Domestic Violence and Victimless Prosecution

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School of Law Enforcement Supervision XXXII

Fall 2008

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You receive a call that a woman is being held against her will at a local hotel. After attempting to locate the actual hotel, you finally receive the information where the incident is occurring. You arrive on scene with two other officers. After making contact with maintenance, you have a key holder present to make entry into the room. One officer knocks on the door. There is no answer but you notice that the curtains have moved aside like someone is looking out of the window. Fearing for the life of the victim, you have the maintenance worker unlock the door and all three officers make entry into the room. A male is pretending to sleep in the one bed that is near the window. A female rises out of the other bed and says "Thank-you for coming. He told me that I had two hours to live." She jumps out of the bed and grabs you. She is crying and shaking. She has a bruise on her left eye and another across the bridge of her nose. She has additional bruises on the inside of her right arm and on the left side of her neck. As you lead her out of the room, she says that the man in the other bed had been hitting and kicking her since early that morning. She also says that he would not let her use the cell phone or leave the room. You also notice a clump of blonde hair lying in the floor of the room. The suspect is arrested and charged with Kidnapping, Terroristic Threatening, and Domestic Battery 3rd.

Sixteen months later the case comes to trial. The Prosecutor has repeatedly tried to contact the victim to get her to travel from her home state of Texas to Arkansas for the trial. On the day of the trial, she fails to appear. The defense is ready for trial. All witnesses for the prosecution are ready for trial. What happens next? Can the case proceed without the victim?

As police officers we often deal with this type of situation. The victim either refuses to testify or simply does not show up for court. Rather than dismissing the case, there is the chance that a prosecutor can proceed without the victim. The success of this prosecution relies on the case preparation by the officers involved and being able to overcome some important constitutional hurdles. The prosecutor must overcome the Confrontation Clause of the 6th Amendment, the Hearsay Rule, and whether the statements that he wants entered into evidence are testimonial or nontestimonial based on recent caselaw.

The Confrontation Clause of the 6th Amendment

The Sixth Amendment to the U.S. Constitution states:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining

witnesses in his favor, and to have the Assistance of Counsel for his defence." (West, 1997)

The objective of the Confrontation Clause is to allow the accused to cross examine the witness by being afforded the "opportunity not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." (*Mattox v. United States*, 1895) This is a fundamental right for the accused in a trial. In the case listed above, it appears that the case would not be able to proceed without the testimony of the victim. However, there have been cases that allow testimony to be entered against the accused when the testimony falls under one of the exceptions to the Hearsay Rule.

The Hearsay Rule

The Hearsay Rule is found in the Federal Rules of Evidence under Rule 801. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." (NITA, 1998) Simply put it is second hand information that is offered as testimony to prove the truth of something that has been claimed by either the prosecution or the defense. Under Rule 802 of the Federal Rules of Evidence, "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by an Act of Congress." (NITA, 1998) Generally

second hand information is not able to be used as testimony at a trial. However, there are exceptions to the Hearsay Rule and these exceptions are extremely important.

The following are exceptions to the Hearsay Rule when the availability of the declarant is immaterial and will allow the statements to be used in court:

1. Present Sense Impression- A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
2. Excited Utterance- A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
3. Then Existing Mental, Emotional, or Physical Condition- A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) offered to prove the present condition or future action, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.
4. Statements for Purposes of Medical Diagnosis or Treatment- Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

5. Recorded Recollection- A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by the adverse party. (NITA, 1998)

There are more exceptions to the Hearsay Rule, however, these are the most likely to be used by law enforcement or the prosecution when a victim fails to show for court or does show and refuses to testify. Officers need to be aware of the exceptions so that when they are gathering initial evidence and statements in the case, they will have an idea of the types of questions to ask the victim and witnesses to prepare the case in case the victim does not come to court. Most officers are well aware of using the exception of excited utterance. This exception will allow you to testify in court to what the declarant said when the statement is considered an "excited utterance." In the initial example listed at the beginning of this paper, an example of excited utterance would be when the officers entered the room and the female said "Thank-you for coming. He said that I had two hours to live." That statement could be admissible in court with one of the officers testifying. Other statements made by the victim in conjunction with the initial excited utterance would also be admissible. Officers should also be aware of any statements made by the suspect especially when they first arrive on scene and the suspect is present. The other exception that may be widely used is present sense impression. For example, if a victim calls 911 and states to the dispatcher that the suspect is threatening her at that

time. She may describe the situation to the dispatcher as it occurs and her statement would be admissible even if she does not show up for court. Statements made by the victim about their mental condition (frightened) or physical condition (bruised, in pain) may be admissible under the exception of then existing mental, emotional, or physical condition. All of these statements are important for law enforcement to recognize and document so that the case may proceed later with or without the victim.

Recent Cases Affecting the Confrontation Clause- Testimonial v. Nontestimonial

There have been some recent cases that affect the prosecution of cases without a victim. These cases were decided on Confrontation Clause issues. The Supreme Court cases are *Crawford* v. *Washington,* 124 S. Ct. 1354 (2004); *Davis* v. *Washington*, No. 05-5224; and *Hammon* v. *Indiana,* No. 05-5705. These cases are important to law enforcement because the facts of the case help to define the types of statements and situations that can be used in court if the victim fails to appear or refuses to testify.

In *Crawford,* the defendant, Mr. Crawford, told police that he had acted in self defense. According to his statement, he had stabbed a man who had tried to rape his wife on an earlier occasion. Mrs. Crawford gave the police a tape recorded statement where she corroborated part of her husband's statement. However, her statement did not corroborate his claim of self defense when he stated that the victim had pulled a gun prior to Mr. Crawford stabbing him. At Mr. Crawford's trial, Mrs. Crawford asserted spousal privilege so that she did not have to testify against her husband. The prosecutor

proceeded to introduce her taped statement into evidence. The defendant's attorney objected citing the Confrontation Clause of the Sixth Amendment. The attorney argued that allowing the taped statement by Mrs. Crawford would violate Mr. Crawford's federal constitutional right to confront witnesses against him. The lower court allowed the taped statement to be entered into evidence and the defendant was convicted. On appeal, the United States Supreme Court excluded the tape. They stated "Our cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from a trial have been admitted only where the declarant is unavailable, and only where the defendant has had prior opportunity to cross-examine." They also stated "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Crawford v. Washington*, 2004). The holding of the *Crawford* case then states that whenever the prosecution offers hearsay evidence against the accused that is "testimonial" in nature, the Confrontation Clause requires that the declarant must be unavailable and that the defendant had a prior opportunity to cross examine the witness. (*Crawford v. Washington,* 2004) What the *Crawford* court failed to do was give a comprehensive definition of testimonial. They did however define it to include, at a minimum, police interrogations. The question then arises as to the difference between testimonial and non-testimonial statements.

In *Davis* v. *Washington,* a 911 operator received information from the victim that she had been assaulted by her former boyfriend, Mr. Davis, who had just fled the scene.

During the initial part of the conversation, the suspect was still on the scene. The victim started the conversation by stating "He's here jumpin' on me again." The 911 operator continued to ask her questions and the victim stated that he had been "usin' his fists" and that his name was Adrian Davis. At that point, the suspect fled from the scene. Officers arrived within four minutes and were able to document the victim's injuries which appeared to be fresh and also her state of mind where she was shaken and frantic to leave the home with her children. (*Davis v. Washington*, 2006) However, the suspect had left prior to the officers' arrival. He was later arrested and charged with felony violation of a domestic no-contact order. At trial, the victim did not appear and the only witnesses for the prosecution were the officers. They were able to testify to the injuries that they observed, however, they were not able to testify that Mr. Davis had been the cause of those injuries. The trial court allowed the recording of the 911 tape to be admitted as evidence in the case. The defendant's attorney objected based on the Confrontation Clause of the Sixth Amendment. Mr. Davis was convicted. The Washington Court of Appeals affirmed the conviction as did the Supreme Court of Washington who concluded that the conversation between the 911 operator and the victim in this case was not testimonial. In *Davis*, the Supreme Court of the United States distinguished between testimonial and nontestimonial hearsay:

"Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing

emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Davis v. Washington,* 2006.) The Supreme Court ruled that the conversation between the 911 operator and the victim prior to the suspect leaving the scene was nontestimonial and therefore admissible. However, the conversation which occurs after the suspect has fled the scene and the emergency is over could be construed as testimonial. This case differs from *Crawford* because in the *Crawford* case, the victim was describing past events whereas in *Davis,* the victim was describing events as they were actually occurring.

Another Supreme Court case that has some bearing on this subject is *Hammon* v. *Indiana.* In *Hammon,* the police responded to a call of a domestic disturbance at the home of Amy and Hershel Hammon. Mrs. Hammon told the officers that there was nothing wrong and gave them permission to enter the residence. The officers separated the couple and while separated, Mrs. Hammon completed and signed a battery complaint against Mr. Hammon. He was arrested and charged with domestic battery. At the trial, Mrs. Hammon did not testify. However, the court did allow the police officer to testify to what Mrs. Hammon told him. The defense attorney objected but the judge allowed the testimony under the hearsay exception of excited utterance. The trial court reasoned that "the officer was not trying to preserve evidence but merely to assess the incident, so Mrs. Hammon's statements to him were not the sort of testimony prohibited under the U. S. Supreme Court's decision in *Crawford v. Washington."* (The Oyez Project, 2005) The Indiana Court of Appeals affirmed in relevant part. The State Supreme Court also affirmed, although they concluded that Mrs. Hammon's statement was testimonial and

wrongly admitted, they ruled that it was harmless. The U. S. Supreme Court ruled that the statements made by Mrs. Hammon were testimonial. At the time she was questioned, there was "no emergency in progress" and "no immediate threat to her person." (The Oyez Project, 2005) The Court stated that the conversation between Mrs. Hammon and the officer was formal enough to be testimonial and therefore, it was inadmissible. According to the Court, the statements in *Hammon* were similar to the statements in *Crawford* and alluded to past criminal conduct. In *Hammon* the officer was attempting to determine what had already occurred before their arrival. This made the statement testimonial under *Crawford.*

Two additional cases are important for officers in Arkansas. The recent Arkansas cases are *Seely v. State*, 100 Ark. App.33 (2007) and *Seaton v. Looney,* CA CR 07-432 (Ark. App. 1-30-2008).

In *Seely,* the defendant, Seely, was convicted of the rape of his three-year old daughter. Testimony was admitted by trial court of the child's mother questioning the child at bedtime. She had asked the child questions like "what's wrong, what do you mean, and when did this happen?" The court had also allowed testimony from a social worker who posed questions to the child while she was undergoing a sexual abuse examination at Arkansas Children's Hospital. The Court of Appeals held that the testimony of the social worker was testimonial in nature due to the purpose of determining facts in a criminal case; however, the statement by the mother was nontestimonial. The mother's questioning of the child was not formal or considered an

interrogation and therefore did not meet standard for testimonial. (Meredith, 2008) The State then appealed and the Arkansas Supreme Court reversed the Appeals Court. They ruled that the statement to the social worker was not testimonial because the primary purpose of the statement was for medical care rather than preparation for criminal prosecution. (*Seely v. State*, 2007) Therefore, both the statements to the mother and to the social worker were admissible.

In *Seaton*, the defendant was convicted of second degree murder. He tried to claim self-defense; however, a statement made by his sister as to his intent was ruled by the Court of Appeals as inadmissible. The defendant's sister was interviewed by law enforcement and gave a damaging statement implicating her brother. The sister failed to show up in court, however, the trial court did allow her statement to be entered as evidence against Mr. Seaton. The Court of Appeals stated that "it is the testimonial character of the statement that separates it from hearsay which, while subject to traditional limitations on hearsay, is not subject to the Confrontation Clause." (*Davis,* 2006) They further stated that the sister's statement was clearly testimonial since it was given at the request of law enforcement in order to solve a murder case. (*Seaton v. Looney*, 2008)

How This Impacts Law Enforcement

The issue of victimless prosecution is extremely important to law enforcement. We repeatedly return to the same home, often dealing with the same people over and

over. With domestic violence, it becomes extremely frustrating for the officers who continually go to the calls and for the judicial system that must continually deal with repeat offenders. However, if the officers are properly trained to recognize the situations, then the judicial system may be able to proceed without the victim. Since it is our duty to serve and protect, we need to be aware of all possible strategies that can be utilized to help those who can't or won't help themselves. The impact of domestic violence on our society is immense. Statistics show that it impacts millions of families each year. According to the American Bar Association-Commission on Domestic Violence, the following statistics are key:

- Approximately 1.3 million women and 835,000 men are physically assaulted by an intimate partner annually in the United States.
- Intimate partner violence made up 20% of all nonviolent crime experienced by women in 2001.
- In 2000, 1,247 women and 440 men were killed by an intimate partner. In recent years, an intimate partner killed approximately 33% of female murder victims and 4% of male murder victims.
- Access to firearms yields a more than five-fold increase in risk of intimate partner homicide when considering other factors of abuse, according to a recent study, suggesting that abusers who possess guns tend to inflict the most severe abuse on their partners.
- Offender Recidivism studies show that in the examination of 1,309 cases under a program mandate at the Bronx misdemeanor domestic violence court: 8% of the

defendants were rearrested between the initial arrest and case disposition, 35% during the program mandate period, 31% during the one year following the end of the mandate and 44% during the two years following the mandate. Overall, from the moment of index arrest to two years past release, 62% of all defendants were rearrested.

- It is estimated that 3.3 million to 10 million children witness domestic violence annually. Research shows that exposure to violence can have serious effects on children's development.
- Fear of reprisal by the perpetrator made up 19% of the reasons females did mot report their victimization to the police. About 1in 10 male victims and fewer than 1 in 10 female victims said they did not report the crime to the police because they did not want the offender in trouble with the law. (American Bar Association)

These statistics show the enormity of the problem of domestic violence. As officers, we know that repeat incidents are common. We also know that it is not unusual for a victim to request a "No Contact Order" on the night of the incident only to show up in court the next week to have the order dropped. The dynamics of the abuse situation prevents many victims from being able to protect themselves or their children. This is the reason that it is critical for law enforcement and prosecutors to prepare the cases to be able to move forward without the victim.

At the Conway Police Department, we have a policy that directs both dispatchers and officers in handling domestic violence situations. Under CPD 800-42, there is important information that must be gathered by the dispatcher to relay to the officers.

a) Whether the suspect is present and, if not, the suspect's description and possible whereabouts;
b) Whether weapons are involved;
c) Whether the offender is under the influence of drugs or alcohol;
d) Whether there are children present;
e) Whether a current protective or restraining order is in effect;
f) Complaint history at the location.(CPD Directive 800-432)

Based on the information from *Davis v. Washington*, dispatchers play a very important role in developing a victimless prosecution case. In that case, the dispatcher was still on the phone with the victim while the situation was occurring. This allowed that 911 tape to be introduced as evidence since the statements made on the tape were ruled to be nontestimonial due to the emergency situation. Without that 911 tape, the prosecutor would have been unable to show who had inflicted the injuries on the victim because the victim did not testify and the officers had arrived after the suspect had fled the scene. This case stresses the importance of training the dispatchers to ask specific questions while the emergency still exists so that the information can be used later if needed in court. One key question that they need to ask is the identity of the suspect. They also need to focus on the incident and what occurred and is occurring while they have the victim on the phone. In some cases, it may be a child who calls while the

domestic violence is occurring. Again, dispatchers need to be trained to ask specific questions such as who is involved and what exactly is occurring. The 911 tape may be the key to proceeding with a victimless prosecution.

Officers also need to be trained in preparing cases for victimless prosecution. The case that was described at the beginning of this paper is a real case that occurred on 07/08/06. I was one of the officers that responded to the hotel and was the officer that the victim grabbed and thanked for being there. In that case, the victim lived in Texas and had come to Arkansas with the suspect where he was working in construction. The day of the incident, the victim had managed to contact family members in Texas. She told them that her boyfriend had beaten her and would not let her leave the hotel. We knew the suspect's name and that he was working on the renovation of one of the Wal-Mart stores in Conway. We were eventually able to find the hotel where they were staying and made contact with them at that hotel. The suspect was arrested and transported to jail. We helped the victim pack her things so that she could leave and return home to Texas. Sixteen months later, we showed up for court. The victim had received a plane ticket from the prosecutor's office, but she did not come to Arkansas for the trial. This was not totally unexpected since it is not uncommon for victims to refuse to testify in domestic situations. Deputy Prosecutor Joe Don Winningham had a choice- drop the charges or proceed without the victim. He chose to proceed. All three officers were able to testify to what they saw in the hotel room- the injuries to the victim, her demeanor, and the clump of blonde hair in the floor. We also testified to the statements that we heard the victim make as she rose up out of the bed and ran toward me and grabbed me. The judge had admitted the statements under the excited utterance exception to the hearsay rule. I

was also able to testify to the statements she made as we exited the room since this was considered a continuation of the event and she was still an "excited" state. It was the documentation of these statements that allowed us to proceed without the victim and receive a conviction in this case. Officers should be trained to make thorough documentation of the scene and all statements made when they arrive at a domestic disturbance. Under a *Davis* or *Crawford* analysis, these statements would be deemed as nontestimonial along with fitting the excited utterance exception. The details are important when it comes to these cases and stressing this to officers is one way to help protect and serve these victims.

Conclusion

There is no doubt that domestic violence is a huge problem in our society. Law Enforcement's response to the problem is extremely critical in battling the effects that it has on not only one family but also on society in general. By training officers and dispatchers to recognize the situation and document it properly, we can make a difference. The suspect cannot intimidate us into not testifying and the case can proceed much to their dismay. By understanding the Confrontation Clause of the Sixth Amendment, the Hearsay Rule and its exceptions, and caselaw that defines the difference between testimonial and nontestimonial statements, we can have the knowledge to investigate our cases with the possibility of proceeding without the victim. This will benefit society by imprisoning the offender and allowing the victim the opportunity to escape and build a better life.

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