TENTH CIRCUIT

Legal Advisor

Jerry Hill, State Attorney

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The Importance of Physical Evidence
or
Why We Occasionally No Bill Domestic Violence Cases

by Victoria Avalon, Domestic Violence Unit

Recently I had the opportunity to attend shift briefings with one of our area law enforcement agencies. The one question that stood out above all the rest was, "What causes you to drop a Domestic Battery case?" This is a good question and one that I'm sure is near and dear to the hearts of any street officer. No one likes to work a case and then find that the State Attorney's Office isn't prosecuting it. Sadly, not all cases are destined to go to trial, and not every defendant will take responsibility for battering a loved one.

More often than not, the victim in a Domestic Battery case will approach the prosecutor and ask the prosecutor to drop the case. The victim's reasons for this are many and varied but include one common factor in virtually every case: the victim still loves the batterer and doesn't want him or her punished by the system. In these cases, the victim comes to the State Attorney's Office, attends the four-hour Domestic Violence Program, and then is given the opportunity to execute a waiver of prosecution.

Does this mean the state HAS to drop the case?

No. We *can* prosecute. In fact, the Legislature intends for the State to prosecute these cases regardless of victim approval or disapproval. *See* Fla. Stat. § 741.2901 (2) (2001). However, another problem arises when the victim either recants or refuses to cooperate. As law enforcement officers, you make arrests for Domestic Battery when you have probable cause to do so, regardless of victim objection. *See* Fla. Stat. § 741.29 (3) (2001). "The test to determine the existence of such probable cause is whether 'the facts and circumstances within the officer's knowledge and of which he had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense had been [or is being] committed.'" *Elliot v. State*, 597 So. 2d 916, 918 (Fla. 4th DCA 1992) (*citing Benefield v. State*, 160 So. 2d 706, 708 (Fla. 1964)). In other words, if the circumstances are such that a reasonable person would think a criminal act is, or just was, in progress, you've got probable cause. However, as prosecutors, we have to convince six ordinary citizens who are unschooled in the details of criminal procedure that the defendant is *guilty beyond and to the exclusion of every reasonable doubt! See* Fla. Std. Jury Inst. § 1.01 (2001). While this is not a "mere possible doubt, a speculative, imaginary or forced doubt," it is still a far greater burden than you have to make the arrest. *See id.* at § 2.03.

How to get over the reasonable doubt threshold?

It's best, of course, if the victim cooperates. But we prosecute other cases without the victim, relying on circumstantial evidence. Homicide is a great example. The difference, of course, is that in a homicide the victim won't be walking into the courtroom, asking the jury to let the defendant go and denying that anything happened. However, we CAN use circumstantial evidence to establish the defendant's guilt in a Domestic Battery case as well.

To do this, we need the aforementioned evidence. You should begin by making detailed observations in your report. Note all injuries to the victim, no matter how slight or minor. Take photographs if at all possible; a picture tells a thousand words. Videotaping the victim's statement would go a long way to preserving evidence of her injuries and her demeanor on the night in question. Is her shirt torn? Take it into evidence! Are items around the house broken? Take them into evidence, or at least take photos. Find out who made the 911 call-get their name and address. Knock on the neighbors' doors-ask if they heard anything. If they don't want to talk to you, just get a name and address; let us subpoena them in. Did EMS respond? Don't just get the unit I.D.-get the names and badge numbers of the responding medics. We can subpoena them in as well. Indicate every single officer who responds-often, a victim will tell us that the reporting officer falsified his or her statement as an inducement for us to drop the charge. If your fellow officers were there and saw any details at all, it will bolster our case. If all we have is one victim, who does not want to come forward, we will be reluctant to go forward. Your actions in the field will determine our success, or failure, in the courtroom.

And we do appreciate the work you do!

**********FROM THE COURTS**********

TOOLS MUST BE USED TO BREAK IN TO SUPPORT CHARGE

The defendant was charged with, among other things, possession of burglary tools. At his trial, the evidence established that he entered the yard of a home which was surrounded by a chain link fence through a closed but unlocked gate. He then used a pair of pliers to remove the bolts holding a window unit air conditioner in place. Based on these facts, he was convicted of possession of burglary tools. On appeal, the Fourth District reversed, holding that because a burglary occurred when the defendant entered the fenced area, the pliers could only be considered as facilitating a theft. *Dukes v. State*, 26 FLW D2502 (Fla. 4th DCA Oct. 17, 2001).

REACHING IN TRUCK BED TO STEAL ITEM WAS BURGLARY

The defendant was charged with burglary of a conveyance. At his trial, the evidence established that he stole a bicycle from the bed of a pickup truck by reaching over the side of the truck and lifting the bicycle out. He was convicted as charged. On appeal, the Fourth District affirmed, holding that reaching over the side of the bed of a truck to retrieve an item constitutes an entry into the truck. *Barton v. State*, 26 FLW D2615 (Fla. 4th DCA Oct. 31, 2001).

FAILURE TO HAVE SIREN BLARING IN MARKED POLICE CAR TORPEDOED FLEEING CHARGE

The defendant was charged with aggravated fleeing to elude at high speed. At his trial, the evidence established that the defendant was stopped during a drug operation and approached by police officers wearing t-shirts with police insignias on them. After the defendant's passenger was removed from the car, the defendant fled without permission. A high speed chase ensued during which the defendant was pursued by two unmarked cars and one which had a City of Miami seal. While the officers screamed at the defendant, none activated sirens. The chase ended when the defendant wrecked his car. The defendant was convicted as charged. On appeal, the Third District reversed, holding that the evidence was insufficient to prove aggravated fleeing at high speed because there was no showing that the police vehicles had agency insignias on them and there was no evidence that sirens and lights were activated. *Gorsuch v. State*, 26 FLW D2556 (Fla. 3d DCA Oct. 24, 2001).

FACTS SUPPORTED BOTH ROBBERY AND THEFT CONVICTIONS

The defendant was charged with armed burglary, armed robbery, and grand theft of a motor vehicle. The evidence at his trial established that he and two others entered the home of the victim where they robbed the victim of several items of personal property including the keys to a van. They then went outside where the van was parked and drove off in it. The defendant was convicted as charged. On appeal, he argued that the convictions for robbery and theft of the van violated double jeopardy. The Supreme Court rejected this argument and affirmed, holding that the taking of the items in the house was sufficiently separated in time, place, and circumstances from the taking of the van to constitute separate criminal acts. *Hayes v. State*, 26 FLW S780 (Fla. Nov. 21, 2001).

OFFICER SHOULD HAVE DISCONTINUED STOP

The defendant was charged with driving on a suspended license and filed a motion to suppress evidence of identity. The facts on which the motion was based were that an officer stopped the defendant's car because he could not read the temporary tag in the back window. As the officer approached the car, he found that he could clearly read the tag and that nothing was improper about it. Nonetheless, he asked the driver for identification and using the identification discovered that the defendant's license was suspended. The trial court denied the motion, and the defendant was convicted as charged. On appeal, the Second District reversed, holding that once the officer determined the tag to be proper, no further stop or inquiry was justified. *Diaz v. State*, 26 FLW D2679 (Fla. 2d DCA Nov. 14, 2001).

COURT FINDS ENTRAPMENT

The defendant was charged with sale of hydrocodone. At her trial, the evidence established that her supervisor at work who was working undercover for police in order to obtain leniency in a pending prosecution pressured her to sell hydrocodone which she had obtained legally to an undercover officer masquerading as a friend of the supervisor. The supervisor told the defendant that the friend was very sick and needed additional pain medication, but when the defendant offered to simply give the friend some of the hydrocodone, the supervisor insisted that the friend should pay for it. The evidence also established that the police did not monitor the supervisor's activities or record her conversations with the defendant. The defendant moved for a judgment of acquittal on the grounds of entrapment. The trial court denied the motion, and the defendant was convicted as charged. On appeal, the Fourth District reversed, holding that the undercover operation violated the defendant's due process rights and thus constituted entrapment as a matter of law. *Dial v. State*, 26 FLW D2688 (Fla. 4th DCA Nov. 14, 2001)..

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LEGAL ADVISOR
Staff
Jerry Hill.....Publisher
Chip Thullbery.....Managing Editor
Michael Cusick.....Legal Content Editor

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