



Shoveling the Sidewalk while It's Still Snowing

Prosecution of Domestic Violence Cases

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Prosecutor's Role as a Leader

- Change attitudes/dispel myths
- “No drop” policies (if evidence allows)
- Aggressive follow-up investigation
- Take responsibility for prosecution away from victims
- Provide support – the more contact the victim has with the criminal justice system, the more likely she is to participate in prosecution
- Impose adequate sentences





- What helps for increasing success once the cases reach the prosecution:
- Fast tracking cases
- Increased victim contact
- Reduced victim vulnerability

Victim Right to Contact Prosecutor

- If no p/c and no arrest, officer SHALL notify victim of right to initiate criminal case AND of the importance of preserving evidence. UCA 77-36-2.2(c)
- Victim may contact prosecutor, independent of what police do



Lack of Victim Participation



Why???

Answer:

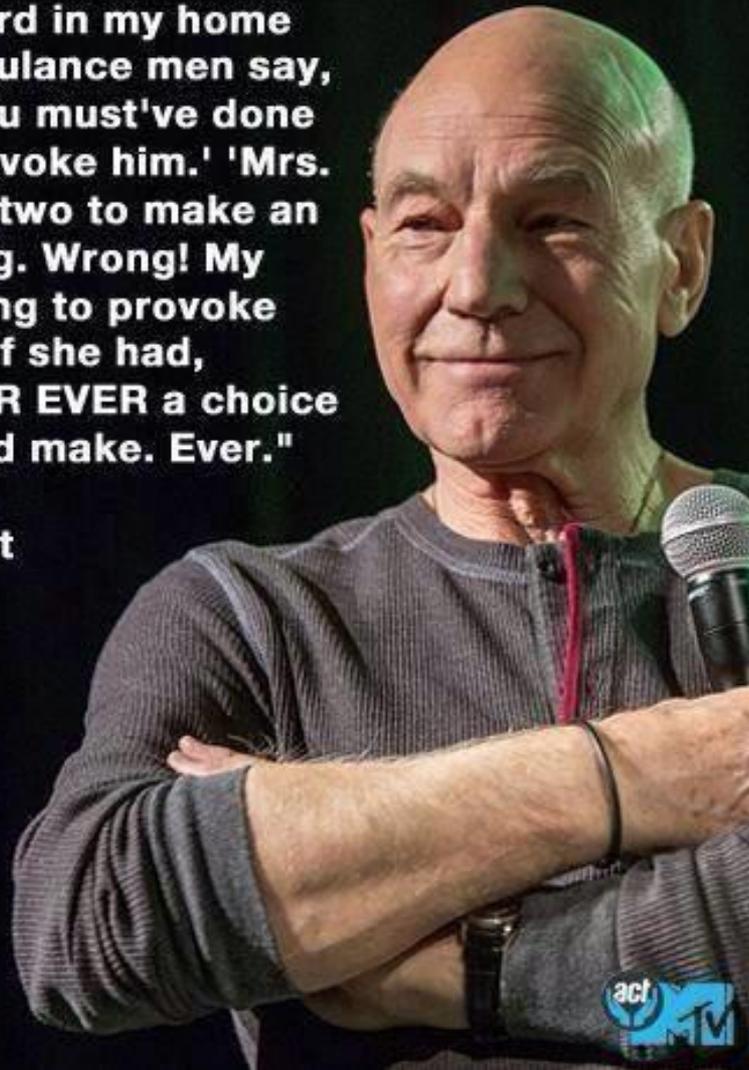
It Doesn't Matter!!!

We need to do our jobs!

In a 2005 study by Dan Jones and Associates for CCJJ, in Utah the biggest reason cited by victims for not reporting abuse and not leaving violent relationships: FEAR.

"As a child, I heard in my home doctors and ambulance men say, 'Mrs. Stewart, you must've done something to provoke him.' 'Mrs. Stewart, it takes two to make an argument.' Wrong. Wrong! My mother did nothing to provoke that -- and even if she had, violence is NEVER EVER a choice that a man should make. Ever."

-- Patrick Stewart







■ Three things to remember in working with victims:

- 1) “It ain’t about you.”
- 2) “It ain’t about you.”
- 3) “It ain’t about you.”

Victim’s reactions may be situational. Victim may feel she has to oppose us to stay safe.

Also remember that victim’s behavior may be affected by PTSD, brain injury(ies) and trauma.

Victim Behavior

- Studies are consistent and clear:
- The majority of Domestic Violence victims have PTSD
- Some studies say 90 per cent



PTSD Behaviors

- Feeling emotionally numb
- Difficulty sleeping
- Upsetting dreams/thoughts
- Intrusive flashbacks
- Sense of hopelessness
- Difficulty concentrating
- Irritability/Anger
- Guilt/Shame
- Self destructive behaviors
- Difficulty making decisions

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- **Difficulty making decisions**

Victims' Coping Mechanisms



Victims often think they
can control it.

But they can't.

Three types of DV victims



Assume Victim will not Participate and then **PROCEED** with case



- Nationally, only 15 per cent of DV victims participate in prosecution
- Look at DV case as if it were a murder case
- (NOTE: Foundation for evidence becomes a little more complicated without the victim's testimony.)



Bulletproofing DV Cases

Evidence available to prosecutor –
Admissible regardless of victim participation:

<i>9-1-1 recording</i>	2 %	Victim Photo	17 %
Crime Scene Photo	16 %	Physical Evidence	8 %
Weapons seized	11 %	Medical evaluation	9 %
Witness interviews	37 %	Suspects statements	18 %

Can be increased: Recorded hearsay statements!

- Think about this one question:
- What will cross exam be if we DON'T gather this evidence?



Bulletproofing DV Cases

“It is what it is.”

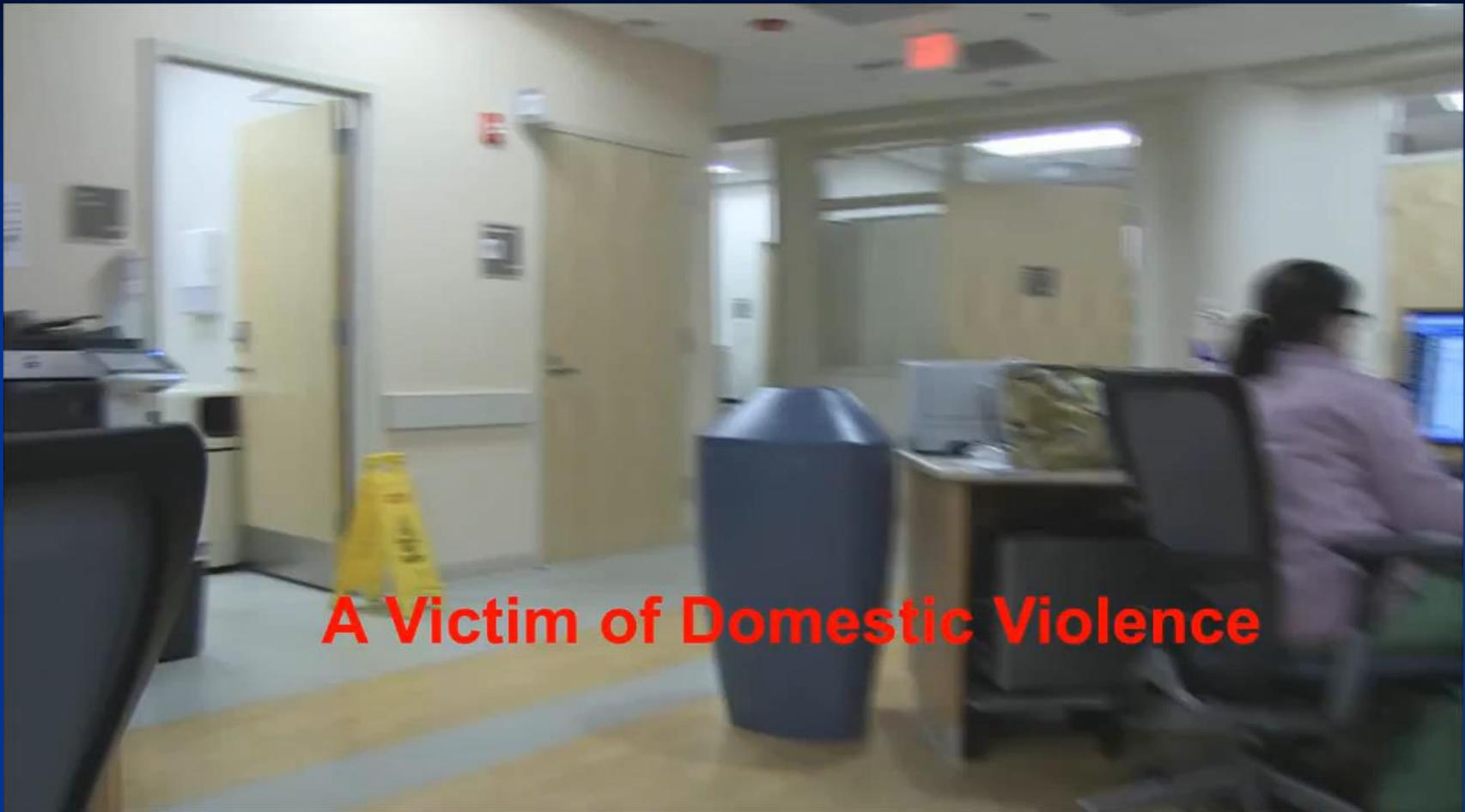
“It is what we make it.”

** An opportunity for us to
create admissible evidence **

International Chiefs of Police
DV Model Policy (June 2006):

“Use recording devices to
capture statements made by
combatants and witnesses.”





A Victim of Domestic Violence



Bulletproofing DV Cases

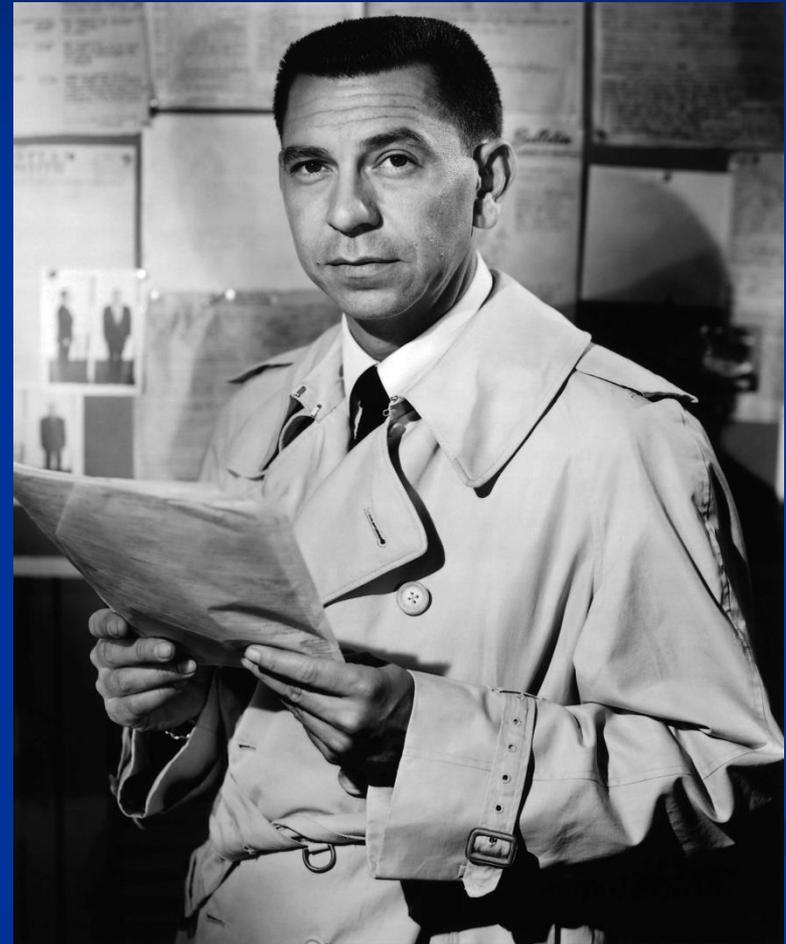
- Get officers to think of their DESCRIPTIONS as pieces of evidence
- The more detail officers record about things, the more effective their testimony
- NOT “upset” – but “She was sobbing and gasping for air and she had streaks of mascara running down her cheeks.”





Bulletproofing DV Cases

- First thing to say to victim at the scene:
 - NOTHING.
 - Yes, NOTHING.
- Second thing to say:
 - Are you OK/hurt?
 - Other safety questions
- Third thing to say:
 - What happened?



Using Hearsay Rules to Our Advantage



The hearsay rule is a firm rule excluding out of court statements . . .
. . . with 27 exceptions

- Most common ways to admit hearsay in DV cases:
- Excited Utterance
- Present Sense Impression
- State of Mind
- Existing Mental, Emotional or Physical Condition
- Utah has a “residual” exception URE 807
- *Are we teaching our officers to watch for these?*

Foundation for Exhibits

- URE 901
- “The proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”
- First thing to do for every exhibit: CALL (OR WRITE TO) DEFENSE AND ASK THEM TO STIPULATE TO FOUNDATION.
- If defense will not stipulate, consider pretrial motion. URE 104.
- **Once foundation is laid, must still meet other evidence rules**
- Two Methods of laying foundation for every exhibit:
 - Direct Evidence
 - Circumstantial Evidence

Photographs and Videos

- “If witness testifies . . . That photograph accurately reflects” the item or scene, it is admissible. *State vs. Purcell*, 711 P2d 243 (Utah 1985)
- NOTE: No requirement that photographer testify.
- Three questions for foundation for a photograph:
 - What is this?
 - How do you know that?
 - Does it accurately reflect X?

Photographs of Injuries



- Photos can do more than document injuries –
- They also record emotions and pain
- According to FBI research, photographs increase success of DV cases by about 60 per cent (both filing and conviction)

Photographs of the Scene



Photographs of kids at scene



May be more powerful than
child testimony

And - Talk to them!

“Hi, I’m Officer Smith, and my job is to
help people and keep them safe.”

“What happened today?”

“Where were you when this happened?”

“Do your mom and dad fight a lot?”

“Do you ever get hurt?”

Sensitive Photographs



- Donna's Manilla Envelope Method
 - Place photo inside
 - Have witness remove and identify
 - Place back inside
 - Offer into evidence
 - Tell jury to look at photo as they see fit

Email/Text Messages/Social Media

- Old School ways to preserve evidence
- DIRECT evidence:
 - Identifying information of author in message
 - Internet service provider identifies owner of IP address
- CIRCUMSTANTIAL evidence:
 - Person familiar with receiving messages
 - Pattern or “chain” of emails/posts
 - Internal evidence of message
- State met its burden to show text message is admissible by showing phone belonged to Defendant and he had possession of phone when message was sent. *State vs. Otkovic, 2014 UT App 58.*



Medical Records

- Types of Records
- Hospital, ED, EMS, Hospital Social Workers
- Check *ALL* for medical hearsay exception statements URE 803 (4)

Past Recollections / Letters / Notes

- URE 803 (5) Past Recollection Recorded
 - On a matter witness once knew about and now cannot testify fully and accurately,
 - Made while matter was fresh on witness's memory, and
 - Accurately reflects witness's knowledge
- DIRECT evidence:
 - Person who saw witness write it
 - Admission by writer that this is their writing

Past Recollections / Letters / Notes

- CIRCUMSTANTIAL evidence:
 - Expert testimony on handwriting
 - Non-expert witness familiar with handwriting
 - Must have “familiarity with handwriting that was not acquired for present litigation.” URE 901 (b) (2)
 - One time seeing person write is enough. *State vs. Jaques, 924 P2d 898 (1996)*.
 - “Reply letter doctrine”
 - Internal evidence of writing

Self Authenticating Records

- Admissible as self-authenticating documents if signed and sealed
- Medical records URE 902 (11)
- Court records as certified public records URE 902 (4)
 - Get protective orders and petitions and affidavits
 - They come in, but make sure to prove contents separately if you want them for the truth of the matters asserted

Phone Calls

■ DIRECT evidence:

- Any person who is a party to the conversation can identify the caller and the call
- Jail call records (jail sergeant, operations managers, etc.)
- Evidence that a call was made to a number assigned to a person URE 901 (b) (6)

■ CIRCUMSTANTIAL evidence:

- Person familiar with caller's voice.
- Officer talked with Defendant 3 times in person and by phone numerous times was adequate foundation for a Defendant's call. *US v. Bush, 405 F3d 909 (2005)*

Favorite Jail Call Quotes

- “I’m sorry baby! You know I only hit you when I’m drunk.”
- “You didn’t tell the cops where I took the guns, right?”
- “They can’t prove I broke the window unless you tell them.”
- “Don’t come to court. They will have to dismiss it.”
 - “Tell them it wasn’t me.”
 - “Then who should I say did it?” “Make something up.”
- Def: “Hey Baby – how are you?”
- Victim: “My head really hurts.”
- Def: “Yeah, I know, my fist hurts from punching you in the head.”

Use of Testimony to Authenticate

- Preliminary hearing testimony can be used to lay foundation for exhibits at trial
- Clothes worn by victim and seized by police are admissible, even though victim did not appear for trial. *State vs. Lovell*, 758 P2d 909 (1988).

URE 404(b) “Other Acts”

PRIOR ASSAULTS ON THE SAME VICTIM ARE ADMISSIBLE

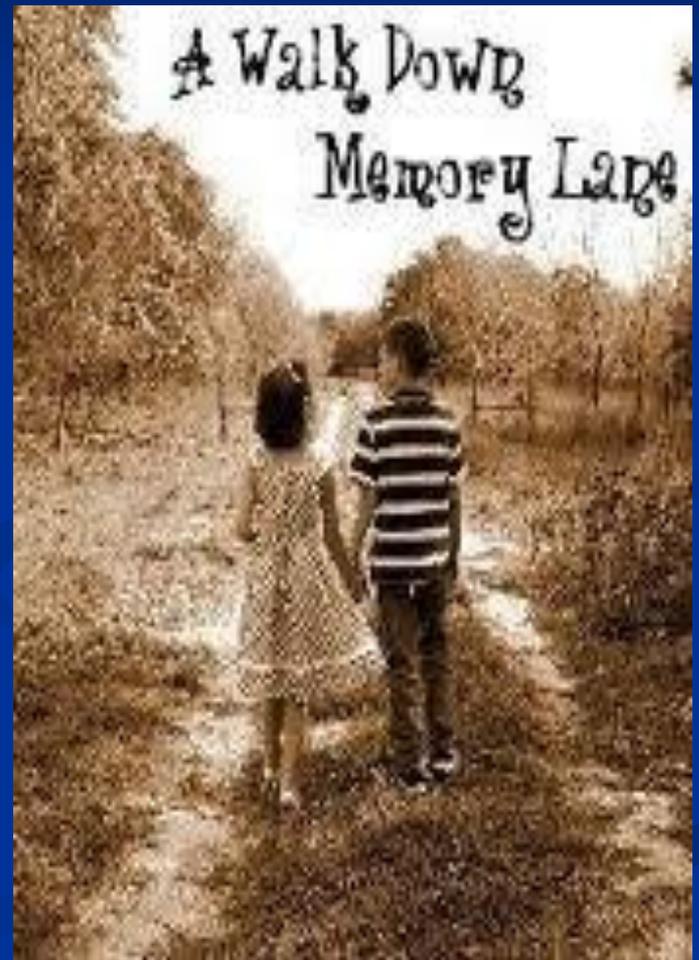
State v. Holbert, 61 P3d 291 (2002)

In a trial for threatening his wife with a gun, court allowed testimony of wife about a previous strangulation event.

Evidence of prior assault “helps demonstrate a pattern of DV that goes to prove the element of intending to inflict injury or terrorize.”

State v. Losee, 283 P3d 1055 (2012)

Holbert cited with approval



URE 404(b) “Other Acts”

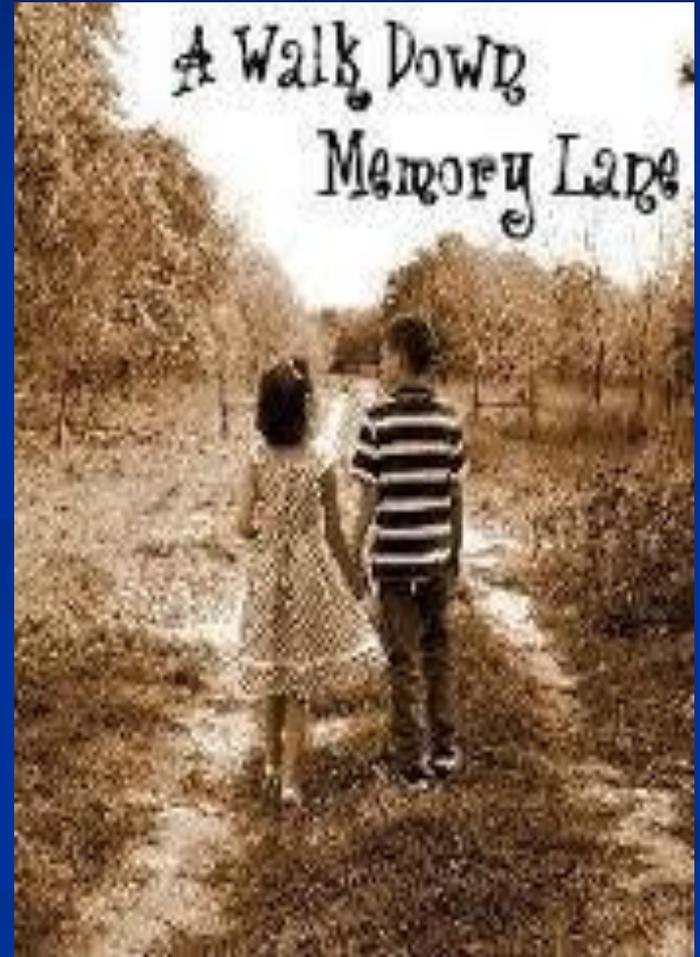
Other acts must meet scrutiny of :

URE 404(B), URE 402, URE 403

Reasons to file a pretrial motion:

- Defendant more likely to plead
- Judge more likely to rule in our favor pretrial than in middle of trial
- You will be more confident as to the evidence – making better opening statements and a more orderly presentation for the jury

Sample pretrial motion: State vs. Torgensen





- Don't forget URE 403
- “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”

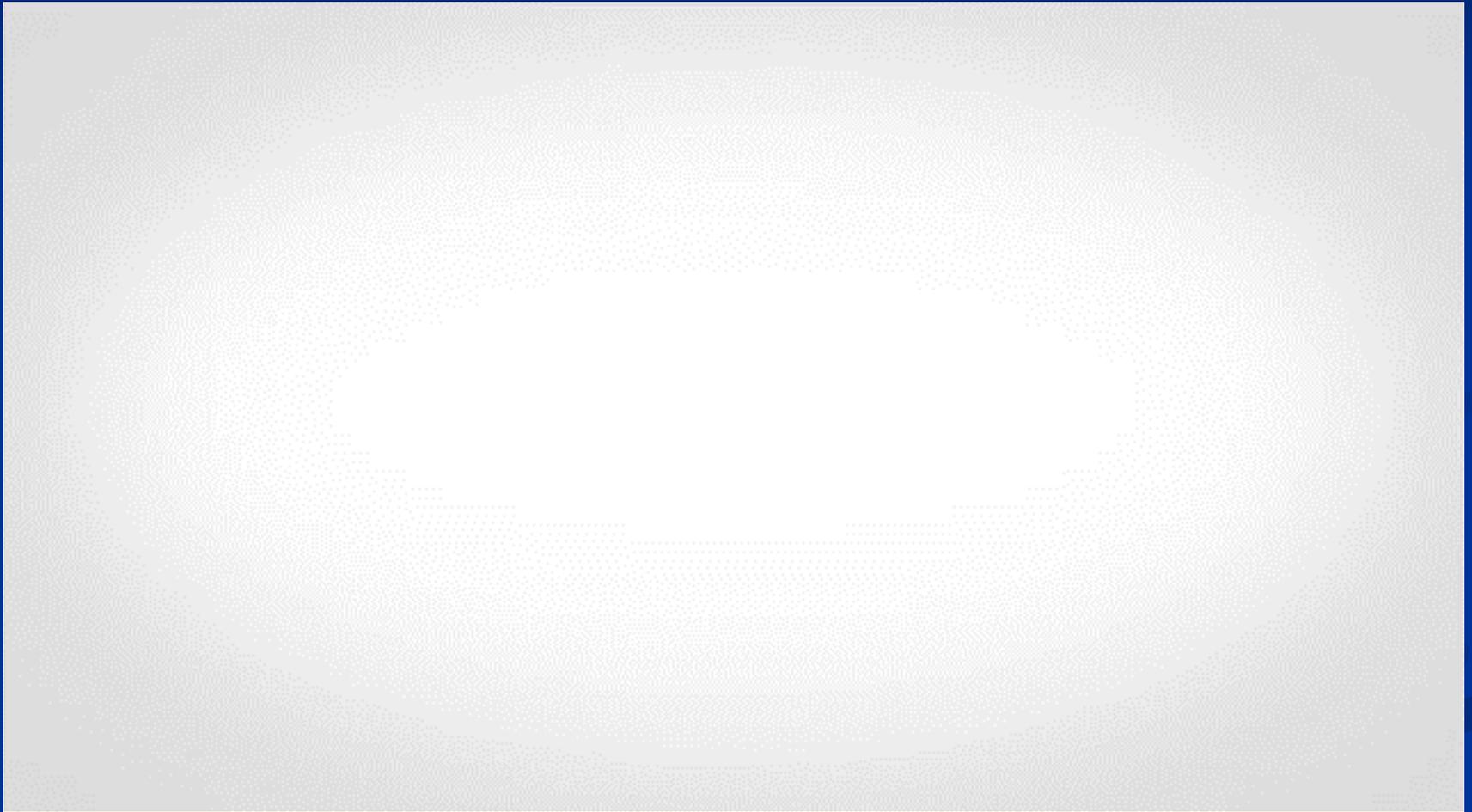


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Rice DV Case



February 14, 2014





- February 15, 2014 Both Ray Rice and Janay Palmer arrested (her charges were later dropped)
- February 19, 2014 Video released
- March 27, 2014 Ray Rice indicted on felony Aggravated Assault charges – maximum sentence 5 years in prison
- March 28, 2014 Rice and Palmer marry
- May 1, 2014 Rice rejects plea offer – applies for pretrial diversion program
- May 21, 2014 Rice accepted into diversion program. Less than 1 per cent of pretrial diversion requests in DV cases are approved, law states diversions are to be used for “victimless crimes.” Rice ordered to pay \$125 and do “anger management.” Defense attorney publicly states result is appropriate because this was “little more than a misunderstanding.”

May 23, 2014



**FIRST
TAKE**

LIVE

JULY 25, 2014



@ESPN_FirstTake



**NFL suspends Ray Rice for 1st 2 games of
season (violating NFL personal conduct policy)**



- June 23, 2014 NFL disciplinary hearing.

Janay Rice testifies that there was “no violence other than this incident.”

Ray Rice gives statement that is “a starkly different version” of the event than is in the video, according to NFL commissioner Roger Goodell.

Consequence: 2 game suspension.

- August 28, 2014 Goodell says “I didn’t get it right.” Announces new policy by NFL on DV that applies to all personnel, executives and owners
- September 8, 2014 Ravens terminate Rice contract

September 9, 2014



- November 28, 2014 Rice appeals his suspension. Rice is reinstated.
- May 21, 2015 DV charges against Rice are dismissed after his completion of “anger management.”



Screening Checklist

Office of the District Attorney
Special Victim's Unit
Screening Checklist

<input type="checkbox"/> 404 (a) & (c) Evidence	<input type="checkbox"/> Witness List	<input type="checkbox"/> DCFS Records
<input type="checkbox"/> Police Reports	<input type="checkbox"/> Medical Reports	<input type="checkbox"/> Cocaine Exam/Report
<input type="checkbox"/> CJC Recording(s)	<input type="checkbox"/> 911 Calls	<input type="checkbox"/> Suspect Recording(s)
<input type="checkbox"/> Photos	<input type="checkbox"/> Search Warrants	<input type="checkbox"/> Interview Transcripts
<input type="checkbox"/> Written Affidavit Waiver	<input type="checkbox"/> Written Witness Statements	<input type="checkbox"/> Certified Court Documents

Victim's Date of Birth: _____

Relationship of suspect to victim: _____

Brief description of event(s), including location and times: _____

Physical evidence: _____

Corroborating evidence: _____

Interview of suspect (if no, please explain): _____

Suspect Admissions: _____

The Screening Process

The Prosecutor's To Do List:

- Require submission of ALL police reports.
- Review any recorded interviews.



The Screening Process

❑ Make sure you have a finished investigation before filing

OR

Make sure you know what is missing and you decide that you can proceed without it.



The Screening Process

- ❑ Contact or meet with Victim. Please.
- ❑ Call or Meet with police officer.



The Screening Process

Screen close calls or difficult cases with other prosecutors



Prosecuting Agency Duties

UCA 77-38-1 et seq – Notice

Notify of felony charges w/in 7 days

Allow victim to be heard in “any appropriate fashion”

Victim has right to a speedy trial (same standards as Defendant)

URCP 35 – Responsibilities and Protections

Inform of “responsibilities” during criminal proceedings

Inform of right to be free from threats, intimidation, harm

If requested, provide notice of all important criminal justice hearings in felony cases and right to be present

Victims responsible for providing current contact info

Prosecutor Duties

UCA 77-36-7 Notice of Declination of Charges

Notify victim of decision as to prosecution.

- (1) The prosecutor who is responsible for making the decision of whether to prosecute a case shall advise the victim, if the victim has requested notification, of the status of the victim's case and shall notify the victim of a decision within five days after the decision has been made.
- (2) Notification to the victim that charges will not be filed against an alleged perpetrator shall include a description of the procedures available to the victim in that jurisdiction for initiation of criminal and other protective proceedings.

Prosecutor Duties

URCP 35

Explain plea bargain to victim

Identify possible penalties to be imposed

Represent to the court at sentencing:

Proposed plea bargain has been explained to victim

Inform the court of whether victim wishes to address court

UTAH CONSTITUTION ARTICLE I, Section 28

[Victim has the right] To have a sentencing judge, for the purpose of imposing an appropriate sentence, receive and consider, *without evidentiary limitation*, reliable information concerning the background, character, and conduct of a person convicted of an offense [in felony cases except capital cases].

Judges Duties

UCA 77-36-2

- Not dismiss because civil case filed;
- Waive any requirement that victim's location be given;
- Identify as DV on docket;
- Dismiss on stipulation of prosecutor and victim;
- Order treatment in any PIA;
- PIA dismissed only if all conditions completed;
- In criminal case protective order, mandate “any other relief” necessary to keep victim and any family/household member safe (also the rule for probation conditions)

Brady duties in DV cases

- Usual *Brady* disclosures
 - All information in possession of “prosecution team” – Prosecution must look beyond “their own file cabinets”
 - Good faith of prosecutor irrelevant
 - *State vs. Knight*, 734 P2d 913 (1987)
 - Criminal histories of potential witnesses must be disclosed
 - *Salt Lake City vs. Reynolds*, 849 P2d 582 (1993); *State vs. Mickelson*, 848 P2d 677 (1992)
- Additional *Brady* disclosures DV cases
 - Failure to disclose assaultive conduct of victim may be a Brady violation if that information might be “valuable” to a defendant *State vs. Shabata*, 678 P2d 785 (1984)

Charging Decisions



Overcharging vs.
Undercharging



Charging Decisions

The single greatest factor in increasing DV prosecution filing and conviction rates is the number of charges filed.

FBI research shows the prosecution filing rates increased by 300 per cent if officers document multiple crimes. The conviction rates on those cases increased by 150 per cent.

*Police Controlled Antecedents which Significantly Elevate Conviction Rates,
Crime and Criminal Justice, November 2012. Eric Nelson.*



Charging Decisions

Will the numbers of charges allow you to get different evidence admitted?

Examples: stalking; attempted assaults

Will there be a different sentence if multiple charges are filed?

Are there qualitatively different types of criminal activity?

Will multiple charges reflect the seriousness of the case?



Charging Decisions

How will the victim be affected by the number of counts charged?

Is there difficulty in proving each separate charge?

Will the case be easier or harder to resolve?

Which charges will the judge/jury care about the most?

Example: DV in presence of kids

Will jury perceive us as being “fair?”

Working With Victims

“Minutes of skillful support by any sensitive person immediately after the crime can be worth more than hundreds of hours of professional counseling later.”

-- Morton Bard and Dawn Sangrey, “The Crime Victim’s Book”



Things to Say to Victims

“I am worried about you / and your kids.”

“We may not always agree on every issue. And, that’s OK. That’s normal.”

“I will always seek your input before making any important decisions in the case.”

“My job is different from yours. Let me tell you a little bit about my job.”

“What would you like to see happen in this case?”

“Let’s take this case one step at a time.”

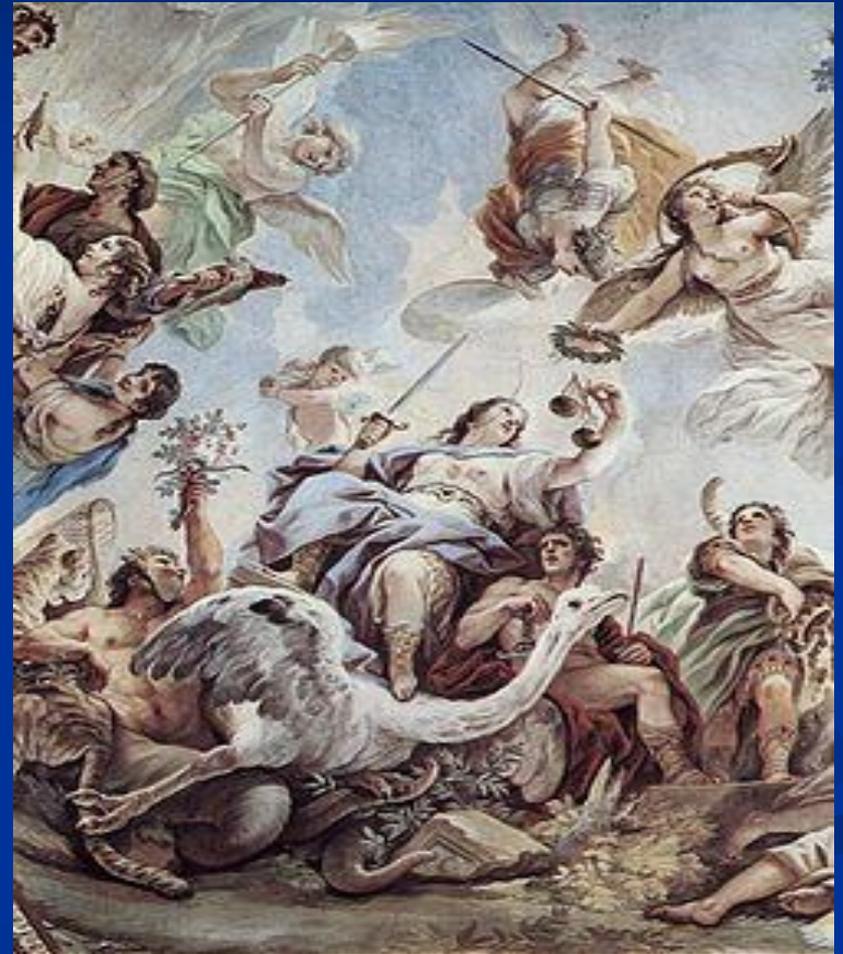


PLEA BARGAINING

Yeah, Sure I'm Guilty ... Just Get Me the Hell Away from This Guy!

Plea Negotiations

- Office policies
- Respect victim's right to give input BUT preserve your independence
- Be very clear in communicating with defense
- When should plea offer be changed?



Factors in Making Plea Offer

- Effect of resolution on the victim
- The perpetrator's likelihood to reoffend
- Whether treatment will be effective
- Similar sentences for similarly situated perpetrators



Factors in Making Plea Offer

- The biggest factor of all:
- The strength or weakness of the evidence.



- The best way to resolve a case is to prepare for trial.

Spousal Privilege



State vs. Timmerman 2009

Utah Supreme Court:

“The privilege enables abusers to silence their victims and makes the testifying spouse vulnerable to coercion from the defendant spouse and his attorney.”

Two privileges:

Testimonial Privilege – Article 1, Section 12 Utah Constitution

Only testifying spouse can invoke

Marital Communications Privilege - URE 502

Either spouse can invoke

Privilege does NOT apply in case where there is a crime against a spouse or a child of either spouse

Taking the Reluctant Victim Case to Trial

- State vs. Robert Jones
- 7 Previous DV calls in 3 years
- No convictions and one PIA in 3 years
- Defendant came home high on meth and beat girlfriend in the head with his laptop computer and threatened to kill her
- Two small boys present during assault

Taking the Reluctant Victim Case to Trial

State vs. Robert Jones - Audio of 9-1-1 call



What charges could be filed based on 9-1-1 call and officer responding to the scene?

Charges Filed

- Charges filed:
- Aggravated Assault (F3) – weapon used
- Two Counts DV in Presence of Child (MBs)
- No Contact Order requested but not issued

Taking the Reluctant Victim Case to Trial

- Audio of Victim Testimony Part 1



Taking the Reluctant Victim Case to Trial

- Audio of Victim Testimony Part 2



I freed a thousand slaves. I could have freed a thousand more if only they knew they were slaves.

-- Harriet Tubman



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