

Tenth Circuit

Legal Advisor

Jerry Hill, State Attorney



Vol. 14, No. 1

January 2000

Domestic violence prosecution When the victim recants or is uncooperative

By Kevin Cox

Domestic violence charges are hard to prosecute because of the emotions incited by these cases.

However, proving a charge of domestic violence where the victim either becomes uncooperative or recants makes a hard case even more difficult to prosecute.

A victim of domestic violence

can become uncooperative or recant for numerous reasons.

These include fear of the abuser, financial need, trying to keep the family together and embarrassment.

When dealing with a victim of domestic violence the officer never

INSIDE:

Warrant; search.....	”Facts”	page 6
Battery; LEO.....	”Officer”	page 6
Search.....	”Search”	page 7
Evidence; E-mail.....	”Defendant”	page 7
Abuse; child.....	”Prosecution”	page 8

blames the victim, even when the victim is uncooperative or recants.

Instead, our office will review a charge of domestic violence and determine:

(1) if the charge warrants prosecution, and

(2) whether the State can prove this charge beyond a reasonable doubt.

When a charge warrants criminal prosecution it is important for the prosecutor assessing the charge to determine whether the charge can be proven beyond a reasonable doubt.

Proof beyond a reasonable doubt is a higher standard than probable cause. Therefore, the prosecutor reviewing the charge for approval of prosecution will need to know as much as possible before deciding whether to prosecute the case.

When an officer responds to a scene of a domestic violence disturbance, that officer should approach the possibility of charges with the belief that the victim will be uncooperative or will recant later.

This is not to say that victims of domestic violence are always

uncooperative or recanting. However, by taking this approach at the scene the officer can gather information and evidence that will allow the prosecutor to determine that a charge of domestic violence can be prosecuted even without the testimony or cooperation of the victim.

The following are tips on how an officer should investigate a case to ensure that domestic violence which warrants criminal prosecution is chargeable in court by the prosecutor.

VICTIM'S STATEMENTS

A. Oftentimes when you arrive at the scene of domestic violence the victim is very emotional and willing to tell you, the officer, what happened.

Note what the victim says to you and her state of mind. Spontaneous statements, excited utterances, and then-existing mental or physical conditions are only a few of the elements that the officer can testify to in court as exceptions to the hearsay rule.

B. Written or taped statements. Obtain written and taped statements from the victim, if possible. Remember that a written

or taped statement made by the victim is admissible to impeach an uncooperative or recanting victim.

C. Determine if a 911 call was made and by who. A tape of a 911 call is generally admissible as an excited utterance or spontaneous statement.

DEFENDANT'S STATEMENTS

A. Note any spontaneous statements or excited utterances the abuser made when you were at the scene.

B. When interviewing an abuser note statements he made when he was in custody and being questioned.

C. Ask the victim and witnesses, if any, whether the abuser made any admissions to them. If the abuser did make admissions to them, have them write out a statement which includes these admissions.

WITNESSES

Ask the victim if there are any witnesses. Also check the surrounding area to determine if there were any witnesses. Remember that witnesses do not have to see the actual abuse.

They may have heard the incident.

Seeing the victim or the abuser after or before the abuse may also be important as it will corroborate whether the abuser was angry and upset or if the victim appeared to be scared. Actions often speak louder than words.

INJURIES

A. Note when you see an injury and the condition. Do not state conclusions such as "it was fresh". Instead, explain the nature of the injury itself: "It was reddish" or "There was some blood coming from the injured area".

B. Photograph the injuries. This includes taking pictures at the scene and then doing followup photographs. Followup photographs taken several days later often show the bruising and swelling. Pictures are admissible as long as they are fair and accurate.

C. If paramedics or hospital personnel are involved, obtain their names. This will allow the prosecutor to obtain these records later through a subpoena. Do not simply allow the abuser's records to be given to you at the scene as this might cause a confidentiality

problem. Such records must be obtained with the abuser's consent or by a subpoena after first giving the abuser notice.

EVIDENCE

A. any physical evidence such as torn clothing, broken phones or blood evidence should be collected when it can be easily impounded. Whether or not such evidence can be easily impounded, you should photograph it prior to collection.

B. Note any damaged areas or items in your report.

C. Diagram the crime scene. Diagrams do not have to be to scale and can help the officer explain his testimony to the jury. Diagrams are also important for use by the prosecutor in cross examination of an uncooperative or recanting victim.

WEAPONS

Collect and impound any weapons that are found within the crime scene which are relevant. This includes guns, knives, belts and any object - telephones, vases, etc. - which were used as weapons during the incident.

COMMUNICATIONS BY ABUSER TO VICTIM

Determine if there were any communications by the abuser to the victim. This includes phone calls, letters or E-mail. When possible, collect this evidence, if relevant, for the charge. Often the abuser will write or make some admission on a tape or in a letter.

INJUNCTIONS AND RESTRAINING ORDERS

Many times there is an injunction or restraining order in effect. If so, obtain a copy of it from the victim. Injunctions are obtained only after the victim has established some precedent, such as past domestic violence, before a court. A review of these injunctions will often reveal the abuser's background and help the prosecutor to determine if there are prior incidents which can be used against the abuser.

PRIORS

When an officer responds to a domestic violence disturbance there is a good chance that this is not the first incident. Ask the victim about priors. Also ask the

victim where the abuser has lived previously. This will help the prosecutor in establishing whether a prior record exists for the abuser.

These are some general tips that an officer should consider when investigating a domestic violence disturbance.

Remember that the main goal of domestic violence prevention is

victim safety. Prosecution is a tool that can be used to achieve that goal.

Because victims often become uncooperative or recant after the investigation, the success of the prosecution is often dependant on how well the charge was investigated from the beginning.

Darke Age Doomes

A zoning law of Canterbury effective in 803 A.D. mandates a two foot gap between houses in the town to serve as “eaves Drip”.

Darke Age Doomes

The office of “Scir Gerefa” (sheriff) was instituted during the reign of Athelstan of Wessex circa 924 - 939

FROM THE COURTS

Edited by Chip Thullbery

Facts known to court didn't justify "Search all persons present" warrant

The defendant was charged with possession of cocaine and drug paraphernalia and filed a motion to suppress.

The facts on which the motion was based were that a judge issued a search warrant for a residence which contained a search of all persons present provision based on an affidavit that described a confidential informant's single buy of an undisclosed amount of cocaine from the residence within the previous 10 days.

During the execution of the

warrant, an officer searched the defendant who was present at the residence and found cocaine and paraphernalia.

The trial court denied the motion, and the defendant was convicted as charged.

On appeal, the Second District reversed, holding that the facts known to the court at the time it issued the warrant did not justify the search of all persons present provision.

Szardy v. State, 24 FLW D2481 (Fla. 2d DCA Oct. 27, 1999).

Officer leaving courthouse after testifying was engaged in the lawful performance of his duties

The defendant was charged with battery on a law enforcement officer.

At his trial, the evidence established that after an officer testified against the defendant in another case, the officer was waiting for an elevator outside the courtroom.

At that point the defendant hit the officer from behind. The defendant was convicted as charged.

On appeal, he argued that at the time he hit the officer, the officer was not engaged in the lawful performance of his duties.

The First District rejected this argument and affirmed.

Lee v. State, 24 FLW D2465 (Fla. 1st DCA Oct. 25, 1999).

Search conducted by employer was legal

The defendant was charged with robbery with a firearm and filed a motion to suppress evidence.

The facts on which the motion was based were that the defendant was arrested at his place of employment. At the end of the day, his employer went through his desk to assess the status of his work.

When he did so, he found a firearm in the desk. He called the police who came and removed the gun from the

desk when he showed it to them.

The trial court granted the motion, but on appeal, the Fifth District reversed, holding that neither the search of the desk by a private individual nor the police search which did not exceed the private search violated the defendant's Fourth Amendment rights.

State v. Olsen, 24 FLW D2564 (Fla. 5th DCA Nov. 12, 1999).

Defendant could be prosecuted where his E-mail was received

The defendant was charged in Lake County with attempting to seduce a child.

At his trial, the evidence established that he used a computer in Duval County to make contact in Lake County with a person whom he believed to be a child.

He was convicted as charged.

On appeal, he argued that Lake

County did not have venue because he used the computer in Duval County.

The Fifth District rejected this argument and affirmed, holding that venue will lie where an electronic communication is received as well as from where it was sent.

Hitchcock v. State, 24 FLW D2567 (Fla. 5th DCA Nov. 12, 1999).

Prosecution of parents for child abuse limited

The defendant was charged with aggravated child abuse and filed a motion to dismiss, asserting that the State could not establish a *prima facie* case.

The facts on which the motion was based were that the defendant who was the mother of the victim had slapped him once across the face because he was having a temper tantrum and refused to follow instructions.

Although the child had a red mark from the slap, his skin was not broken, and he did not require medical

attention.

The trial court granted the motion in part and reduced the charges to third degree felony child abuse.

The defendant was convicted of this charge, but on appeal, the Fourth District reversed, holding that a parent has a privilege to administer corporal punishment and so cannot be guilty of child abuse for that act unless the State establishes the malice necessary to prove aggravated child abuse.

Wilson v. State, 24 FLW D2592 (Fla. 4th DCA Nov. 17, 1999).

Tenth Circuit LEGAL ADVISOR Editorial Staff

Jerry Hill.....Publisher
Chip Thullbery....Managing Editor
Mike Cusick..Legal Content Editor
Carl Weaver....Layout and Makeup

*The "Tench Circuit Legal Advisor" is published by the Office of the State Attorney,
Drawer SA, P.O. Box 9000, Bartow FL 33830-9000 (941) 534-4800*