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Prosecution Strategies in Domestic Violence Felonies:

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Telling the Story of Domestic Violence

Executive Summary

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Summary and Objectives of this Study

Evidentiary constraints, myths and misconceptions about domestic violence, women's perceived lack of credibility, and a tendency to view domestic violence cases as less serious than stranger assaults all present significant challenges to prosecuting domestic violence related cases. This study identified the trial strategies used by the prosecution and defense in domestic violence related felony cases. Trial strategies were identified by examining the trial transcripts of a sample of 40 domestic violence-related murder and non-murder felonies in the state of Iowa. Cases were analyzed to determine general prosecution and defense themes and strategies.

Background and Purpose

The criminal justice system has only recently begun to respond to domestic violence as a public offense. Although wife beating was declared illegal in all states in 1920,¹ domestic violence was largely ignored in the criminal justice system.² The advent of mandatory arrest for domestic abuse,³ has resulted in a dramatic rise in prosecutions in many jurisdictions.⁴

To date, studies of the prosecution of domestic violence cases are limited to charging decisions.⁵ No study has examined prosecution or defense strategies in domestic violence cases. This study entailed an in-depth, qualitative analysis of the trial strategies used by the prosecution and defense in domestic violence-related felony cases.

Difficulties Prosecuting Domestic Violence-Related Cases

Domestic violence-related cases are often viewed as notoriously difficult to prosecute,⁶ in part because our criminal justice system is not structured to respond well to domestic violence-related crimes. One reason for this difficulty in responding has to do with how our laws and rules of evidence are written. Our legal system is based on charging individuals for "discrete

events." A man may batter his partner for years, but is often charged for only one abuse event. Thus, the legal process takes the assault out of the context of the larger abusive relationship. Our rules of evidence limit evidence of previous violence (other acts evidence) between the domestic partners that can be admitted at trial. These rules also restrict the admission of evidence of a defendant's character or violent nature. However, many domestic violence experts and prosecutors agree that evidence of prior abuse plays an important role in prosecuting these cases.⁷ The limitations on other-act and character evidence can have a significant impact in domestic violence prosecutions. Jurors may not be able to hear the evidence that gives context to the violent relationship.

A second reason for the difficulty in prosecuting domestic abuse cases involves a lack of understanding of domestic abuse dynamics on the part of fact finders. The jury makes all decisions about the credibility of the witnesses and evidence. Thus, it is the jury's responsibility to evaluate the evidence presented and determine if the prosecution has successfully proven the elements of a given charge.⁸

Myths and misconceptions about domestic violence abound in the general population.⁹ Domestic violence victims are perceived as weak or responsible for the abuse. Many people do not understand why a battered woman does not leave the relationship when the violence begins and are often unable to comprehend the power and control a batterer exerts over the victim. They fail to understand that a single incident of abuse is part of a longstanding pattern of psychological control and physical violence. In general, individuals without personal experience with domestic violence have a very difficult time conceiving of violence by intimate others.

It is from this uninformed group of individuals that a prosecutor will seat a jury. In fact, any potential juror who has personal knowledge of or experience with domestic violence, and therefore has some understanding of the dynamics of domestic violence, is often struck for cause. The defense counsel may also use a peremptory strike to remove that juror. Thus, jurors selected in a domestic violence trial may have misconceptions regarding domestic violence that may interfere with their ability to decide the case.¹⁰

Domestic violence cases also are difficult to prosecute because of the perceived lack of credibility of women as witnesses. Assessing witness credibility is an important part of the trial process. Yet women, who make up the majority of domestic violence victims, are often seen as "less credible" witnesses in the criminal justice system.¹¹

Assessing victim/witness credibility in domestic violence-related cases presents a difficult challenge. Domestic violence is typically a hidden crime. Batterers often isolate their victims from others, and are not likely to batter the victim in front of witnesses. Because of this isolation and manipulation, many victims do not tell others about the abuse. Therefore, there is no one to corroborate the victim's account of the abuse. Coping behaviors of abuse victims, such as not resisting when the batterer forces sex, when taken out of context, or when evaluated by someone who does not understand the dynamics of domestic abuse, may appear strange or unexplainable. Thus, the credibility of the victim's testimony is likely to be significantly undermined when presented without the context of the larger abusive relationship and an understanding of abuse dynamics.

Finally, there are several indications that domestic violence cases are not taken as seriously as other criminal cases. In making arrest decisions, police officers have been shown to

view domestic violence cases as less serious than other types of assaults.¹² Prosecutors traditionally have been reluctant to prosecute these cases, reporting significantly lower prosecution rates for domestic violence cases, and making comments suggesting that domestic violence is not as serious as other forms of violence.¹³ Judges, too, have de-emphasized the seriousness of domestic violence cases.¹⁴

Prosecution Themes

Three prosecution themes were present in every case, with one theme getting primary emphasis in a case.

(1) **Proof of the elements: "This was a crime."** Prosecutors sought to show that domestic violence is a serious public offense, or that the defendant's actions should be punished.

(2) **Proof of identity: "The defendant is responsible."** Prosecutors presented this theme in several ways: a) it was the defendant who committed the criminal acts; b) the brutal nature of the attack or the defendant's lack of concern about the victim show his culpability; c) the defendant controlled the relationship, and violence was his means of control; or d) under the law, words alone cannot "provoke" physical violence.

(3) **Proof of credibility: "The State's evidence is credible."** Victims and offenders often tell different stories in domestic violence cases, therefore the prosecutor would focus on indicators of the victim's credibility, or on the inconsistencies or unsubstantiated claims made by the defendant.

Proving the Prosecution's Case by "Telling the Story of Violence"

In proving the elements of the crime, prosecutors generally seemed to "tell the story" of the violence. Sometimes the story included a history of abuse; other times the story involved

only the incident of violence that was charged. Regardless of the scope, however, prosecutors used storytelling techniques to present the evidence.

The "story" often began with a witness -- the victim, an eyewitness, an investigating officer, or an examining physician -- who could give a graphic account of the events surrounding the crime. Subsequent witnesses filled in more details about the story. Prosecutors followed a pattern in having the witness "tell the story." Prosecutors *set the scene* by establishing the physical setting: the location, the time of day, the type of weather, the lighting.

Then prosecutors elicited a *step-by-step replay of events*, rich in detail, about what occurred. Asking a series of questions, prosecutors drew out the story of the events: what the witness saw, heard and felt, including the witness's emotional reaction to the events. In this step-by-step replay of events, many prosecutors focused on the *language used* by the witness. If the witness used a particularly graphic or descriptive word or phrase, the prosecutor reinforced the testimony by repeating the words when asking another question, or by making reference to the powerful description later in the testimony.

In addition, prosecutors often "illustrated" the testimony with *physical evidence*. For example, when the witness described the weapon used, the prosecutor produced the weapon as an exhibit and asked the witness to describe or demonstrate how it was used. Prosecutors also brought the story to life by using photographs of the victim or the scene, diagrams of the scene, and tangible objects, like bloody clothing, seized in the investigation.

The stories also included discussion of *motives*. Usually, the prosecutor tried to show what motivated the defendant to act -- jealousy, rage, or a need to control. Sometimes the prosecutor also tried to show the victim's motive in reporting the abuse. Highlighting the

victim's motive usually was in response to or in anticipation of a defense strategy painting the victim as a liar or a vengeful person. Many prosecutors tried to establish that the victim had little to gain from the criminal justice system, or that the victim's primary motivation was simply to see justice served through the court system.

Anticipating Defenses

Part of an effective trial strategy is to anticipate likely defenses by presenting evidence that undercuts or contradicts the anticipated defense.¹⁵ The prosecution strategy is likely to be based, at least in part, on the defense they expect to be presented. Although we did not interview the prosecutors involved in the cases in this study, the trial transcripts suggest that prosecutors generally were aware of the likely defenses, and structured their prosecution strategies in anticipation of those defenses.

Defense Themes and Strategies

Defense attorneys generally focused on one of four defense themes, although there was overlap in some cases.

(1) Self-defense or Provocation. *Self-defense* was an attempt to show that the defendant's behavior resulted from defending himself against attack. *Provocation* was connected to this notion of self-defense. The defense used this theme to show that, particularly in the murder cases, the defendant lacked some element of the crime, specifically intent. The crime occurred in the heat of the moment, was not planned, or "things got out of hand."

(2) Going-for-a-Lesser-Charge. The going-for-a-lesser-charge defense typically found the defense challenging various elements of a specific charge. The defense did not deny that the defendant did something – he physically assaulted her, but did not sexually assault her; he killed

her but he did not premeditate the crime – just that it was not as serious as charged.

(3) **Diminished Responsibility.** Diminished responsibility defenses can be thought of as a specific type of going-for-a-lesser-charge defense. In diminished responsibility, the defense typically tried to show that the defendant was either not responsible or less responsible for his actions because he was incapacitated in some fashion at the time of the offense from alcohol, drugs or a psychological disorder.

(4) **“Didn’t Do It.”** The final defense theme was an attempt to maintain the defendant’s innocence by establishing sufficient reasonable doubt about whether the defendant committed the crime or whether the injuries were accidental.

As with the prosecution themes, there is some overlap among defense themes, but generally one theme was primary.

Defense Strategies

The defense used a variety of strategies to create or support the above-mentioned defense themes. These defense strategies are divided into five categories:

(1) **The Relationship was Fine.** In many cases the defense focused on showing that the relationship between victim and defendant was fine. To support this claim, friends and family testified that the relationship was normal, happy, or status quo. Defense counsel contrasted the victim’s testimony about violence with the other testimony about the “happy relationship” in order to discredit the victim’s testimony. These strategies were used to establish that either the offender did not commit the offense or, in going for a lesser charge, the offense was out of character given all the other positive aspects of the relationship. The defense also showed that the relationship was fine through omission - if the victim had not told anyone about problems in

the relationship or about abuse she was experiencing, then the relationship was fine.

(2) Character Enhancement of the Abuser. The intent of this character enhancement was to imply that the defendant was unlikely or unable to abuse because of his good character. This was accomplished by showing that the defendant was generally a “good guy,” he loved the victim, he was cooperative with police, he did not intend for anything bad to happen, he never threatened the victim, and/or he was remorseful after the offense.

(3) Evidence Presented in Trial was Faulty, Misleading, or Inconclusive. In cases where the defense strategy was to go for a lesser charge or to argue that the defendant did not commit the crime, the defense focused on challenging the prosecution’s evidence by establishing that there were no witnesses to the crime, there was no or poor physical evidence linking the defendant to the crime, or the victim’s physical injuries were not obvious or very serious.

(4) Police Botched the Investigation. Although a poor police investigation was evident in only a handful of cases, when there were police procedure problems, the defense was meticulous in their attack of the investigation. These attacks included accusing the police of contaminating the crime scene, failing to collect certain evidence, and challenging the chain of custody of evidence.

(5) Attacking the Victim’s Character. One of the most common and aggressive strategies used by defense attorneys involved an attack on the victim in some form: either a general character assassination of the victim, or more specifically turning behavior that the victim engaged in during the relationship or during the abuse against her.

The general character assassination involved attacking overall victim character by dredging up any negative behavior from the victim’s past, such as mental health history,

emotional problems, and/or substance abuse. This character disparagement of victims varied, with the defense asserting such claims as: the victim was a "strong willed person who wasn't easily pushed around," the victim had emotional problems, she could not control her temper, she had sex with other men, or she drank or used drugs.

Turning the victim's behavior in the relationship or during the abuse against her against her involved questioning why she not attempt to leave the violent relationship, or "call for help" during the offense. The intent of this attack was to challenge the victim's credibility and/or motives.

Defense Strategies, Abuse Dynamics and Myths About Domestic Violence

With these strategies, the defense manipulated many common abuse dynamics and myths about domestic violence. One dynamic is social isolation of the victim. This isolation helps the batterer ensure that his victim is cut off from others who might help her see an outsider's perspective of what the abuser is doing.¹⁶ The isolation also ensures few if any witnesses to the abuse, and reduces opportunities for the woman to disclose the abuse to others. The defense capitalized on this isolation dynamic in their claims of no witnesses to the offense, no evidence of prior abuse, claims that the relationship was fine, and no evidence that the defendant threatened the victim.

The defense strategy showing that "the relationship was fine" manipulates the myth that violence and love are incompatible; if the relationship is fine, there cannot be violence. The "relationship is fine" strategy also capitalizes on social isolation and privacy dynamics. The combination of the abuse occurring in private and the victim being isolated from others assures there are no witnesses to testify about problems in the relationship.

Batterer minimization is another common abuse dynamic. Batterers use a variety of tactics to avoid responsibility for the abuse, ranging from outright denial, to minimizing the abuse or its impact on the victim, to blaming the victim, drugs or alcohol, or other life circumstances for the abuse.¹⁷ The four defense themes used all fall within the common denial or minimization tactics used by batterers. Self-defense or provocation claims attributed the violence to the victim's behavior ("I was provoked," "I was defending myself"). The going-for-a-lesser charge defense often minimized the impact of the abuse on the victim when arguing that the defendant did something, it just was "not that bad." Blaming the abuse on alcohol or drugs or other life circumstances ("I have PTSD from serving in the military") were common topics in the diminished capacity defenses. In these cases, the defendant was denying responsibility for the abuse due to some incapacitation.¹⁸ The "didn't do it" defense involved an outright denial of the offense.

Attacking weaknesses in the prosecution's case and arguments that the victim's injuries were not obvious or very serious are also minimizations of the abuser's behavior. Attacking evidence attempts to deflect responsibility off the abuser, and diminishing injuries is a common tactic by batterers to trivialize the effects of the abuse on their victims.¹⁹

The defense manipulation of abuse dynamics was particularly apparent in the victim character assassination. Batterers commonly attack their victim's character as a way of maintaining their power and control.²⁰ During the trials, the victim's weaknesses were maximized in an effort to undermine her credibility and challenge the prosecution's evidence. In murder cases, this character assassination was easier to accomplish because the victim was not

available to rebut these claims. The defense sometimes used character assassination to suggest that the crime was not as serious (a lesser charge should be considered) because of the victim's shortcomings. The defense attack of the victim's lack of self-defense or protective action taken before or during the offense manipulates the abuse dynamic of victim fear. The reason an abused woman might not try to escape is that she was experiencing real fear based on not necessarily what the abuser *was doing at the moment*, but on what she knew he was *capable* of doing.²¹

Jury Decision Making

To understand the potential implications of this exploitation of abuse dynamics by the defense, one needs to consider these findings in light of research on how jurors make decisions about guilt or innocence in criminal trials.

When making decisions, a decision maker uses a *value system* to rank the relevant attributes of each decision alternative. Different values will be ascribed to each attribute according to the decision maker's value system.²² The more complicated the decision, the greater the role of the decision maker's value system. Characteristics of individual jurors provide the "internal" sources of data in criminal trials.²³ The jurors will consider the external sources of data (the information presented at trial) in light of their internal thought processes when making a decision about guilt or innocence. Jurors come to the task without knowledge of what they will be asked to decide, or what information they will be provided in making the decision. Jurors are presented with bits of information in various forms, at different times, with differing degrees of formality and varying amounts of explanation. The jurors must take all of the information they receive in the trial and, using their internal value systems to interpret and understand the information, they must make a decision about guilt or innocence.²⁴

The "story model" of decision making in the trial procedure is the most well developed model of jury decision making.²⁵ In their story model, Pennington and Hastie describe the process by listing the various "tasks" of jurors in reaching a decision: encoding trial contents, establishing judgment categories based on jury instructions, selecting only admissible evidence presented at trial, and constructing a plausible sequence of events (a story) that they then evaluate for believability and test whether the story supports a finding of guilt.²⁶

Pennington and Hastie posit that jurors will construct a story, based on the evidence presented *and* the juror's own life experience. That is, jurors may "fill in the blanks" of the story, consciously or unconsciously, based on their own life experiences.

Juror Decision Making and the Dynamics of Abuse

The theories about the juror decision making process have important implications for domestic violence-related prosecutions. These theories suggest that jurors' decisions in domestic violence cases will depend on their preconceived notions about domestic violence. Their knowledge about domestic violence may affect their assessment of the decision alternatives. Thus, if jurors accept the commonly held myths about domestic violence, they may "fill in the blanks" with an unrealistic view of the violent relationship, and their evaluation of the evidence may be skewed.

Thus, jurors need information about the context of the abusive relationship, because domestic violence is not a commonly understood phenomenon that would make decision making routine for them. Rather, it may be necessary to explain how violent relationships differ from non-violent relationships, how the violence affects interactions, and how victims put in a powerless position may respond differently from persons in a more egalitarian relationship.

Given that many of the attributes of a violent relationship are unlike those of a non-violent relationship, jurors may be asked to assess evidence that they genuinely believe that they understand, but that they actually do not.

Prosecution Strategies, Telling the Story, and the Dynamics of Abuse

What is commonplace experience for domestic violence victims may not be commonplace for jurors who hear the evidence. Therefore, it is up to the prosecution to assist the jurors in understanding these dynamics through “telling the story” of domestic violence. Often the story told is a limited story about an isolated incident. In cases where the offender is a stranger, this is an accurate story, because the crime is an isolated incident. In the case of domestic violence, however, the incident by itself is not an adequate unit of information. Context information about the relationship or prior abuse completes the story and can dispel some myths about domestic violence.

The Role of Expert Witnesses in Educating Jurors

The use of expert testimony would be the most direct method for “educating” jurors about the dynamics of domestic abuse. Expert witnesses on domestic violence can be called to explain common behaviors that may seem like irrational or atypical responses to violence, but are understandable when taken in context. The advantage of using experts is that jurors may recognize their limited knowledge about domestic violence and set aside any biases.

If it is carefully circumscribed and combined with other prosecution strategies, expert testimony can enhance the prosecution’s case by educating jurors about a phenomenon that they did not realize was foreign to them. Thus, jurors may mistakenly consider some evidence to involve a routine decision, when in fact, their lack of knowledge about this type of relationship

means that the evidence requires a more in-depth analysis of an unfamiliar decision problem.

The expert testimony of domestic violence advocates helps the jury to understand the context of the larger abusive relationship and the particular rationale behind the victim's actions. Prosecutors should be careful in choosing a well-qualified and knowledgeable expert, and should design a trial strategy that tells the story of domestic violence.

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