Evidence

Using the rules of evidence to prove a domestic violence case

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This paper is a summary of some of the common evidence rules and issues which will arise during a domestic violence trial. I presented this paper at the Washington State Association of Municipal Attorneys in 2006. There have been some changes in the law since then, however the paper still provides a good basis for the fundamental evidence rules which apply in DV cases. I generally take a copy with me to trial to have a quick reference when I need to respond to objections.

The evidence addressed in this paper is divided into the following topics:

1. Victim statement under oath (Smith affidavit)
2. Excited Utterances
3. 911 call
4. Photos of injuries and/or crime scene
5. Witnesses- victim, police, neighbors, children, etc.
6. Statements made to doctors, nurses
7. Prior domestic violence assaults by defendant

1. Victim statement under oath (Smith affidavit)

The law:

Every victim of domestic violence should be asked to fill out a handwritten statement explaining what happened during the assault. This should be done at the time of the investigation, signed under penalty of perjury by the victim, witnessed by a police officer, and taken into evidence when the police depart the scene. Assuming this document meets these guidelines, it should qualify as what is commonly referred to as a Smith affidavit.

A Smith affidavit is admissible *as substantive evidence* at trial if the victim appears and testifies inconsistently with the affidavit. This is pursuant to evidence rule 801 as interpreted by the courts in Washington. ER 801(d)(1)(i) provides as follows: "(d) Statements Which Are Not Hearsay. A statement is not hearsay if: (1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or *other proceeding*, or in a deposition."

In determining whether a statement made as a written complaint to investigating police officers falls under the "other proceeding" requirement, a factual determination of reliability is required. *State v. Smith*, 97 Wn.2d 856, 858, 651 P.2d 207 (1982), *see also*, *State v. Nelson*, 74 Wn.App. 380, 385, 874 P.2d 170, 174 (1994) (relying on *Smith* to determine whether written statement properly admitted as substantive evidence). The Supreme Court in *Smith* did not establish a bright line rule that all written statements made to investigating officers falls under the scope of "other proceeding," rather, the court listed four factors to be considered in assessing the reliability of the written statement. *Smith*, at 860.

The first factor is whether the witness voluntarily made the statement. *Smith*, at 862. The court in *Smith* determined that the written statement of the assault victim, Rachael Conlin, naming Smith as her assailant was voluntarily written because the statement was volunteered to the investigating officer, written in her own words describing the details of the assault, and signed by her under oath and subject to penalty for perjury. The court in *Nelson* also made a determination of whether the victim's statement was made voluntarily. *Nelson* at 380. Although the victim's statement was not written in her own words, she voluntarily signed the affidavit, satisfying the requirement for a voluntary statement. In both cases the victims were told by police officers that nothing could be done unless they were willing to testify in court and that a voluntary statement would likely result in criminal action.

The second factor is whether there were minimal guaranties of truthfulness. *Smith* at 861. In *Smith*, the statement was attested to before a notary, under oath and subject to penalty for perjury. The court in *Nelson,* went further in defining when an affidavit constitutes a sworn statement as per RCW 9A.72.085, thus meeting the formal guidelines of truthfulness. *Nelson* at 389-390. Included in the victim's affidavit was the following declaration: "I have read the attached statement or it has been read to me and I know the contents of the statement." It was further determined the victim understood that her written statement was made under penalty of perjury and her signature satisfied the minimal guaranties of truthfulness.

The third factor is whether the statement was taken as standard procedure in one of the four legally permissible methods for determining the existence of probable cause. *Smith* at 862. The court listed the four methods as: (1) filing of an information by the prosecutor in superior court; (2) grand jury indictment; (3) inquest proceedings; and (4) filing a criminal complaint before a magistrate. *Smith* at 862 (quoting *State v. Jefferson*, 79 Wn.2d 345, 347, 485 P.2d 77 (1971)). The court reasoned that the result of police investigation into alleged criminal activity, and the taking of statements from witnesses to present to the prosecuting attorney who then exercises discretion in finding probable cause and files an information, meets the first legally permissible method of determining the existence of probable cause, which constitutes an "other proceeding." The court in *Nelson* agreed with *Smith*, that the victim's statement made during a police interrogation was standard procedure meeting the "other proceeding" requirement. *Nelson* at 391. The court distinguished from other cases, which lacked the requisite degree of legal formality in obtaining statements from victims.

The fourth factor to be considered in assessing the reliability is whether the witness was subject to cross-examination when giving the subsequent statement. *Smith* at 861-863. The court in *Smith* found that since the victim testified that she had made the

earlier written statement under oath and that she was later testifying inconsistently also under oath and subject to cross-examination on both statements, the jury was in a position to determine which statement was true. *Smith* at 862. The victim in *Nelson*, also stated on the stand that she falsely identified her assailant, whereupon her prior written statement was introduced as substantive evidence having met the requirements of ER 801 (d)(1)(I). *Nelson* at 385-386.

The *Smith* court reasoned that in many cases, the inconsistent statement is more likely to be true than the testimony at trial as it was made nearer in time to the matter to which it relates and is less likely to be influenced by factors such as fear or forgetfulness. *Smith*. at 860. It is a factual determination whether this evidence should be admitted, based upon reliability.

Therefore, if the victim testifies that nothing happened and she invented the whole story, the prosecutor admits the Smith affidavit. Unlike a prior verbal statement to the police officer, it is substantive rather than impeachment evidence. The jury should be allowed to read the victim's own words and determine whether or not an assault occurred.

Unfortunately, if the victim does not appear, the Smith affidavit is not admissible under ER 801. Similarly, if the victim appears and testifies consistently with her original statements, the Smith affidavit is not admissible under ER 801. On occasion, a defense attorney may open the door to the Smith affidavit when a victim is cooperative with the prosecution. If the defense attorney implies that the victim has recently fabricated the story, or is testifying under improper influence or motive, the statement is admissible under ER 801(d)(1)(ii).

Also, there are no implications under *Crawford v. Washington* if the victim testifies in court and her prior inconsistent statement is admitted. In *State v. Thach*, 126 Wn.App. 297, 309 (2005) the court held, "*Crawford* has no bearing on this case as the Supreme Court stated that the confrontation clause is not implicated when the declarant is available for cross-examination at trial. *Crawford,* 124 S. Ct. at 1369, n.9.

2. Excited Utterances

Well-trained police officers record the demeanor of the victim and any statements she made to the police or any other witnesses. Prosecutors rely on excited utterances to prove domestic violence assaults.

An excited utterance is defined in ER 803(a)(2) as: "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." Courts recognize three criteria which are consistent with excited utterances; (1) a startling event or condition; (2) made while the declarant was under the stress of the startling event; and (3) the statement is in relation to the startling event. *State v. Hardy,* 133 Wn.2d 701, 714, 946 P.2d 1175 (1997) citing *State v. Chapin,* 118 Wn.2d 681, 686, 826 P.2d 194 (1992).

Sometimes a defense attorney will argue that the victim waited to call the police or that the police took an inordinate amount of time to arrive. In fact, there are cases where the victim is assaulted and waits in terror until the batterer leaves a few hours later and then calls the police. It is important to remember that a statement is not rendered

inadmissible solely by the passage of time between the event and the declaration or because the declaration was made in response to questions. *State v. Slider,* 38 Wn. App. 689, 692, 688 P.2d 538 (1984). The court will instead review the trauma undergone by the victim, and the victim's subsequent actions prior to the excited utterance to determine admissibility. *State v. Guizzotti,* 60 Wn. App. 289, 295, 803 P.2d 808, review denied, 116 Wn.2d 1026 (1991). In *Guizzotti*, the court held that a rape victim's 911 call was admissible following a rape on a boat and then hiding in the boatyard in a frightened state for 7 hours. The duration of time between the event and when the statement is made is not measured by a codified/objective standard for admissibility; instead it is the goal of the court to ascertain whether the victim was under the influence of the event at the time the statement was made. See generally e.g. *State v. Sunde,* 98 Wn. App. 515, 985 P.2d 413 (1999). The court in *State v. Fleming*, held that despite a 36 hour delay in making a statement, the declarant was still under the excitement of the event and the statement was admissible. 27 Wn.App. 952, 621 P.2d 779 (1980). Whether the victim is under the influence of the event is a factual inquiry. *Hardy,* 133 Wn.2d at 416-17. What the victim did during the delay in reporting may also be a factor for the court. In *State v. Hochhalter*, 131 Wn.App. 506 (2006), the court of appeals held that the admission of statements to a police officer was error where the victim delayed calling 911 and instead spoke with a friend about what had occurred and what portions should be reported.

It is also important to emphasize to the judge that excited utterances can result from the unsolicited statements of the victim, or through the questioning of investigators. *State v. Woodward,* 32 Wn. App. 204, 207, 646 P.2d 135 (1982) (Juvenile's rape statement to a parent). *State v. Owens*, 128 Wn.2d 908, 913 P.2d 366 (1996) (Questioning by investigators following a startling event). In *Owens*, the court held that "an excited utterance can be prompted by a question which itself follows an exciting event, such as asking a crime victim what happened." *Owens* at 913 citing *State v. Griffith*, 45 Wn.App. 728, 737, 727 P.2d 247 (1986). Just because a victim's statement is elicited by the police officer asking what happened does not mean the statement is not an excited utterance.

Whenever questioning by the police is involved, it becomes less likely that a statement is an excited utterance. At some point, the spontaneity vanishes and the response to questioning begins. However, in a case published in December 2005, the court allowed admission of excited utterances to a police officer. In *State v. Ohlson*, 131 Wn.App 71, (2005) "Officer Gray testified that L.F. and D.L. told her that Ohlson had driven past them several times, yelling racial epithets. Ohlson then swerved "up on to the curb trying to hit them," and they had to "jump out of the way" to avoid being struck. Officer Gray stated that L.F. and D.L. believed that Ohlson had tried to hit them with his vehicle. Ohlson objected to the admission of D.L.'s out-of-court statements; and the court admitted the statements as excited utterances. The court of appeals found that these statements to the police officer were admissible as excited utterances since they were a "spontaneous recitation of the facts."

Historically, excited utterances are admissible regardless of the availability of the witness. Therefore, in the scenario of a missing witness, the excited utterance becomes the voice of the victim who is perhaps too scared of the defendant to testify. In the event that the victim is recanting, an excited utterance with the accompanying description of the victim's demeanor allows the jury to hear the true story. And when the victim is present

and cooperative with the prosecutor, the excited utterance confirms that the victim's story on the stand is consistent with her actions and statements on the day of the assault.

Even if a witness later recants the statement, it should still be admissible if it meets the qualifications of an excited utterance. See *State v. Williamson*, 100 Wn. App. 248, 258, 996 P.2d 1097 (2000).

It should also be noted that the excited utterance exception to the hearsay rule also applies to witnesses and children. The statements of a sobbing child who has just witnessed his mother get pushed to the ground carry great weight with juries. Even excited utterances from a child who is too young to be a competent witness may be admitted. *State v. Robinson*, 44 Wn.App. 611, 722 P.2d 1379 (1986).

3. 911 call

A prosecutor should always request a copy of the 911 call in a domestic violence case. Frequently, the call will record the victim, in a state of terror, calling for help. Often, the defendant is audible in the background swearing, screaming or making threats.

Several evidence rules are applicable to 911 tapes. ER 803(a)(2), excited utterances, may be used to convince the judge that the tape is admissible. Similarly, ER 803(a)(1), present sense impression, should also be argued. The present sense impression exception to the hearsay rule allows the admission of statements describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter. Thus, a statement from a victim who is describing an assault which is still in progress should be admissible under 803(a)(1). Similarly, the call of a neighbor or a child, describing the sights or sounds he is currently observing, is admissible under this rule.

Another possibility for admitting the statements on the 911 tape is ER 803(a)(3), which allows the jury to hear about then existing mental, emotional, or physical condition. The victim's statement that she is afraid or in pain or injured should be admissible. For the applicability of this rule, see *State v. Parr*, 93 Wn.2d 95, 606 P.2d 263 (1980).

Assuming the tape is admissible, a foundation must be laid. ER 901 sets forth the rules of authentication and identification of tangible evidence. The prosecutor must show that the tape recording is what he claims it to be and that the recording is in substantially the same condition as when the crime occurred. *State v. Jackson*, 113 Wn. App. 762, 54 P.3d 739 (2002) allows the prosecutor to let a cooperative 911 caller lay the foundation for the tape:

> "Just as a proponent can authenticate a photo by "eyewitness comparison," a proponent can authenticate a tape recording by "earwitness comparison" -- i.e., by calling a foundational witness to testify (a) that the witness has personal knowledge of the events recorded on the tape**;** (b) that the witness has listened to the tape and compared it with those events; (c) and that the tape accurately portrays those events. If the tape records human voices, the foundational witness (or someone

> else with the requisite knowledge) usually must identify those voices. The witness' testimony provides the necessary "foundation" if it is sufficient to support findings (1) that the tape is what it purports to be and (2) that the tape's condition at trial is substantially the same as its condition on whatever earlier date is relevant (usually the date on which the tape was recorded). *Jackson* at 766-767.

This scenario assumes that the 911 caller will testify and is cooperative. If the 911 caller is hostile or not present, the tape should be authenticated by the more traditional approach of having a record keeper testify. Under this scenario the foundational requirements that must be met before a tape recording can be admitted into evidence are:

(1) [T]he mechanical transcript device was capable of taking testimony;
(2) [t]he operator of the device was competent to operate it;
(3) [t]he authenticity and correctness of the recording must be established;
(4) [c]hanges, additions, or deletions have not been made;
(5) [t]he manner of the preservation of the record has been established;
(6) [t]he speakers are identified; [and]
(7) [t]he testimony elicited was freely and voluntarily made, without any kind of duress.

State v. Robinson, 38 Wn.App 871, 885, 691 P.2d 231 (1984), citing *State v. Williams*, 49 Wn.2d 354, 360, 301 P.2d 769 (1956).

Another ground for admissibility of the 911 tape is that the tape is a business record pursuant to RCW 5.45.020, the Uniform Business Record Act. The Act provides:

> [A] record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of the information, method and time of preparation were such to justify its admission.

In *State v. Ross*, the court held that 911 tapes were admissible as a business record. 42 Wn.App 806, 809, 714 P.2d 703 (1986). And in *State v. Bradley*, the court recognized that emergency calls may satisfy the requirements of RCW 5.45.020. 17 Wn.App. 916, 567 P.2d 650 (1977) *review denied*, 89 Wn.2d 1013 (1978).

A 911 call offers the jury the closest evidence to actually being there. Assuming you have a means of identifying the caller, the tape should come in if it is an excited utterance. From a tactical standpoint, it is often most persuasive to play it for the jury immediately before a recanting victim testifies. The statement that nothing happened is hard to believe after hearing most 911 tapes.

4. Photos of injuries and/or crime scene

Juries love photos. If there is photographic verification that the assault occurred, jurors usually convict. ER 901 covers admissibility of photographs. All the prosecutor needs to show is that the photo fairly and accurately shows the subject on the day it was taken. The photographer is not required, so long as a witness can testify that the photo is accurate.

Crime scene photos are also useful in domestic violence prosecutions. Seeing the room or rooms where the assault occurred helps the jury get a better mental picture of the action. Photos of the scene are especially important if household items have been thrown, knocked over, or otherwise disturbed.

Photos are admissible regardless of whether the victim testifies for or against the prosecution. The victim need not be present so long as a witness can lay the foundation.

5. Witnesses- victim, police, neighbors, children, etc.

The direct observations of any witnesses to the crime are admissible. The testimony of a victim in a domestic violence case is almost always tricky. Even when a victim is cooperative with the prosecution, the victim may minimize. Or, if the victim comes across as too assertive, the jury may assume she could not be a victim of domestic violence, based upon stereotypes in popular culture. If the victim is extremely hostile or fearful, the prosecutor may choose to proceed without calling her at all.

Children who were present in the home may also be called as witnesses. In the case of a cooperative victim, the child may make the difference in a "he said vs. she said" scenario. If the victim is absent, it is likely that the child will also be absent. As for cases where the victim is recanting, if the child is living with the recanting victim, he will almost certainly recant as well. Often, the best way to present the testimony of children is through excited utterances.

Neighbors are often the witnesses who get overlooked. If the assault occurred in an apartment complex, the odds are that some neighbor heard it. The neighbors may hear it all the time. Even if all the neighbor heard was the victim crying and saying, "stop hurting me!" it is often enough to turn a close case to the prosecution's favor.

The police officers involved in the case will also testify. With luck, they are well trained to write detailed reports and take photos. When the officer is unable to remember portions of her report, ER 612 sets out the procedures for allowing the officer to refresh her memory by referring to her report. The positive side of this for the prosecutor is that the officer will probably be more accurate and detailed. Unfortunately an officer who refers to her report too often appears to be unprepared or to have no independent memory of the incident.

Witnesses in a case like this also need to be cautioned by the prosecutor not to give opinions. It is tempting for a police officer or a relative to want to give his view

about who was telling the truth, who appeared more believable, or who was acting like she had just been assaulted. Witnesses need to be reminded multiple times that they are in court to *describe* rather than *interpret*.

6. Statements made to doctors, nurses

While medical reports are always requested by the prosecutor in felony assaults, they can also be useful in misdemeanor domestic violence assault cases. Assault in the fourth degree encompasses a wide range of behavior. Sometimes it is a very close call as to whether to file an assault as a felony or a misdemeanor. The victim may have bruises, scratches, pain, or even suspected fractures. As a routine matter, the investigating officers in a domestic violence case should ask the victim to sign a medical release and determine where she is going for treatment. The prosecutor should then request copies of the medical reports, even though the degree of the injury is not an element of the crime.

Evidence Rule 803(a)(4) provides as follows: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

> (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."

Statements to nurses, as well as doctors, may be admitted under this exception. *State v. Robinson*, 44 Wn.App. 611, 722 P.2d 1379 (1986). Paramedics are also potential witnesses under the rule.

Statements regarding causation are usually not admissible under this exception, because they are not usually pertinent to medical diagnosis or treatment. However, in domestic violence cases, the identity of the abuser <u>is</u> pertinent to treatment. *State v. Sims*, 77 Wn.App. 236, 890 P.2d 521 (1995). In <u>Sims</u>, the Court found:

> "**The physician generally must know who the abuser was in order to render proper treatment** because the physician's treatment will necessarily differ when the abuser is a member of the victim's family or household. In the domestic sexual abuse case, for example, the treating physician may recommend special therapy or counseling and instruct the victim to remove herself from the dangerous environment by leaving the home and seeking shelter elsewhere. *Sims* at 239 (*emphasis added*).

Similarly, in a child abuse case, *State v. Ashcraft*, 71 Wn.App. 444, 859 P.2d 60 (1993), the treating physician was allowed to testify that the child said "mama" caused her injuries, referring to the defendant. The court stated that the child's statement was necessary for proper diagnosis, especially since the child may have been in further danger

due to the presence of the abuser in the child's home. When making a decision on treatment, a doctor must know whether he is sending the child home for rest and medication with a caring adult or the person who caused the injuries.

In misdemeanor domestic violence assault cases, then, the medical reports and testimony of a nurse or doctor can serve two roles. First, the testimony demonstrates the injuries the victim suffered; it emphasizes the severity of the incident if the victim felt she required a medical examination. Second, the nurse or doctor can testify as to who the victim identified as her abuser and what she said about how the injury occurred. The doctor needs to know how the victim was injured to provide a diagnosis and treatment. Similarly, the doctor needs to know who caused the injury in order to provide treatment; resting at home with the batterer is not a safe or medically practical treatment.

Under ER 803(a)(4), the medical reports and statements to medical providers are admissible whether or not the victim is present. If the victim is cooperating with the prosecution, the reports enhance her credibility and verify her story. If the victim is hostile to the prosecution or not present at trial, the medical reports provide independent proof that an assault occurred and that the defendant was identified as the batterer.

7. Prior domestic violence assaults by defendant- ER 404(b)[1]

a. Explaining the dynamics of domestic violence/ assessing victim's credibility

In cases where the defendant has assaulted the victim in the past and is charged again, the prosecutor has the opportunity to admit the prior bad acts or convictions if the victim is recanting. The overriding reason for this is to help the jury understand the dynamics of domestic violence. As a rule, the prior assaults should be proved by a preponderance of the evidence outside the presence of the jury. The judge must then weigh, on the record, the probative value of the prior bad acts against the prejudicial effect. *State v. Ecklund*, 30 Wn.App 313, 633 P.2d 933 (1981).

Evidence Rule 404(b) is the rule used when asking the court to admit the defendant's prior bad acts. Under ER 404(b) prior bad acts are admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. However, this list is not exhaustive and should not be treated as such. *State v. Lane*, 125 Wn.2d 825, 831 (1995). Prior bad acts may be admissible for broader purposes than those stated in Rule 404(b), including providing evidence for the occurrence of domestic violence. *State v. Grant*, 83 Wn. App. 98, 109 (1996).[2]

*Gran*t annunciated the reasons why prior assaults against the same victim should be admissible in domestic violence cases. In such cases, the probative value of the evidence is especially high due to a victim's tendency to recant or minimize previous

[1] This section of the paper is based upon a brief written by Jim Senescu, Deputy Prosecuting Attorney for Clark County.

[2] See State v. Gibbons, 256 Kan 951, 889 P.2d 772, 780 (1995), State v. Elvin, 481 N.W.2d 571, 575 (Minn. App. 1992), State v. Johnson, 73 Ohio Misc. 2d 1, 657 N.E.2d 383, 384 (1994), State v. Kelly, 89 Ohio App. 3d 320, 624 N.E. 2d 733, 734-35 (1993), People v. Zack, 184 Cal. App. 3d 409, 229 Cal. Rptr. 317, 320 (1986), Lindsey v. State, 135 Ga. App. 122, 218 S.E.2d 30, 31 (1975).

statements made immediately following the incident while in an excited state. *Grant* at 109. "…where there was a prior history of assaultive conduct against the same alleged victim, it does become extremely relevant to the case." *Grant*, at 108. Grant built on the Court's theories in *State v. Wilson*, 60 Wn. App. 887, 808 P.2d 754 (1991).

In *Wilson*, the Court allowed evidence of prior bad acts because it was *relevant* and *necessary* to assess the victim's credibility as a witness and in order to prove the charged assault occurred. The defendant was charged with one count of statutory rape and one count of indecent liberties. At trial, the court admitted evidence of the defendant's history of physical abuse of the victim. Following his conviction on both counts, the defendant appealed, contending that the evidence of prior physical abuse was inadmissible under ER 404(b). Division Two affirmed the convictions, holding that the evidence was admissible to explain the victim's delay in reporting the abuse and to rebut the implication that the molestation did not occur:

> The evidence of the physical assaults was relevant to rebut the evidence presented by [the defendant] and other witnesses that the sexual abuse did not occur. That testimony would have gained unwarranted credibility had the court prevented the victim from testifying that she never reported the abuse and was unable to resist or escape the abuse out of fear of [the defendant]. The evidence is relevant because it tends to make the existence of a material fact, that [the defendant] sexually abused the victim, more probable. *Wilson*, 60 Wn. App. at 890.

In *Grant*, the Court of Appeals stated, in reference to the *Wilson* case that:

> Similar principles support the admissibility of a defendant's history of domestic violence under ER 404(b) in cases such as the present one in which the current charge involves yet another alleged act of domestic violence toward the same victim. Such evidence is properly admissible in the sound discretion of the trial court under ER 404(b) when it is relevant – when it makes a fact of consequence to the determination of the action more or less likely – and when its probative value outweighs its prejudicial effect. Here the State sought to admit evidence of Grant's prior assaults on Ms. Grant to explain her statements and conduct when might otherwise appear inconsistent with her testimony of the assault at issue in the present charge. As is reflected in the present case, victims of domestic violence often attempt to placate their abusers in an effort to avoid repeated violence, and often minimize the degree of violence when discussing it with others.[3]

[3] A victim's apparently inconsistent response to abuse may stem from any number of reasons. Some victims minimize or deny abuse because they fear retaliation by the abuser:

The couple's history of domestic violence thus explained why Ms. Grant permitted Grant to see her despite the no-contact order, and why she minimized the degree of violence when she contacted Grant's defense counsel after receiving a letter from Grant, sent from jail. Ms. Grant's credibility was a central issue at trial. The jury was entitled to evaluate her credibility with full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a relationship has on the victim.

Division 2 has adopted a modified version of the *Grant* rationale. In *State v. Cook*, 131 Wn. App 845 (2006) the court allowed prior assaults against the same victim to be admitted to "illuminate the victim's state of mind" when she recanted to the jury: "We agree with Grant that a defendant's prior acts of domestic abuse against the alleged victim may be admissible under ER 404(b). But for the reasons that follow, we disagree with Grant that such evidence should be considered by the jury for the generalized purpose of assessing the victim's credibility. When an alleged victim acts inconsistently with a disclosure of abuse, such as by failing to timely report the abuse or by recanting or minimizing the accusations, evidence of prior abuse is relevant and potentially admissible under ER 404(b) to illuminate the victim's state of mind at the time of the inconsistent act." The court also indicated that no expert witness was needed to explain these domestic violence dynamics to the jury. "The jury may draw from its own common knowledge and the evidence submitted at trial to determine if the victim's inconsistent behavior is the result of a fear of retaliation, misguided affection, internalized shame or blame, or a continuing dependence on the defendant."

The perpetrators in these cases may have terrorized the abused party over the period of time between the assault and the time of the court proceeding in order to coerce the abused party into lying. The perpetrator may increase the violence and the threats of violence, or they may bargain with the abused party to change the story with promises that if they do, the violence will stop. A. Ganley, Ph.D, *Domestic Violence: The What, Why and Who, As Relevant to Civil Court Domestic Violence Cases*, contained in *Domestic Violence Cases in the Civil Court: A National Model for Judicial Education*, p. 20, The Family Violence Prevention Fund (1992).

Other victims minimize or deny abuse out of a sense of hopelessness or mistrust of the ability of the judicial system to protect them:

Sometimes the abused party lies about the abuse because they have been told by law enforcement, lawyers, counselors, their ministers, etc. that nothing can be done, and that only the abused party can stop the violence by changing the behavior that makes the perpetrator angry. In such cases, the abused party has learned that the systems with the power to intervene will not act. Thus, they are forced to try to work out their own deals with the abuser in hopes of stopping the abuse. A. Ganley, *Domestic Violence* at p. 20.

Moreover, victims of domestic violence may remain with their abuser for similar reasons:

The primary reason given by victims of domestic violence for staying with the perpetrator is the realistic fear of the escalating violence. Victims may know from past experience that the violence gets worse whenever they attempt to get help. Research shows that domestic violence tends to escalate when the victim leaves the relationship. National Crime Statistics show that in almost 75% of reported spousal assaults, the partners were divorced or separated. (U.S. Department of Justice, 1983, Washington D.C.). Perpetrators may repeatedly tell the abused party that she/he will never be free of them. The abused party believes this as a result of past experience. When they did attempt to leave, the perpetrator may have tracked them down or abducted the children in the attempt to get the victim back. A. Ganley, *Domestic Violence* at p. 20.

b. Rebutting a claim of accident or mistake

It is not unusual for a batterer to claim that the injury to the victim was an accident. The batterer slammed a door without knowing that the victim's hand would be there. During an argument, the defendant tripped and fell into the victim. ER 404(b) specifically states that the defendant's prior bad acts may be admissible to rebut a claim of accident or mistake. As in any 404(b) issue, the judge should weigh the admissibility on the record, outside the presence of the jury. The rule is supported by the case of *State v. Hernandez*, 99 Wn.App 312, 997 P.2d 923 (1999). In *Hernandez*, the State was allowed to introduce evidence of the defendant's prior abuse of the victim to rebut his claim that she accidentally shot herself.

The difficulty with this exception is that you may not know that the defendant is claiming that it was accident until he testifies. If there are prior convictions for domestic violence, it is best to have certified copies in advance, just in case the defendant opens the door to this evidence at trial.

c. Proof of motive

The sixth edition of *Black's Law Dictionary* defines motive as:

> "Motive" is said to be the moving course, the impulse, the desire that induces criminal action on part of the accused; it is distinguished from "intent" which is the purpose or design with which the act is done, the purpose to make the means adopted effective.

Black's Law Dictionary 1014 (6th ed. 1990).

ER 404(b) allows the judge the discretion to admit the defendant's prior bad acts, such as assaults or threats, if they are relevant to show a motive for assault. Most of the major cases which uphold this exception are murder cases. However, the rationale is the same; prior threats, assaults and indications of a hostile relationship provide the jury with evidence relevant to show the defendant's motive. See *State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997) and *State v. Powell*, 126 Wn.2d 244, 893 P.2d 615 (1995).

d. Demonstrating the victim's fear in harassment cases

Many domestic violence assaults also involve threats to the victim, either before or after the physical violence. Prosecutors can charge these threats to cause bodily injury or damage to property as the separate crime of harassment. When harassment is charged, ER 404(b) can be used to admit the defendant's prior threats or assaults, of which the victim is aware, to show that the victim's fear of the threat was reasonable. Obviously, if a victim knows that the defendant has threatened her in the past and followed the threats by beating her, it makes it likely her fear of the defendant's threats in the new case were reasonable. The supporting case allowing the court to admit the prior bad acts is *State v. Barragan*, 102 Wn.App. 754, 9 P.3d 942 (2000).

e. Summary of ER 404(b)

ER 404(b) can be a powerful tool. It also creates issues for appeal. If the prosecutor has a strong case with or without a cooperative victim, it may not be worthwhile to try to admit the defendant's prior assaults. If the prosecutor decides to try to have prior bad acts admitted, it is wise to raise all the grounds that apply, and ask the judge to make specific findings on as many of the grounds as possible.

Conclusion

This paper addressed some of the evidence which may be admitted or excluded in a domestic violence cases. An entire book could be published on this topic. Additional time could be spent on Evidence Rule 609, which allows impeachment of a witness who has a conviction for a crime of dishonesty in the past 10 years. If the resources are available, a prosecutor could also consider using Evidence Rule 702, which sets out the guidelines for an expert witness. If the victim recants, the prosecutor may wish to consider calling an expert witness on the topic of battered woman syndrome to explain the cycle of violence and the reasons victims recant.

Most of this case law can be cut and pasted into a pretrial motion or trial brief. Even a short written summary on the admissibility of the Smith affidavit or statements made to a nurse will usually impress the judge and make you look more prepared.