court of Appeals' Unpublished Cases of Note

OV 10 Properly Scored for Exploitation of Domestic Relationship

The defendant appealed his sentence for his conviction of assault with intent to do great bodily harm less than murder. The trial court scored Offense Variable 10 at ten points because the defendant "exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." Defendant argued that the mere existence of his romantic relationship with his victim did not justify the scoring of OV 10.

The Court of Appeals disagreed. The victim and the defendant argued at the victim's home. When the victim went to leave, the defendant ordered her to stay, physically attempted to prevent her from going, struck her in the face, pursued her when she did leave and ultimately kicked her in the face with his steel-toed boots. This evidence supported the finding that defendant's actions were motivated by jealousy and a perceived threat to his relationship. His conduct was "selfish and unethical, and thus comports with the definition of 'exploit' in MCL 777.40(3)(b)." *People v. Robert Prescott*, COA No. 270912 (9/20/2007)

Editor's Note: The scoring in this case is supported by some pretty typical batterer behavior. All of it occurred during the charged event itself. It is worth arguing that typical batterer behavior that leads up to the charged event should be considered in OV 10 as well. If the behavior isn't admitted at trial it can still be considered by the sentencing court.

In Camera Hearing on Rape Shield a Critical Stage of Proceedings?

In this rape case, the defendant filed a motion to admit evidence that the victim, his former wife, had consensual sex prior to and after the date of the charged offense. The trial court held an in camera hearing on the motion but excluded the defendant. After the hearing, the motion was denied.

Defendant first argued that one alleged event of sexual intercourse prior to the charged event showed "what happens between these parties..., and what no means, and when no means no and when it doesn't mean no." The defendant also argued that prior consensual sex days before the

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charged rape cast doubt on the victim's credibility.

Both arguments were rejected. The first because the defendant did not say that the charged assault was consensual, rather he denied the event even took place. Prior consensual sexual activity between defendant and the victim was irrelevant to the defense. The second was rejected because the evidence is not probative of truthfulness. Ultimately, the Court considered the whole argument a "red herring."

The Court did find merit in defendant's objection to his exclusion from the in camera hearing. After citing the Confrontation Clause of the U.S. Constitution and some Michigan cases, the Court held that the in camera hearing is a "critical stage of the proceedings" and his exclusion was error. The error did not affect his substantial rights, however, and since the disputed evidence was clearly inadmissible the error was harmless. *People v. Rick Brownrigg*, COA No. 270303 (11/20/2007)

*Editor's Note: This is a troubling case, not because of the decision on the evidence, but because the Court of Appeals determined that an in camera hearing concerning the defendant's efforts to abrogate rape shield protections is a "critical stage." Michigan's courts are hopelessly adrift when it comes to rape shield. The Michigan Supreme Court has had two opportunities to clear up exactly what the procedure ought to be in determining whether evidence is precluded by rape shield, most recently in **People v. Piscopo**, in which the Michigan Supreme Court recently decided to vacate its grant of leave, after the case had been argued, rather than issue a decision. **Order of the Supreme Court, SC No: 127129 (12/7/2008)**. There is considerable confusion as to what evidence is covered by the provision of rape shield, and what procedure should be followed by the trial courts in deciding issue of admissibility. It could have a chilling effect on a victim's willingness to report rape and participate in a prosecution if the defendant can compel a hearing at which he can attend, on the bare allegation that he wants to admit evidence that should be excluded by rape shield.*



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