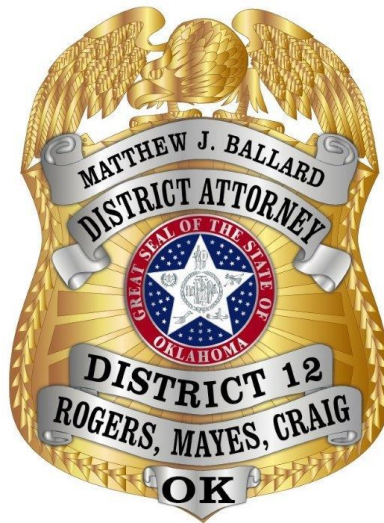


DOMESTIC VIOLENCE PROSECUTOR HANDBOOK

A QUICK REFERENCE GUIDE TO PRACTICAL DV PROSECUTION



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About the Author

Mary E. Walters is a graduate of the University of Oklahoma College of Law. She is currently an Assistant District Attorney for the Oklahoma District Attorney’s Council presently assigned to the Oklahoma District 12, which consists of Rogers County, Mayes County and Craig County. She personally prosecutes all felony and misdemeanor domestic violence offenses committed within Rogers County. She advises prosecutors throughout the district on effective prosecution of domestic violence cases. She is a member of the Rogers County Coordinated Community Response Team (CCRT). Prior to working for District 12, she was a prosecutor with Tulsa County District Attorney’s Office, in Tulsa, Oklahoma. During her six year career as a prosecutor, she has prosecuted crimes ranging from juvenile deprived and delinquent cases all the way to misdemeanors and general felony crimes including but not limited to offenses against children and women. While working as prosecutor for the Tulsa District Attorney’s Office, she was the lead domestic violence prosecutor responsible for making the felony domestic violence filing decisions for all of the offenses that occurred in Tulsa County. She specializes in Evidence Based Investigation and Prosecution of cases involving domestic violence as well as instructs law enforcement and prosecutors in this area. Her writings have been published in nationally circulated journals relating to domestic violence, she has given multi-disciplinary presentations on domestic violence prosecution and advocacy, and has been asked to meet with a production crew to film video trainings for the Oklahoma District Attorney Council on domestic violence.

DOMESTIC VIOLENCE PROSECUTOR HANDBOOK: A QUICK REFERENCE GUIDE TO PRACTICAL DV PROSECUTION

INTRODUCTION

Cases involving domestic violence are different than any other crime committed in our society. More often than not, the victim will be unwilling to testify against the loved one that has hurt them. As a result, law enforcement and prosecutors must be vigilant in their efforts to hold these abusers accountable for their actions. On those occasions that the victim does agree to testify, they fear that the case will “just be he said she said.” This leaves these victims feeling vulnerable and alone. Knowing that the victims will not want to participate, it is imperative that cases involving domestic violence are investigated and prosecuted working with the obstacles in mind and not against them.

What does working with the obstacles mean? We must: know they exist, understand why they exist and work to overcome their existence.

EVIDENCE BASED PROSECUTION (Also referred to as “Victimless Prosecution”)

What is Evidence Based Prosecution? Using the evidence available to tell the victims story. Creativity and thinking outside the box is key in achieving this goal. There are many different ways to prove that a crime of domestic violence occurred without relying on victim participation. Requesting and using the evidence is key.

Evidence that can be used to prove your case:

- ❖ Pictures
- ❖ Independent Witnesses
- ❖ Child Witnesses
- ❖ 911 Calls
- ❖ Jail Calls
- ❖ Physical Evidence
- ❖ VPO Transcripts
- ❖ Excited Utterances
- ❖ Burks Evidence
- ❖ Family Members of Victim or Defendant
- ❖ Victim Medical Records
- ❖ Medical Personnel at Scene
- ❖ Expert Witness Testimony
- ❖ Forfeiture by Wrongdoing
- ❖ Transcripts of Previous Testimony of Victim

How to use this evidence:

Pictures: In cases of Domestic Violence, pictures are worth their weight in gold. As many pictures as possible should be taken by law enforcement at the scene. These pictures should depict any and all areas where the crime occurred; particularly anything that corroborates the victim’s version. Pictures of any weapons, damage, layouts of the residence...*anything*. These pictures should be taken at the time of the call (if at all possible). Pictures should also be taken of the victim and the defendant. The police officer as well as others at the scene can identify and testify about the pictures that are taken of the scene as well as the appearance of both the victim and the defendant. This will allow the victims story to be told whether they are present or not.

Independent Witnesses: The ideal independent witness is a person who witnessed the event. However, they can also be someone who adds to any of the elements that must be proven. Family members of the victim and defendant can serve to establish the relationship element in a domestic violence prosecution. They can testify to what the victim or defendant say during the event (i.e. fighting next door or in another room), before an event (i.e. defendant and victim fighting at a party before leaving to go home where the abuse happens), even after the event (i.e. bloody and shaken defendant runs to the home of a neighbor and asks to use the phone). The excited utterances made by the victim to or around an independent witness can be testified to by independent witnesses. Independent witnesses, unlike victims of domestic violence, are also subject to the subpoena power and can be forced to comply with the requirement to appear and testify.

- *Practice Tip*: Identify and subpoena independent witnesses. Have them subpoenaed and appear at the preliminary hearing setting.

Child Witnesses: Unfortunately, incidents of domestic violence are often committed in front of or around children. A child witness can be a helpful tool. Child hearsay exceptions can be used to bolster not only the testimony of the child witness, but also to corroborate the victims' abuse.

- *Practice Tip*: Subpoena child(ren) through the victim (when the child(ren) is/are her/his bio child(ren)). If the parent/victim does not bring the child witness, the parent/victim can have a failure to appear warrant issued for failing to bring the child(ren) to the hearing.

911 Calls: Emergency calls made to a 911 caller are not testimonial and are therefore not subject to Crawford. Endorse the dispatcher who participated in the 911 call. Include a copy of the call in discovery. The 911 dispatcher can sponsor the call at the preliminary hearing and/or trial. If the victim makes the call and describes what happened and who committed the crime, it can be extremely helpful in the prosecution of the case. The call could also possibly come in as an excited utterance.

- *Davis v. Washington*, 547 U.S. 813 (2006) – Statements made to a 911 operator that are describing events as they were actually happening (on going emergency) are not testimonial and therefore an exception to the hearsay exclusion. (case decided with *Hammon v. Indiana*).
- *Michigan v. Bryant*, 131 S.Ct. 1143 (2011) – “Primary Purpose Test”: the primary purpose of the statement made was made to describe an ongoing emergency. This is among the most important factors but not the only factor. We hold that the circumstances of the interaction between Covington and the police objectively indicate that the “primary purpose of the interrogation” was “to enable police assistance to meet an ongoing emergency.” These statements did not violate the Confrontation Clause. (Victim statements made to police officers who discovered him mortally wounded in a gas station parking lot).

Jail Calls: Calls made by the defendant from the jail are many times incriminating. The most useful calls are typically made immediately after arrest. The defendant will more often than not call the victim from the jail. He/she will often make admissions and possibly a confession. The victim will usually still be upset with the abuser and recount the abuse on the recording. These calls are admissible. The statement made by the other party is not testimonial. Endorse the appropriate representative from the company that provides phone services for the jail facility in your area. They will testify to how the system works. The person who pulled the calls off of the system will also need to be endorsed. They can testify to the authenticity of the call. Example questions and motion(s) are included in the materials. Use these calls at the preliminary hearing and/or trial.

- *Practice Tip*: Listen to calls made by the defendant leading up to and immediately after court appearances. These calls are generally the most revealing. Calls made after booking are also helpful. The defendant has not had the opportunity to meet with an attorney and have not had the time to calm down. An emotional defendant is a talkative defendant. Remember to redact appropriately (i.e. take out comments about prior criminal history and/or pending cases).

Physical Evidence: Physical evidence can give an important visual component to your prosecution. Items such as broken glass/objects, firearms, knives can further paint the picture of the abuse the victim suffered at the hands of the defendant. Retrieving the item(s), in addition to having pictures of where the items were found and the surrounding scene, will aid in the prosecution of the abuser.

- *Practice Tip*: Inspect the physical in advance of the discovery deadline. If the defendant gave a statement, ensure that the evidence does not support his version. This is particularly important when proceeding with an evidence based prosecution. The defendant will feel much more confident if the victim does not appear to testify. If his story is plausible, that will not play will to a jury.

Protective Order/Other Transcripts: Cases involving domestic violence have many layers. They often have a corresponding Protective Order or Family Law matter pending at the same time the criminal case is pending. If comments or admissions have been made on the record in these cases, consider ordering/obtaining copies of transcripts of these proceedings. The defendant may have locked himself into a story on the record without realizing it.

- *Practice Tip*: If the statements made on the transcript were done under oath and the declarant was subject to cross examination, the statements are admissible on their own. If not, they are still useful for cross examination and/or impeachment purposes. Remember, impeachment material is to require to be turned over in discovery. However, if this evidence is damaging, it may be beneficial to turn it over in discovery in order to facilitate a plea.

Excited Utterances/Present Sense Impressions: These are among the most valuable of the hearsay exceptions available in a domestic violence case. Most of the time, the victim will exhibit an excited demeanor when interacting with police and witnesses. Written statements are imperative when preserving excited utterances. Accuracy and preservation is the key to a successful prosecution using this valuable hearsay exception. Independent witnesses and law enforcement must be able to recount what was said, how it was said and how the victim was reacting while it was being said. *If this foundation is given, ANYTHING the victim said during this time will come in thought these witnesses.* With excited utterances and admissions by the victim, ANY case can be prosecuted without the victim's participation. Proper foundation is the key. Work with your officers on how to document both their observations as well as others.

Present sense impressions are also valuable statements that are an exception to the hearsay rule. These statements are made while the stressful event is happening or immediately thereafter.

See: Title 12 O.S. § 2803(2) Excited Utterances - 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.

See: Title 12 O.S. § 2803(1) Present Sense Impressions - A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

Propensity/Burks Evidence: More often than not, the defendant in a domestic violence prosecution has been violent in the past. This violence has almost always been perpetrated on the victim in the current prosecution. In addition, the defendant usually has other previous victims. The previous abuse of the current victim can be presented as Res Geste/Burks evidence. The abuse of previous victims can be presented as Burks evidence. The abuse presented can be those that were reported and not reported to the police. They can also be crimes that were reported to the police but not filed by the prosecutor or pursued by the victim at the time.

See: *Harris v. State*, 2004 OK CR 1 (¶135), 84 P.3d 731, "In the guilt stage of trial, the State presented evidence that Appellant had physically and verbally abused his wife for years. In Proposition 4, Appellant claims that this evidence was irrelevant to the issues in the case and should not have been admitted. We disagree. Evidence of other wrongs, crimes, or bad acts committed by the accused may be relevant to such issues as motive and intent. 12 O.S.2001, § 2404; *Burks v. State*, 1979 OK CR 10, ¶ 2, 594 P.2d 771, 772, *modified on other grounds*, *Jones v. State*, 1989 OK CR 7, ¶ 8, 772 P.2d 922,

925. We have often held that in marital homicide cases, prior acts of abuse committed by the accused against the victim may be relevant to the issue of intent.”

See: Holt v. State, 1989 OK CR 21 (¶3 - ¶16), 774 P.2d 476, previous violations of PO admitted under as Burks evidence. The prosecutor is not required to specify, before the time the evidence is being sought to be admitted, the exception under which they are seeking to admit this evidence.

- *Practice Tip:* File all notices by the deadlines listed in the statutes. Evidence of sexual propensity must be filed at “least fifteen (15) days before the scheduled date of trial or at such later time as the court may allow for good cause” (See Title 12 O.S. § 2413) and Domestic Violence Res Geste/Burks filed at least ten (10) days before the scheduled date of trial (See: *Burks v. State*, 1979 OK CR 10, ¶12, 594 P2d. 771 (Okla. Cr. 1979); *See also*, 12 O.S. § 2404(B)).

Family Members of Victim or Defendant: Those who have known the victim and/or defendant for longer than the prosecutor are a useful source of information. They can establish the relationship element when proceeding with an evidence based prosecution. These witnesses are subject to subpoena power and can be compelled to testify. Family members can also be independent witnesses if they were called or seen by the victim and/or defendant during or after the violence was perpetrated. Additionally, they are a valuable resource for establishing the relationship status between the victim and defendant. Even if an independent witness can attest to the violence perpetrated, they may not know how the parties are related.

- *Practice Tip:* When speaking to the victim, get the name and number of an “alternative point of contact” such as a parent or sibling. This will allow you to track down the victim if she becomes difficult to find for the purposes of prosecution. There is a strong possibility that the family member of the victim that you are reaching out to, is fearful for the safety of the victim. They are likely going to assist in any way that they can.

Victim Medical Records: HIPAA does not apply to the medical records of the victim in a domestic violence case. A law enforcement officer can retrieve these documents with their credentials. Getting medical records from the victim can be helpful. However, by having law enforcement retrieve these records, the prosecutor can ensure that the complete record is being retrieved. This eliminates any argument made by the defendant that something is being “left out.” Additionally, obtaining the records from the source will reduce the chance that the victim feels “responsible” for the prosecution of their loved one.

- *Practice Tip:* Medical records can be vital in a domestic violence prosecution. The “purpose of medical diagnosis or treatment” hearsay exception can tell the victims story when he/she refuses to do so. A physician will ask questions about what happened in order to treat the injury but also the cause. The medical professional need to know if they are releasing the victim in to a dangerous situation. They should be able to testify that information is collected for the purpose of medical diagnosis and treatment. Therefore, the person that hurt the victim is an exception to hearsay, not excluded by it.

See: Title 12 O.S. § 2803(4) Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, if reasonably pertinent to diagnosis or treatment.

Under both State and Federal law, HIPAA does not apply to medical records pertaining to the abuse suffered by the victim of a domestic violence:

See: 22 O.S. § 58(F) “Every physician, surgeon, resident, intern, physician assistant, registered nurse, or any other health care professional making a report of domestic abuse pursuant to this section or examining a victim of domestic abuse to determine the likelihood of domestic abuse, and every hospital or related institution in which the victim of domestic abuse was examined or treated shall, upon the request of a law enforcement officer conducting a criminal investigation into the case, provide copies of the results of the examination or copies of the examination on which the report was

based, and any other clinical notes, x-rays, photographs, and other previous or current records relevant to the case to the investigating law enforcement officer.” Also *See*: 45 CFR 164.512(f)(1)(ii)(c) –Federal Law Exception.

Medical Personnel at Scene: First responders are a great source of information regarding treatment of the victim and/or defendant. The information given by the victim is admissible through the same hearsay exception as described under the “Victim Medical Record” section above. The statements made by the defendant are admissible as they would be in any other type of prosecution. He will give others information regarding his participation. This information will place him at the scene and will usually establish his relationship with the victim. His statements to the on scene medical personnel will also lock him into a story. This e

- *Practice Tip*: Get statements from the first responders who interacted with both the victim and the defendant. The information given to these individuals will usually be more detailed and truthful than the information given to police or the prosecutor. Use this information to your advantage when pursuing an evidence based prosecution.

See: Title 12 O.S. § 2803(4) Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, if reasonably pertinent to diagnosis or treatment.

Expert Witness Testimony: Using an expert witness to explain the effects of domestic violence is an extremely underutilized tool. The Legislature directs the court to allow expert testimony in cases of domestic violence. Using an expert educates the court and/or jury regarding the unique qualities that exist in a domestic violence situation. They can explain the mysteries of domestic violence such as why victims stay, why they fail to report, why they decline to participate in the prosecution and so on. This explanation is vital to shining light on the darkness that is domestic violence.

- *Practice Tip*: Use a “blind expert” to explain the dynamics of domestic violence. The expert can testify generally as to the effects of domestic violence and how it manifests itself. The defendant’s attorney will likely argue that the expert has never met the victim or the defendant. This argument can be used against the defendant in closing by reminding the jury that this is true and yet the expert accurately stated and explained everything that was presented in the trial. That means that the evidence presented at the trial was evidence of domestic violence. Be sure to add the CV of the expert witness to discovery. These experts are exempt from the Rule of Sequestration.

See: Title 22 O.S. § 40.7 – “In an action in a court of this state, if a party offers evidence of domestic abuse, testimony of an expert witness concerning the effects of such domestic abuse on the beliefs, behavior and perception of the person being abused shall be admissible as evidence.”

See: Title 12 O.S. § 2615(3) – “At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses. The court may make the order of its own motion. This rule does not authorize exclusion of: *A person whose presence is shown by a party to be essential to the presentation of the party's cause.*”

Forfeiture by Wrongdoing: This recent addition to the Oklahoma Hearsay Exception Statutes is a powerful tool to use in the pursuit of evidence based prosecution cases. Hearsay does not apply to pretrial admissibility hearings. Use resources available to prove that the defendant has caused the victim/witness to not appear and intended that result. This would be done at a pretrial admissibility hearing and therefore anyone with information can testify at the hearing to prove that the defendant kept the victim from testifying. If the victim told anyone that defendant is keeping her from testify, that comes in. Any avenue that can be taken to get the victims story out should be explored.

See: Title 12 O.S. § 2804(5) – “A statement offered against a party that wrongfully caused or acquiesced in wrongfully causing the declarant's unavailability as a witness, and did so intending that result.” Amended by Laws 2014, HB 2343, c.106, § 1, eff. November 1, 2014.

Although Oklahoma Law has only recently adopted the statutory language that allows for Forfeiture by Wrongdoing, case law has been long established that allows for this hearsay exception. Including:

- Reynolds v. US, 98 U.S. 145, 158 (1878), “the Constitution gives the accused the right to a trial at which he should be confronted with the witness against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to the supply the place of that which he has kept away.”
- Giles v. California, 554 U.S. 353 (2008), Burden of Proof to establish forfeiture by wrong doing is Preponderance of the Evidence; a pending case is necessary to apply this doctrine.
- Davis v. Washington, 547 U.S. 813, 833 (2004) and State v. Hand, 840 N.E.2d 151, 172 (Ohio 2006), Burden of Proof to establish forfeiture by wrong doing is Preponderance of the Evidence.
(Case law cites provided by Aequitas)

Transcripts of Previous Testimony of Victim: If the victim has previously testified on the record at a proceeding where he/she was subject to cross examination and is not unavailable due to refusing to testify, the previous testimony can be admitted. At the hearing where it is being admitted, the transcript is read on the stand (usually by someone employed at the District Attorney’s Office) as if it was a script. A motion should be filed giving notice to the court that the prosecutor intends to introduce this previous testimony at trial along with an affidavit of efforts used to try and locate the victim.

See: Title 12 O.S. § 2804(2) – The declarant “persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so.”

CHARGING DECISIONS – Making the right call

Creativity is important when deciding what to charge. Knowing what can be charged will aid in making an informed decision. The charges concerning domestic violence are not limited to Title 21, Section 644. Several other sections are also appropriate to charge. Consider charging:

- ✧ Title 21 O.S. § 644:
 - ✧ Domestic Assault and Battery (misdemeanor - first offense)
 - ✧ Domestic Assault and Battery (felony – second or subsequent offense)
 - ✧ Domestic Assault and Battery Against a Pregnant Woman (misdemeanor - first offense)
 - ✧ Domestic Assault and Battery by Strangulation
 - ✧ Domestic Assault and/or Assault and Battery with a Dangerous Weapon
 - ✧ Domestic Assault and Battery -Great Bodily Injury
 - ✧ Domestic Assault and Battery in the Presence of a Minor Child (misdemeanor - first offense)
- ✧ Title 21 O.S. § 644.1:
 - ✧ Domestic Abuse with Prior Pattern of Physical Abuse (felony) – “two or more separate incidences, including the current incident, occurring on different days and each incident relates to an act constituting assault and battery or domestic abuse committed by the defendant against [see 644.1 for categories] where proof of each incident prior to the present incident is established by the sworn testimony of a third party who was a witness to the alleged physical abuse or by other admissible direct evidence that is independent of the testimony of the victim.” (Effective November 1, 2016)
- ✧ Title 21 O.S. § 741:
 - ✧ Kidnapping
- ✧ Title 21 O.S. § 1123(B):
 - ✧ Sexual Battery
- ✧ Title 21 O.S. § 1114:
 - ✧ Rape

- ⌘ Title 21 O.S. § 1289.16:
 - ⌘ Feloniously Pointing of a Firearm
- ⌘ Title 22 O.S. § 60.6:
 - ⌘ Violation of Protective Order
- ⌘ Title 22 O.S. § 60.1:
 - ⌘ Definitions - Protection from Domestic Abuse Act

See page 11 for specific elements of each.

Strangulation:

Strangulation demonstrates to the victim that abuser has the ability to kill the victim. The crime itself is achieved by cutting off the air OR blood flow to the brain of the victim by the abuser. This can be achieved by applying pressure to the neck OR chest of the victim by the abuser. The victim can lose consciousness, have trouble breathing or even urinate on themselves. Often times the neck does not appear to have any signs of injury. The eyes of the victim could have petechiae (red spots) but not required in order to have an incident of strangulation. Evidence of strangulation also includes a sore throat in the days following the abuse. Death of the victim can occur up to 72 hours following the strangulation. The victim can also suffer from the residual effects of strangulation such as heart issues and blood clots. The charge applies to both strangulation AND attempted strangulation (see jury instruction – OUJI 4-26D). It is not necessary to charge “attempted” strangulation.

Violation of Protective Order (VPO):

To prove a violation of protective order has occurred, it must be shown that: a valid protective order was issued, it was served on the defendant, and that the parameters of the order were violated. Each protective order has specified requirements. To ensure that a violation has occurred, a copy of the protective order must be reviewed by the charging prosecutor. A copy of the protective order and proof of service should be included in discovery. A certified copy of the protective order should be admitted as evidence at the preliminary hearing as well as trial. The person who served the protective order should testify and/or a certified copy of the proof of service should be presented at the preliminary hearing as well as trial.

Punishment for VPO:

1. Has been served with an ex parte or final protective order or foreign protective order and is in violation of such protective order, upon conviction, shall be guilty of a misdemeanor and shall be punished by a fine of not more than One Thousand Dollars (\$1,000.00) or by a term of imprisonment in the county jail of not more than one (1) year, or by both such fine and imprisonment; and
 2. After a previous conviction of a violation of a protective order, is convicted of a second or subsequent offense pursuant to the provisions of this section shall, upon conviction, be guilty of a felony and shall be punished by a term of imprisonment in the custody of the Department of Corrections for not less than one (1) year nor more than three (3) years, or by a fine of not less than Two Thousand Dollars (\$2,000.00) nor more than Ten Thousand Dollars (\$10,000.00), or by both such fine and imprisonment.
- B. 1. Any person who has been served with an ex parte or final protective order or foreign protective order who violates the protective order and causes physical injury or physical impairment to the plaintiff or to any other person named in said protective order shall, upon conviction, be guilty of a misdemeanor and shall be punished by a term of imprisonment in the county jail for not less than twenty (20) days nor more than one (1) year. In addition to the term of imprisonment, the person may be punished by a fine not to exceed Five Thousand Dollars (\$5,000.00).

2. Any person who is convicted of a second or subsequent violation of a protective order which causes physical injury or physical impairment to a plaintiff or to any other person named in the protective order shall be guilty of a felony and shall be punished by a term of imprisonment in the custody of the Department of Corrections of not less than one (1) year nor more than five (5) years, or by a fine of not less than Three Thousand Dollars (\$3,000.00) nor more than Ten Thousand Dollars (\$10,000.00), or by both such fine and imprisonment.

Range of punishment:

The range of punishment can vary greatly depending on how the case is charged. Be aware of what the range of punishment is for each charges that are possible. The ranges vary greatly depending on the charge and the prior offenses.

Filing Multiple Charges:

If there is a time laps, more than one charge can be filed in the same case. Double jeopardy does not apply to multiple charges of the same charge OR multiple charges that occur in quick succession of there is a time gap.

See: Doyle v. State, 1989 OK CR 85, ¶ 16 – “In the present case, the kidnapping, rape and sodomy are separate and distinct offenses, each requiring dissimilar proof of their several elements. Merely because the crimes were committed in rapid succession does not negate the fact that separate crimes were committed, so long as a separation does exist. *Id.* at 1338. The Double Jeopardy Clause is not carte blanche for an accused to commit as many offenses as desired within the same transaction or episode. *Hill v. State*, 511 P.2d 604, 606 (Okl.Cr. 1973).” And , ¶ 18 – “We are not persuaded by Appellant's argument that only one rape occurred since he did not believe the act had been properly consummated until the last act of intercourse. It would be utterly unreasonable to hold that an accused could repeatedly rape or sodomize a victim until he felt that he had completed the act to his own satisfaction.”

Enhancement based on prior offenses:

ALWAYS KNOW THE DEFENDANTS PRIORS WHEN CHARGING. Knowing if the defendant has prior domestic violence offenses and/or felony convictions. If the defendant has entered a plea of guilty or no contest and has been convicted of a misdemeanor OR felony domestic violence offense, any subsequent domestic violence offense is a felony offense. Any felony domestic violence offense CAN be enhanced by ANY prior felony offenses. The charge of Domestic Assault and Battery Second or Subsequent Offense is not limited to the range of zero to four years in the penitentiary. The enhancement statutes located under enhancement statues found at Title 21 O.S. § 51.1.

Charging in the alternative:

Also consider charging in the alternative. The alternative charge that is appropriate for most domestic violence charges is Title 21 O.S. § 644(C) – Domestic Assault and Battery -Second or Subsequent Offense. This give the jury a fall back felony charge when they cannot agree on a more specific charge such as Domestic Assault and Battery by Strangulation or Domestic Assault and Battery with a Dangerous Weapon. Whether or not to use this tactic is a judgement call. The range of punishment may vary greatly. However, if the range of punishment is up to Life on both charges, using an “in the alternative” tactic is a way to give the jury an out if they don’t want to go for the more serious charge.

Using “and/or” when filing charges:

When it comes to domestic violence charges, the more options the prosecutor has, the better off she/he will be. For example, when charging “Domestic Assault and Battery” in a case where the victim has described the physical abuse as being “beat up all over,” an appropriate description of the charges would be “punch and/or kick and/or struck and/or hit the victim about the head and/or body.” Although the judge at both the trial level should instruct the jury appropriately based on the testimony given, that is not always the case. If the judge insists on putting the wording on the information in the jury instructions regardless of the testimony that was given, using “and/or” will keep the prosecutor covered.

Sentence Recommendations:

The offer made to a defendant's attorney will depend on many factors. Victim participation, strength of the evidence, prior history of the defendant as well as the end result sought. A split sentence or a probationary period can often achieve the goal of pleading a case with issues while ensuring oversight of the defendant.

Using an application to revoke/accelerate to the persecutors advantage:

When a defendant is on probation and they commit a charge of domestic violence, keeping leverage is key. Exercising the right to have the revocation being heard within 20 days can expedite and encourage a plea by the defendant. The speed of having the application heard within 20 days also assists in ensuring victim participation. The closer in time the hearing is conducted to the violent event, the more likely there will be victim participation. Another tactic is to have the application to accelerate/revoke heard at the same time the preliminary hearing is conducted. Evidence that may not be considered at the preliminary hearing can be considered by the Judge for the purposes of the application. This will often encourage a plea to the charges.

See Title 22 O.S. § 991(b)(A) - Suspended Sentence Revocation: "Whenever a sentence has been suspended by the court after conviction of a person for any crime, the suspended sentence of the person may not be revoked, in whole or part, for any cause unless a petition setting forth the grounds for such revocation is filed by the district attorney with the clerk of the sentencing court and competent evidence justifying the revocation of the suspended sentence is presented to the court at a hearing to be held for that purpose within twenty (20) days after the entry of the plea of not guilty to the petition, *unless waived by both the state and the defendant.*"

Using the preliminary hearing to the prosecutor's advantage:

If presented with the opportunity to get the victim on the record DO NOT WAIVE IT. Whether it is a preliminary hearing, application to revoke/accelerate or any hearing where the victim is present and subject to cross examination, put the victim on the record. These transcripts can be used during a trial in lieu of victim participation or for the purposes of impeaching a recanting victim.

SPEAKING WITH THE VICTIM

When interacting with the victim, there are several things to keep in mind. Always remember to:

- ◇ Meet/call the victim early and often. Insist on meeting in person if at all possible. This will allow the prosecutor to make a connection with the victim and collect the most information possible. Take the opportunity to have the victim recognized back and/or personally served for the next court date.
- ◇ Be the first person/office the victim meets/hears from. Control the conversation as much as possible. If the attorney for the defendant has already made contact, they have set the tone with the victim. This will require the prosecutor to spend time doing damage control instead of building rapport.
- ◇ Do not meet with a victim alone. Have an advocate or another prosecutor present. Victims of domestic violence often recant. The prosecutor should make efforts to protect himself/herself from being accused of giving false information or threatening the victim.
- ◇ Let the victim lead the conversation. If the victim is a "drop in" and does not have an appointment, ask them what the office can do for them. By letting the victim lead the conversation, the prosecutor will obtain additional information regarding why they have come to office. If the victim has been "sent" by the defendant and/or his/her family, they may not know exactly why they are there. Asking a victim at a scheduled appointment what questions they have at the outset of the interview will also give guidance as to their intentions. Use this information to guide the conversation. *By letting the victim talk, he/she will provide possibilities for corroborating evidence.*
- ◇ "I don't want to testify." or "do I have to testify?" are commonly stated by the victim during an interview. An effective way to redirect the conversation is to ask "what about testify makes you uncomfortable?" This

question will encourage the victim to articulate the reasons that they do not want to participate and allow the prosecutor to address those reasons.

- ◇ Inevitably, the victim will give reasons why the abuse is not the defendant's fault. Inquire as to how the State can assist the defendant in correcting these deficiencies. Assure the victim that if there is a way to fix the defendant, we want to assist in that endeavor. If probation or a split sentence is appropriate based on the situations, explain to the victim what that means and how it can help the defendant. If there is a way to make the defendant not become a repeat offender, that helps not only the victim but the community. Remind the victim that only the defendant can take responsibility for his actions and that we are trying to assist the abuser in fixing their issues. This will reassure the victim that the prosecutor is the good guy and anyone whose interests are contrary to ours is not trying to help fix the issues that lead to a charge being filed in the first place.
- ◇ Many times the victim has been sent to the prosecutor's office in order to "drop the charges." The victim has likely been convinced by the defendant that if the charges are dropped they will get help. They are being nice to the victim during the "honeymoon" period that typically occurs after abuse is perpetrated. Take the time to meet with this victim, if possible, and explain why only the prosecutor can "drop" or "pursue" charges. It is not up to the victim because they are not the ones pursuing the charges. No matter how the victim appears to react, the victim will feel somewhat relieved to know that they are not responsible for what happens to the defendant.
- ◇ Remind the victim that if the defendant is serious about getting help, they will jump at the chance to be on probation and get the help. Remind them that if the defendant doesn't want the help, then the prosecutor is forced to go forward with the prosecution and that requires witness testimony. **PUT THE RESPONSIBILITY ON THE DEFENDANT.**

PRETRIAL MOTIONS

Giving proper notice to the court and defendant is essential to making sure that the needed evidence is admitted at trial. Examples of these notices are:

- Motion to Use Transcript of Previous Testimony
- Request for Sequestration Exception
- Notice of Expert Testimony and Brief in Support
- Motion to Endorse Witness (jail calls, expert testimony, etc.)

MOTIONS IN LIMINE

When there are issues that the prosecutor does or does not want to be brought out at a jury trial, Motions in Limine's should be used. The benefit of a Motion in Limine is that the prosecutor can advise witnesses about what may or may not come out at a trial. It also helps the prosecutor evaluate the strength of the case and identify issues that will remain at trial. Examples of these motions are:

- Rape Shield
- Previous Relationships
- Divorce/Custody Proceedings

TESTIFYING – PREPARING YOUR OFFICER

When proceeding with a domestic violence prosecution without victim participation, the difference between evidence being admitted or kept out depends on not what you say but how you say it. From the wording of the question to the wording of the answer, how an answer is phrased by a law enforcement witness can be vital. For example:

- Question: "Officer, who did you make contact with at the scene when you arrived?"
 - Correct Answer: "[Name of victim] and [name of defendant]"
 - ✘ Incorrect Answer: "The victim and suspect."

- ✓ The reason: the follow up question needed after the incorrect question will likely draw a hearsay objection. By answering with the names, even if a hearsay objection is coming, the answer will likely get out prior to the defendant's attorney objecting.
- Question: "Officer, what injuries did you observe?"
 - Correct Answer: "[injuries observed]" or "He/She appeared to have [injuries observed]"
 - ✘ Incorrect Answer: "He/She said [injuries suffered]."
 - ✓ The reason: the follow up question needed after the incorrect question will likely draw a hearsay objection. By answering with the observations made, a hearsay objection should be overruled. By stating what was told to the officer, the answer will likely draw a hearsay objection. If the victim made the statement while still under the stress of the abuse suffered, argue that the excited utterance hearsay objection applies

Meet with your officer early. Encourage them to document the demeanor of the victim so that hearsay exceptions can be argued at every hearing.

Victims' rights – Cannot force victim to testify

Both the District Attorney's Office and responding law enforcement agency must inform the victim of a crime involving domestic violence of certain rights afforded to them by law.

See Title 21 O.S. § 142A-2 (District Attorney's Office) and 21 O.S. § 142A-3 (Law Enforcement).

VOIR DIRE

Do not ignore the fact that the victim is unlikely to appear at for the jury trial against the defendant. Inquire of the jury what they inspect to see at a domestic violence trial. Ask if they would need to hear from the victim or if other evidence would be sufficient. Ask the jury if anyone has experienced domestic violence either personally or through someone they know. Of those who have, ask how the victim acted both during and after. Ask if they went through with the prosecution and if not, why. Use the opportunity to educate the jury about the dynamics of domestic violence through the answers of the panel members. Also inquire if anyone has been accused or charged with domestic violence or any crime against a family member. Ask questions of these people cautiously and eliminate them from your jury.

CROSSING THE DEFENDANT

Hopefully, the defendant has been locked into a story based on what they told the police and/or other witnesses. Use that information and compare it to the testimony given. Point out inconsistent statements if any (which there will likely be). If they have not given a statement, lead the defendant down a path by getting him/her to agree with several statements that seem harmless. High light a few areas in the defendant's story that are not supported by the testimony given by the other witnesses. Ask very pointed questions that require yes or no answers.

CROSSING THE VICTIM – WHEN THE VICTIM TESTIFIES FOR THE DEFENDANT

It is not uncommon for the victim to appear after the State has rested its case in order to testify for the Defendant. Use the evidence that has been presented at trial to debunk the story that the victim is not giving at trial. If the victim met with the persecutor and another person (hopefully an advocate or another prosecutor) call that person as rebuttal to impeach the victim.

WHEN EVIDENCE BASED PROSECUTION IS NOT FEASIBLE

Sometimes, there is not enough evidence to proceed with an evidence based prosecution. If that is the case, accurately document the file regarding all of the efforts made to get in contact with the victim. The file should also reflect all of the efforts made to proceed with an evidence based prosecution. Documentation is the key. A defendant does not typically stop being abusive when a case is dismissed. By making all efforts possible, the prosecutor and their office will be

covered when the defendant abuses again. The abuse typically escalates and can ultimately result in the death of the victim. Domestic violence prosecution is murder prevention. The cases should be treated as such. Even if the current prosecution is not feasible, by making efforts to involve the victim and showing them respect throughout the process, they are more likely to participate and trust the office the next time they are abused.

PRACTICE TIPS

Domestic violence prosecution is unlike any other type of case. The rules of what evidence can be useful and how to use it are fluid and always changing. Creative new measures will keep these difficult prosecutions alive. These measures include, but are not limited to:

- ☆ Controlling the conversation with the defendant - The victim will sometimes be close to the defendant's family members. The victim may state that the defendant is under the impression that the deal/offer is different than the one actually on the table. The victim may ask if it is okay to tell the defendant's family member the accurate information. This is a way to control the information/conversation with the defendant.
- ☆ The defendant knows everything – Assume that the attorney for the defendant knows everything. They have spoken with one of a few people who know what happened during the commission of the crime, the defendant. Keeping information on a need to know basis is key to a successful prosecution. Questions regarding victim contact and desire to participate in the prosecution are not discussions that need to be had with the defendant's attorney. The whereabouts of the victim should not be given out without the precautions necessary to keep the victim safe.
- ☆ Be creative – try new and inventive ways to introduce evidence. Protecting those who do not have the means or mental strength to protect themselves is a noble and worthy endeavor. By trying new ways to prosecute, each case will be worthwhile regardless of the disposition.

USE THE NEGATIVES AS POSITIVES

There is much focus on the hardships that present themselves during a domestic violence prosecution. However, these negatives can be transformed into positives. Issues that exist in other types of prosecutions are not present in cases of domestic violence. These positives include:

- The defendant won't deny being at the scene.
- Identifying the defendant is rarely an issue.
- There are usually several hearsay exceptions.
- Getting the misdemeanor predicate can usually be accomplished (probation is usually appropriate and is an attractive alternative to trial).
- There are usually previous victims of the defendant that can be found.
- Domestic violence prosecution allows for creative ideas and thinking outside the box.
- Spousal privilege does not apply in cases involving domestic violence (See Title 12 O.S. § 2504)

ELEMENTS – QUICK REFERENCE

Title 21 O.S. § 644:

- ⌘ Domestic Assault and Battery (misdemeanor - first offense) – Jury Instruction: OUJI-CR 4-26A

First, willful;

Second, unlawful;

Third, attempting or offering to use force or violence; and

Fourth, the use of force or violence;

Fifth, was against the person of a [Specify Applicable Relationship in **21 O.S. Supp. 2011, § 644(C)**].

The relationships listed in **21 O.S. 2011, § 644(C)** are "a current or former spouse, a present spouse of a former spouse, a former spouse of a present spouse, parents, a foster parent, a child, a person otherwise related by blood or marriage, a person with whom the defendant is or was in a dating relationship as defined by section 60.1 of Title 22 of the Oklahoma Statutes, an individual with whom the defendant has had a child, a person who formerly lived in the same household as the defendant, or a person living in the same household as the defendant."

⌘ Domestic Assault and Battery (felony – second or subsequent offense) Jury Instruction: OUJI-CR 4-26A

First, willful;

Second, unlawful;

Third, attempting or offering to use force or violence; and

Fourth, the use of force or violence;

Fifth, was against the person of a [Specify Applicable Relationship in **21 O.S. Supp. 2011, § 644(C)**];

AND a previous guilty or no contest plea that resulted in a conviction or deferred sentence for a domestic violence charge.

⌘ Domestic Assault and Battery in the Against a Pregnant Woman (misdemeanor - first offense) – Jury Instruction: OUJI-CR 4-26E

First, willful;

Second, unlawful;

Third, attempting or offering to use force or violence; and

Fourth, the use of force or violence;

Fifth, was against a pregnant woman;

Sixth, who was a [Specify Applicable Relationship in **21 O.S. 2011, § 644(C)**]; and

Seventh, the defendant knew the woman was pregnant.

[Eighth, a miscarriage/(injury to the unborn child) occurred.]

⌘ Domestic Assault and Battery by Strangulation – Jury Instruction: OUJI-CR 4-26D

First, willful;

Second, unlawful;

Third, attempting or offering to use force or violence; and

Fourth, the use of force or violence;

Fifth, was against the person of a [Specify Applicable Relationship in **21 O.S. Supp. 2011, § 644(J)**].

Sixth, with the intent to cause great bodily harm by strangulation/(attempted strangulation).

✓ Strangulation means any kind of asphyxia, *including but not limited to*, closure of the (blood vessels)/(air passages)/nostrils/mouth as a result of external pressure on the head/neck. (emphasis added).

The relationships listed in **21 O.S. 2011, § 644(J)** are "a current or former spouse, a present spouse of a former spouse, a former spouse of a present spouse, parents, a foster parent, a child, a person otherwise related by blood or marriage, a person with whom the defendant is or was in a dating relationship as defined by section 60.1 of Title 22 of the Oklahoma Statutes, an individual with whom the defendant has had a child, a person who formerly lived in the same household as the defendant, or a person living in the same household as the defendant."

⌘ Domestic Assault and/or Assault and Battery with a Dangerous Weapon – Jury Instruction: OUJI-CR 4-12A

- First, (an assault)/(a battery)/(an assault and battery);
- Second, upon a [Specify Applicable Relationship in **21 O.S. 2011, § 644(D)(1)**];
- Third, with a sharp/dangerous weapon;
- Fourth, without justifiable or excusable cause;
- Fifth, with intent to do bodily harm.

The relationships listed in **21 O.S. 2011, § 644(D)(1)** are "a current or former spouse, a present spouse of a former spouse, a parent, a foster parent, a child, a person otherwise related by blood or marriage, a person with whom the defendant is in a dating relationship as defined by section 60.1 of Title 22 of the Oklahoma Statutes, an individual with whom the defendant has a child, a person who formerly lived in the same household as the defendant, or a person living in the same household as the defendant.

⌘ Domestic Assault and Battery -Great Bodily Injury – Jury Instruction: OUJI-CR 4-26B

- First, willful;
- Second, unlawful;
- Third, attempting or offering to use force or violence; and
- Fourth, the use of force or violence;
- Fifth, was against the person of a [Specify Applicable Relationship in **21 O.S. Supp. 2011, § 644(C)**].
- Sixth, resulting in great bodily injury.

⌘ Domestic Assault and Battery in the presence of a minor child (misdemeanor - first offense) – Jury Instruction: OUJI-CR 4-26C

- First, willful;
- Second, unlawful;
- Third, attempting or offering to use force or violence; and
- Fourth, the use of force or violence;
- Fifth, was against the person of a [Specify Applicable Relationship in **21 O.S. Supp. 2011, § 644(C)**].
- Sixth, was committed in the presence of a child.

- ✓ A child is any child whether or not related to the victim or the defendant. In the presence of a child means in the child's physical presence or the defendant knows a child is present and may see or hear an act of domestic violence

Title 21 O.S. § 644.1:

⌘ Domestic Abuse with Prior Pattern of Physical Abuse – Jury Instruction: none

- First, willful;
- Second, unlawful;
- Third, attempting or offering to use force or violence; and
- Fourth, the use of force or violence;
- Fifth, was against the person of a [Specify Applicable Relationship in **21 O.S. Supp. 2011, § 644(C)**]

- ⌘ AND "prior pattern of physical abuse" means "two or more separate incidences, including the current incident, occurring on different days and each incident relates to an act constituting assault and battery or domestic abuse committed by the defendant against *a current or former spouse, a present spouse of a former spouse, parents, a foster parent, a child, a person otherwise related by blood or marriage, a person with whom the defendant is in a dating relationship, an individual with whom the defendant has had a child, a person who formerly lived in the same household as the defendant, a person living in the same household as the defendant, a current intimate partner or former intimate partner, or any combination of such persons*, where proof of each incident prior to the present incident is established by the sworn testimony of a third party who was a witness to the alleged physical abuse or by other admissible direct evidence that is independent of the testimony of the victim." (Effective November 1, 2016) [Specify Applicable Relationship in **21 O.S. Supp. 2011, § 644(C)**].

Title 21 O.S. § 741:

- ⌘ Kidnapping (not for extortion) – Jury Instruction: OUJI-CR 4-110

First, unlawfully;

Second, seizes/confines/inveigles/decoys/kidnaps/abducts/(carries away);

Third, another person;

Fourth, with the intent to (confine that person)/(imprison that person)/(send that person out of the State)/(sell that person as a slave)/(hold that person to service) against that person's will.

Title 21 O.S. § 1123(B):

- ⌘ Sexual Battery (in the domestic violence context only) – Jury Instruction: OUJI-CR 4-130

First, the defendant intentionally;

Second, touched/felt/mauled;

Third, in a lewd and lascivious manner;

Fourth, the body/(private parts);

Fifth, of a person sixteen years of age or older;

Sixth, without his/her consent.

Title 21 O.S. § 1114:

- ⌘ Rape – Jury Instruction: OUJI-CR 4-121

First, sexual intercourse;

Second, with the spouse of the defendant;

Third, where force/violence was used against [(the victim)/(another person)]/[where force/violence was threatened against (the victim)/(another person) and the defendant] had the apparent power to carry out the threat of force/violence].

Title 21 O.S. § 1289.16:

- ⌘ Feloniously Pointing of a Firearm – Jury Instruction: OUJI-CR 6-42

First, willfully;

Second, pointing a shotgun/rifle/pistol/(deadly weapon), whether loaded or unloaded;

Third, at any person(s);

Fourth, without lawful cause;

Fifth, (for the purpose of threatening)/(with the intention of discharging the firearm)/(with any malice)/(for any purpose of injuring, either through physical injury or mental or emotional intimidation)/(for purposes of whimsy/humor/[a prank]/(in anger or otherwise).

Title 22 O.S. § 60.6:

- ⌘ Violation of Protective Order – Jury Instruction: OUJI-CR 3-24

First, willful;

Second, violation of a protective order;

Third, served on the defendant.

Title 22 O.S. § 60.6:

- ⌘ Violation of Protective Order (Enhanced) – Jury Instruction: OUJI-CR 3-25

First, willful;

Second, violation of a protective order;

Third, which had been served on the defendant;

Fourth, while committing the violation, the defendant caused physical injury/impairment to the person protected by the order;

Fifth, without justifiable excuse to cause the injury/impairment.

* This instruction shall be accompanied by the definition of willful in OUJI-CR 4-28

- ⌘ Violation of Protective Order – Degree of Injury – Jury Instruction: OUJI-CR 3-26

If you find that the defendant caused physical injury/impairment to the person protected by the protective order, you shall consider the degree of physical injury/impairment in determining the term of imprisonment.

Title 21 O.S. §§ 565, 567:

- ⌘ Indirect Contempt - Jury Instruction: OUJI-CR 3-23

First, the willful;

Second, disobedience/(interference with the carrying out);

Third, of a lawful order/process of a court.