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Trial Strategies in Domestic Violence Felonies

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Prosecution Strategies 1**Abstract**

Trial themes and strategies in domestic violence related felony cases were identified through qualitative analyses of trial transcripts of domestic violence cases. Prosecution themes and strategies focus on establishing the seriousness of the crime, corroborating the victim's account, and telling the story of domestic violence. Defense strategies include showing that the relationship was fine, character enhancement of the abuser, attacking trial evidence, and victim character assassination. The defense tactics used often manipulate abuse dynamics and reinforce myths about domestic violence. Findings are discussed within the context of theory on juror decision making.

Trial Strategies in Domestic Violence Felonies

The criminal justice system has only recently begun to respond to domestic violence as a public offense. Although wife beating was declared illegal in all states in 1920,¹ domestic violence was largely ignored in the criminal justice system.² The advent of mandatory arrest for domestic abuse,³ has resulted in a dramatic rise in prosecutions in many jurisdictions.⁴ To date, studies of the prosecution of domestic violence cases are limited to charging decisions.⁵ No study has examined prosecution or defense strategies in domestic violence cases.

A. Difficulties Prosecuting Domestic Violence-Related Cases

Domestic violence-related cases are often viewed as notoriously difficult to prosecute,⁶ in part because our criminal justice system is not structured to respond well to domestic violence-related crimes. One reason for this difficulty in responding has to do with how our laws and rules of evidence are written. Our legal system is based on charging individuals for "discrete events." A man may batter his partner for years, but is often charged for only one abuse event. Thus, the legal process takes the assault out of the context of the larger abusive relationship. Our rules of evidence limit evidence of previous violence (other acts evidence) between the domestic

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partners that can be admitted at trial. These rules also restrict the admission of evidence of a defendant's character or violent nature. However, many domestic violence experts and prosecutors agree that evidence of prior abuse plays an important role in prosecuting these cases.⁷ The limitations on other-act and character evidence can have a significant impact in domestic violence prosecutions. Jurors may not be able to hear the evidence that gives context to the violent relationship.

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

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

It is from this uninformed group of individuals that a prosecutor will seat a jury. In fact, any potential juror who has personal knowledge of or experience with domestic violence, and therefore has some understanding of the dynamics of domestic violence, is often struck for cause.

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The defense counsel may also use a peremptory strike to remove that juror. Thus, jurors selected in a domestic violence trial may have misconceptions regarding domestic violence that may interfere with their ability to decide the case.¹⁰

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

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

B. Summary and Objectives of this Study

The evidentiary constraints, myths and misconceptions about domestic violence and women's perceived lack of credibility all present significant challenges to prosecuting domestic violence related cases. This study identified the trial strategies used by the prosecution and defense in domestic violence related felony cases by analyzing trial transcripts of domestic

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violence-related murder and non-murder felony cases in the state of Iowa.

Overview of Methodology

Trial themes and strategies were identified through a qualitative analysis of 40 domestic violence-related felony trial transcripts.¹² The felony trials took place in Iowa between 1989 and 1995, and all involved a male defendant and female victim who were currently or had in the past been involved in a domestic relationship. Although many cases involved prior incidents of violence in the relationship, this was not a requirement of case selection.

Cases were identified through the assistance of the Crime Victim Assistance Division (CVAD) of the Iowa Attorney General's office, contacts with county attorneys and court reporters, and a review of official case summaries issued by the Iowa Supreme Court and the Iowa Court of Appeals. Trial transcripts were scanned in to computer files, edited and analyzed using HyperResearch™ qualitative text analysis program.

Description of Cases

A total of 40 transcripts were analyzed in the study, 21 murder cases and 19 non-murder felonies. In the murder cases, the length of the relationship between the defendant and victim ranged from four months to 16 years. The majority of murder defendants (N=17) had lived together with the victim at some point. Only 11 (52.4%) were living with the victim at the time of the offense.

For the non-murder defendants, a little over half the defendants had a dating relationship with the victim, with only one third of the defendants having been married to the victim at some point. The length of the relationships varied from two months to 20 years. Forty-two percent of the defendants were living with the victim at the time of the offense.

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Nineteen murder defendants had been charged with first degree murder, one with second degree murder, and another with involuntary manslaughter. Three offenders were charged with an additional count of first degree murder for killing a former partner's mother (one case) or current boyfriend (two cases). A fourth defendant was charged with two additional counts of attempted murder against police officers attempting to apprehend him.

The nature of the charges in the non-murder cases varied. There were attempted murder, kidnaping, physical and sexual assault, burglary, terrorism and theft charges. Most charges involved a physical assault and 16 defendants were charged with more than one offense. The majority of defendants (89.5%) were found guilty of at least one count charged, although not all offenders were found guilty on the original charge.

Trial Themes and Strategies

A. Prosecution Themes

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

1. **Proof of the elements: "This was a crime."** In some cases, the prosecutor sought not only to prove the elements of the crime, but to persuade the jury that these actions were worthy of traditional criminal sanctions. There were two variations on this theme. Prosecutors sought to show that domestic violence is a serious public offense, or that the defendant's actions should be punished.
2. **Proof of identity: "The defendant is responsible."** This theme was presented in several ways: (a) showing it was the defendant who committed the criminal acts; b) illustrating the brutal nature of the attack or the defendant's lack of concern about the victim show his culpability; c)

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demonstrating how the defendant controlled the relationship, and used violence as his means of control; and/or d) arguing, under the law, that words alone cannot "provoke" or justify physical violence.

3. Proof of credibility: "*The State's evidence of guilt is believable.*" In domestic violence cases, it is especially important for the prosecution to show that the State's evidence is credible. More than in almost any other type of case, except perhaps acquaintance rape, domestic violence cases involve a challenge to the victim's credibility. This is especially true when the existence of an ongoing relationship seems to blur distinctions between consent and coercion. When the victim's credibility was attacked, the prosecutors responded by providing corroboration of the victim's testimony with other physical evidence and statements. Prosecutors would also bolster credibility by showing inconsistencies in defendant statements, producing physical evidence to rebut the defendant's claims of what occurred, or presenting other evidence to show that the defendant was not a truthful person.

B. Prosecution Strategies

1. Proving the Case by "Telling the Story of Violence"

In proving the elements of the crime, prosecutors generally tried to "tell the story" of the violence. Sometimes the story included a history of abuse in the relationship; other times it involved only the incident of violence charged. Regardless of the scope, however, prosecutors used storytelling techniques to present the evidence.

The "story" often began with a witness -- the victim, an eyewitness, an investigating officer, or an examining physician -- who could give a graphic account of the events surrounding the crime. Subsequent witnesses filled in more details about the story. Prosecutors followed a

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pattern in having the witness "tell the story." Prosecutors *set the scene* by establishing the physical setting: the location, the time of day, the type of weather, the lighting. Then prosecutors elicited a *step-by-step replay of events*, rich in detail, about what occurred. In this step-by-step replay of events, many prosecutors focused on the *language used* by the witness. If the witness used a particularly graphic or descriptive word or phrase, the prosecutor reinforced the testimony by repeating the words when asking another question, or by making reference to the powerful description later in the testimony.

- Q. During the course of the marriage, besides what we are here for today, but just during the course of the marriage, how many times was he physically abusive, approximately?
- A. Four times.
- Q. What sorts of physical abuse did he inflict on you?
- A. He would punch me or kick me. He has grabbed me by my neck and held me down. He's sexually assaulted me.
- Q. All right. When he kicked you, where did he kick you?
- A. He has kicked me in the back and he has kicked me in the leg.
- Q. All right. And describe what happened when he grabbed you and put your face in the pillow?
- A. He -- That was after he had kicked me. He had left the room. And I was crying and I said I hated him. And he came back in the room and jumped on top of me and grabbed me by the back of the neck and shoved my face into a pillow.

Many prosecutors focused on descriptive terms like "jerked," "slammed," "punched," "back-handed," "throbbing," "saturated with blood," "terrified," or "hysterical." They elicited testimony to describe the weapon that was used in the assault and how it was used; whether blows were struck with an open hand or closed fist; the types of injuries that were inflicted and the pain the victim felt. Also elicited were statements that the defendant made to the victim or others, before, during or after the crime; how the victim felt before, during and after the crime; and what the victim did to seek help after the assault.

In addition, prosecutors often "illustrated" the testimony with *physical evidence*. For

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example, when the witness described the weapon used, the prosecutor produced the weapon as an exhibit and asked the witness to describe or demonstrate how it was used. Prosecutors also brought the story to life by using photographs of the victim or the scene, diagrams of the scene, and tangible objects, like bloody clothing, seized in the investigation. The stories also included discussion of *motives*. Usually, the prosecutor tried to show what motivated the defendant to act -- jealousy, rage, or a need to control.

The following closing argument in a murder case illustrates several story telling techniques, beginning with the defendant's motive.

[PROSECUTOR] And then she told the defendant about [her new boyfriend]. [The victim's son] told you it was shortly before she was killed, within a few days or the weekend before. She told him that there was another man in her life. And it was at that moment -- common sense tells us -- it was at that moment this man who was willing to verbally abuse her before, lost control because he knew [the victim] was out of his life now and she was with somebody else.

And that's when his loss of control and his anger begin to reach a crescendo. He began with the calls. And [the victim's son] told you about that. Again, the continuous calling, the abusiveness. She wouldn't take the calls. His rage builds. His frustration builds. She won't deal with him.

She won't acknowledge him until finally on the night of Wednesday, [date] he is needing to control her to the degree that he goes to her home and he parks back here sometime before 9:00, because that is what [an eyewitness] tells us. And he goes through the alley. And it is at that point, he watches and stalks her and he watches.

And I submit to you it is at that moment that he saw her with [the new boyfriend] and that is when he realized [her new boyfriend] was black. That was the straw that broke that camel's back. It pushed him off the cliff because at that very moment he decided he was going to go home, get his gun, go to his storage locker, get his ammunition and come back and kill her. And kill him if he needed to.

The prosecutor went on to describe the physical evidence and testimony presented at trial that supports the prosecution's story of the crime: the defendant was seen near the victim's residence 13 minutes before the shooting; the defendant had time to get from his storage locker (where he kept his ammunition) to his home to get his gun, to the location where the shooting

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occurred; a box of ammunition was found in his home with 20 missing rounds, along with an empty gun case; the defendant was known to own the type of gun believed to have been used in the shooting; the cigarettes found at the scene are the kind of brand the defendant smoked; the victim had defensive injuries indicating she knew her attacker; the defendant was stopped for speeding shortly after the shooting; and there was time to drive the distance he drove at the time he was stopped by police. This closing argument presented to the jury a plausible story, which explained the events surrounding the murder, as well as the defendant's motivations, and wove together the bits of evidence provided by a wide variety of witnesses during the trial.

2. Corroborating the Victim's Account

Most prosecutors sought to present some form of *corroboration* of the victim's account. This corroboration came through physical evidence consistent with the victim's account as well as witness testimony and statements made by involved parties. Eyewitnesses were called to give graphic accounts of what they saw or heard. The "story" of the violence came to life when they provided details that matched or explained the victim's account of the assault, or expressed the concern or fear they felt in watching the events.

Another common way to corroborate a victim's account was to use other witnesses to testify about the victim's statements about the events. Generally, these statements were admitted through the excited utterance exception or the present sense impression exception to the hearsay rule.¹³ Excited utterance statements included statements the victim made to an investigating officer, a friend, or some other person that she encountered during or after the assault. In a case where the victim was uncooperative and did not testify favorably to the prosecution at the time of trial, the prosecutor used her excited utterances to police officers as a way to tell the story of the

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violence. Obviously, corroboration of the victim's account in murder cases was not possible. There were, however, cases where the prosecution attempted to corroborate a murder victim's reports of threats or past history of violence by the defendant through witness testimony.

Corroboration of the victim's account also came through the defendant's own statements to police, to other persons, or to the victim. Often, offenders testified in their own defense at trial and gave accounts that corroborated the victim's account in many material respects. A defendant in a willful injury and sexual assault case corroborated much of the victim's testimony except for his contention that he did not sexually assault her. During cross-examination the prosecution elicited the following:

- Q. And you just testified to the jury that you don't recall whether you stuck your hand inside [the victim's] vagina; is that right?
- A. Yes, sir.
- Q. But you've also testified about a great number of details, very specific details. Do you still specifically recall hearing a button fall on the floor?
- A. No. I said I felt them. When I pulled her shirt, *I felt the buttons come at me* from me grabbing the shirt.
- Q. You felt that?
- A. Yeah, one hit me right here.
- Q. I believe you said that when you yanked on her pants, you heard the button from her pants fall on the floor.
- A. Yes, I did.
- Q. You remember that specific detail?
- A. I remember it because I heard them when I yanked them.
- Q. Sure. But you don't remember whether you stuck your hand inside her vagina?
- A. No, sir, I did not.
- Q. Do you agree with that one exception your statement that you're giving us here is almost virtually entirely consistent with what [the victim] has testified to?
- A. I don't understand what you mean.

C. Defense Themes

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

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Table 1: Defense Themes by Case Type

Defense Strategy	Murder		Non-Murder	
	N	%	N	%
Self-defense or provocation	3	14.3%	3	15.8%
Going-for-a-lesser-charge	4	19.0%	5	26.3%
Diminished capacity	8	38.1%	2	10.5%
Didn't do it	6	28.6%	9	47.4%
TOTAL	21	100%	19	100%

- 1. Self-defense or Provocation.** *Self-defense* was an attempt to show that the defendant's behavior resulted from defending himself against attack. *Provocation* was connected to this notion of self-defense. The defense used this theme to show that, particularly in the murder cases, the defendant lacked some element of the crime, specifically intent. The crime occurred in the heat of the moment, was not planned, or "things got out of hand."
- 2. Going-for-a-Lesser-Charge.** The going-for-a-lesser-charge defense typically found the defense challenging various elements of a specific charge. The defense did not deny that the defendant did something – he physically assaulted her, but did not sexually assault her; he killed her but he did not premeditate the crime – just that it was not as serious as charged.
- 3. Diminished Responsibility.** Diminished responsibility defenses can be thought of as a specific type of going-for-a-lesser-charge defense. In diminished responsibility, the defense typically tried to show that the defendant was either not responsible or less responsible for his actions because he was incapacitated in some fashion at the time of the offense from alcohol, drugs or a psychological disorder.
- 4. "Didn't Do It."** The final defense theme was an attempt to maintain the defendant's innocence by establishing sufficient reasonable doubt about whether the defendant committed the crime or whether the injuries were accidental.

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

D. Defense Strategies

The defense used a variety of different strategies to create or support the above-mentioned defense themes (see Table 2). These various defense strategies are divided into four categories:

1. The Relationship Was Fine

In many cases the defense spent a considerable amount of time trying to establish that the relationship between victim and defendant was fine. They produced testimony by friends and family members who perceived the relationship as normal, happy, or status quo. In a case where the victim testified that the relationship ended several months before the offense, the defense put on the following testimony by the defendant's mother about seeing the victim and defendant together on Christmas eve, just a week prior to the offense:

Q. Okay. Had you invited [the victim] to come over that day?

A. Not personally. I was just figured she was coming because [the defendant] would invite her as boyfriend, girlfriend thing.

Q. Okay. Were you expecting to see [the defendant] that night?

A. I was expecting to see [the defendant] and I more or less expected to see her. I purchased gifts because I thought she might be there.

Q. Okay. Now, the night before Christmas Eve, was [the defendant] home that night?

A. I can't recall that.

Q. Okay. Did the fact that they came over together on Christmas Eve give you any additional clues as to where [the defendant] might have been that previous week?

A. I figured that he was staying with her.

Q. Okay. How did things go Christmas Eve? Were there any problems?

A. While they were at my house, everything was just normal. She was lovey, dovey, kissy, kissy, girlfriend, boyfriend type thing.

Q. What happened after they left? How did they leave?

A. They were leaving to go to church. As far as I know, they left good.

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In this and other cases, the defense attempted to discredit the victim's testimony by pointing out discrepancies between her testimony about the offense, and others' perceptions of the "happy relationship." This strategy appeared targeted at establishing that either the offender did not commit the offense or, in going for a lesser charge, the offense was out of character given all the other positive aspects of the relationship.

2. Character Enhancement of the Abuser

A second strategy of the defense was to show the good character of the defendant. The intent of this character enhancement was to imply that the defendant was unlikely or unable to abuse because of his good character. Defendant character enhancement was done in a variety of ways to support the different defense themes.

2a) Defendant was a "good guy." One type of character enhancement was to bring in general testimony about the defendant being a "good guy." The testimony focused on describing the defendant as "happy-go-lucky," a good friend, trustworthy, a member of the school board, a good father, etc. This "good guy" approach also focused on nice things the defendant did for the victim. One defendant sent the victim a "nice note" shortly before her death, another participated in the victim's alcohol rehabilitation treatment, a third voluntarily checked himself into an alcohol treatment center after a prior incident of abuse against the victim.

2b) Defendant loved the victim. The defense demonstrated the defendant's caring for the victim through defendant, family and friend testimony describing the defendant as affectionate with the victim or professing his love for her. This defendant in a murder case stated:

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Q. What was your life at home with [the victim], your own apartment, like?

A. Well, except for when she would be mad about something, I mean I thought it was great. I mean I was with the girl that I loved. I thought I was going to spend the rest of my life with her.

Telling others he wanted to spend the rest of his life with her, treating the victim like a queen, looking past her bad behaviors, and doing anything to "please this very difficult to please woman" were other attempts to show this "love."

2c) Defendant was cooperative with police. In many cases the defendant offered no resistance to police after the offense. In these cases, the defense highlighted the fact that the defendant made no attempt to leave the scene, voluntarily turned himself in to police, was generally cooperative and appeared truthful with police.

2d) Defendant did not intend for something bad to happen. The defendant's lack of intent was usually illustrated through statements the defendant made to others after the offense. The defendant told others he "did not mean to do it," he did not intend to kill her when he tied her up, he was intoxicated and did not know what he was doing, he snapped, was in a daze, and/or did not consider the consequences. The defendant's actions after the offense were also used as examples of lack of intent: the defendant called police, or a family member or a priest or tried to get help for the victim after the assault.

2e) Defendant never threatened the victim. When applicable, the defense would attempt to establish that the defendant never made any specific threats toward the victim. As was the case with demonstrating that the relationship was fine, the defense would often show a lack of threats by omission, questioning witnesses about whether they heard the defendant make any threats. In some cases the defense was also hoping to prove that the defendant had never been

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physically violent in the past. In the following example, the defense cross-examined a murder victim's son about whether he had ever seen or heard the defendant physically abuse or threaten the victim:

Q. But then they would get in a fight and he would yell; is that right?

A. Yes.

Q. Would he, from what you saw yourself, what you actually observed, was he ever physically violent with her?

A. I never saw him be physically violent.

Q. He just yelled at her; is that right?

A. Yes.

Q. Were these one-sided fights where he is the only one fighting?

A. No.

Q. So these were verbal arguments the two of them were engaged in, right?

A. Yes.

Q. And basically what you are telling us today is you feel that she was threatened because he called her names like slut and whore, bitch, et cetera, things like that; is that correct?

A. Just from the way he was talking and his behavior.

Q. Not because he had ever threatened her; is that right?

A. No.

Q. Because you never heard him threaten her; is that right?

A. No.

2f) Defendant was remorseful after offense. A great deal was made of the defendant's remorseful behavior after the offense. The defendant was distraught, crying, suicidal, concerned about the victim, somber, very sorry for what he did, or asked the police to "shoot him."

3. Evidence Presented in Trial was Faulty, Misleading, or Inconclusive

In cases where the defense strategy was to go for a lesser charge or to argue that the defendant did not commit the crime, the defense spent a considerable amount of time challenging the prosecution's evidence. This attack of the prosecution's evidence focused on four particular areas:

3a) No witnesses. In a little over half of the cases, there were no witnesses to the

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offense. In these cases, the defense was careful to establish this fact. In one case, the defense called 25 witnesses (neighbors, store clerks, acquaintances) to testify that they never observed the defendant abusing the victim in any way. The defense would also try to establish that there were no witnesses to any prior abuse, threats or injuries made by the defendant toward the victim.

3b) Poor physical evidence. Only a fourth of the cases actually had poor or no physical evidence linking the defendant to the crime. Nonetheless, the defense spent a considerable amount of time challenging the physical evidence. In some cases they tried to establish that there could be another cause or explanation for the presence of that evidence. In the bombing case mentioned previously, the defense argued that the defendant had possession of a mercury switch, similar to the one found in the bomb, in order to perform a home maintenance task.

Q. I want to ask you about another item that's come up; it's a mercury switch. You heard the testimony of [defendant's co-worker] the other day, correct?

A. Yes, sir.

Q. Indicated he gave you a mercury switch?

A. Yes, sir, he did.

Q. He did?

A. Yes, sir.

Q. All right. Why?

A. I had requested that if he had one, I'd appreciate it. I had a problem with a sump pump in [town] with a rental house I had and I was going to try to make a float switch to fix this situation.

Q. Did you?

A. I replaced the sump pump with a brand new one.

Q. So the testimony -- I believe it was [the investigator] -- that there was no switch on that sump pump is correct?

A. That is correct.

Q. What happened to the switch?

A. The switch that [co-worker] gave me?

Q. Yes?

A. I broke it apart to get the mercury out of it.

Q. Why?

A. I wanted to show my son a scientific experiment. We do things like that, like building model airplanes.

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3c) Physical injuries were not obvious. As one would expect, the physical injuries in the murder cases were all apparent. However, in the non-murder cases the nature of the offense sometimes did not involve obvious physical injuries. The defense challenge of the seriousness of injuries seemed focused on contesting the elements of a given charge. For example, in a willful injury case, the prosecution has to show that the injuries or their effects are longstanding, or will take a long time to heal. The defense countered by arguing that the injuries were not that serious or were not likely to cause a permanent disability.

3d) Police Botched the Investigation

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

4. Attacking the Victim's Character

One of the most common and aggressive strategies used by defense attorneys in 71% of the murder cases and 37% of the non-murder cases involved some sort of attack on the victim. These attacks took the form of either a general character assassination of the victim, or more specifically turning behavior that the victim engaged in during the relationship or during the abuse against her.

4a) General character assassination.¹⁴ Character assassination involved attacking overall victim character by dredging up any negative behavior from the victim's past, such as mental health history, emotional problems, and/or substance abuse. This character disparagement of victims varied, with the defense asserting such claims as: the victim was a

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"strong willed person who wasn't easily pushed around," the victim had emotional problems, she could not control her temper, she had sex with other men, or she drank or used drugs.

The character assassination in the non-murder cases seemed to have the intent of attacking the overall credibility of the victim's testimony through showing that the victim had emotional problems or possibly some motive for bringing false charges against the defendant. The victim was shown to have poor judgement in general or an inability to function appropriately. The overall point was -- "don't believe her."

In the murder cases, the character assassination seemed to have two different motivations. In some cases, the victim's character was brought into question in an attempt to establish that the victim may have provoked the offense. The victim was described as aggressive, unable to control her temper, or at times physically abusive. Another motivation was to establish a lesser charge conviction, that the victim's character was so low that her death should not be taken so seriously. Here, the victim was painted as someone who was mentally disturbed, liked to cause trouble, was a hard person to be friends with, was "whoring" around, spent a lot of time in the bars, or was "always drunk, skunkin' drunk."

4b) Turning the victim's behavior against her. Another strategy for attacking the victim's character was to turn the victim's behavior in the relationship or during the abuse against her. If she did not attempt to leave the violent relationship, or "call for help" during the offense, her credibility or motives were questioned. In one case, the defense challenged the victim's claim that she was genuinely fearful of the defendant by asking the victim why she let the defendant move in with her if she was so afraid of him.

Q. And it's my understanding that one of the reasons you tried to kill yourself is because you

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- found out that [the defendant] was getting released from prison, is that correct?
- A. Correct.
- Q. And yet several months later you allow him to move into your house, is that correct?
- A. I never gave permission. He just did it. I asked him several times to leave --

- Q. One last question. This man that caused you so much fear that you tried to kill yourself about his release from prison in 1993, why did you let him back into your house in September of 1993? Can you tell us?
- A. I didn't let him. I just wasn't strong enough to stop him.

Table 2: Summary of Defense Strategies Used

	Murder (N=21)		Non-murder (N=19)	
1. Relationship was Fine	9	42.8%	5	26.3%
2. Character Enhancement of Abuser				
Good guy	5	23.8%	3	15.8%
Loved the victim	9	42.9%	2	10.5%*
Cooperative with police	6	28.6%	3	15.8%
Did not intend for bad to happen	8	38.1%	6	26.3%
Never threatened victim	10	47.6%	8	42.1%
Remorseful after offense	12	57.1%	2	10.5%**
3. Evidence Presented at Trial was Faulty				
No witnesses	11	52.4%	12	63.2%
Poor physical evidence	2	9.5%	8	42.1%*
Physical injuries not obvious	2	9.5%	9	47.4%**
Police botched investigation	6	28.6%	7	36.8%
4. Attacking the Victim's Character				
General character assassination	12	57.1%	7	36.8%
Turning victim's behavior against her	5	23.8%	10	52.6%

* = chi-square significant at .05 level
 ** = chi-square significant at .01 level

E. Anticipating Defenses

Part of an effective trial strategy is to anticipate likely defenses by presenting evidence that undercuts or contradicts the anticipated defense.¹⁵ The prosecutors in these cases appeared to anticipate and effectively challenge many of the defense strategies. For example, prosecutors anticipating a "relationship fine" defense strategy focused on the private nature of domestic

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violence. In the case where the defense called 25 neighbors, store clerks and acquaintances to testify that the "the relationship between the defendant and victim seemed fine," the prosecutor responded by asking the witnesses whether they lived with the couple, were with them constantly, or knew what happened between the couple when they were not present. The following is an example of a prosecutor's cross examination of a next door neighbor called by the defense to testify that "the relationship seemed fine":

- Q. You mentioned that you could see what went on next door at their house by looking out the windows. You weren't able to see in the painted windows in the basement, were you?
- A. No.
- Q. So you could never see what happened inside the basement, could you?
- A. No.
- Q. As a matter of fact, there's generally drapes pulled around the windows, so you weren't able to see what happened inside the first floor of the house either, were you?
- A. No.
- Q. As a result, you have no idea whether [the defendant] ever locked [the victim] in the basement of that house, do you?
- A. No.
- Q. You have no personal knowledge as to whether [the defendant] would have burned [the victim] with cigarettes on various parts of her body, do you?
- A. No.
- Q. You have no personal knowledge as to whether [the defendant] would have choked [the victim] at any point in time either, do you?
- A. No.
- Q. You don't know whether [the defendant] ever beat [the victim] inside that house either?
- A. No.
- Q. You would have no knowledge as to whether [the defendant] would have ever cut [the victim] with a knife inside of that house, do you?
- A. No.
- Q. For all you know, that type of behavior could have gone inside the house next door and you wouldn't have known it the way it's locked up and closed up, right?
- A. Right.

Prosecutors anticipating a "defendant loved the victim" strategy focused on the nature of the injuries the victim suffered. They used medical experts to describe the amount of force necessary to cause the injuries, the amount of time it would take for the injuries to heal, and the

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victim's expression of pain when she was examined. Prosecutors also used photographs of the victim, taken shortly after the crime, to emphasize the brutal nature of the injuries. In one case, the defendant's theme was that he loved the victim and never intended to harm her when he killed her. In cross-examining the defendant, the prosecutor asked a series of questions about previous abuse in the relationship, interjecting several questions about whether the defendant "loved" the victim on those previous occasions when he had abused her. Then, the prosecutor asked the defendant to describe, in painstaking detail, each and every step involved in killing her, again injecting several questions about whether he "loved" the victim as he was doing those things. The following are selected excerpts from that cross examination:

Q. Let's talk about January 1994. You loved her so much in January of 94 that you pushed her, causing marks to her back and marks to her face, didn't you?

A. As I was trying to leave, yes. . . .

Q. And then, Mr. [defendant], you testified that you loved [the victim], but you've tied her up in the past before April 19th?

A. Yes, ma'am.

Q. And the circumstances by which you had to tie her up in the past were what? What happened that day?

A. She was just going into one of her fits. . . .

Q. And how long did you leave her tied up then, because you loved her?

DEFENSE COUNSEL: Okay. I am going to object. Now, that's badgering the witness. She can ask the questions without the sarcasm, your Honor. That's inappropriate cross examination.

THE COURT: You may answer the question if you remember the question.

A. Around 15 to 20 minutes.

Q. And that was because you loved her, is that right?

A. Yes, ma'am.

Q. And when did that happen in relation to the day when you loved her so much you killed her?

A. It was probably about a half a year earlier.

Prosecutors anticipating victim character assassination focused on the "story of violence" from the victim's viewpoint. For example, in one case involving a victim whose character had

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been impugned, the prosecutor asked a series of questions about the victim's behavior during the offense, which might appear strange to many jurors. These questions specifically dealt with why the victim did not try to get away from the defendant, and why she "agreed" to have sex with the defendant during the kidnaping. The victim's explanation for most of her seemingly inexplicable actions was that she did whatever she needed to do "to survive." This became a primary theme of the prosecution.

Q. Jane [pseudonym], did you want to have sex with him?

A. No.

Q. Why did you?

A. To survive.

Q. What made you agree to have sex with him at that point? What were the things that you were thinking?

A. That I wouldn't survive if I didn't.

Q. Was there anything that he had told you that caused you to have sex with him at that point? Was there anything that you knew about him?

A. I knew he had told me he had killed these three people in prison. And I knew that he had been violent in the past. And when he told me how lucky I was that he didn't take me in the bathroom and drown me, I agreed with him.

Q. What, if anything, did you think about what he had told you about the teenage girl that he had raped and kidnaped in Arizona?

DEFENSE COUNSEL: Objection, leading question, Judge.

THE COURT: Sustained.

Q. Did you think about anything else?

A. I was thinking -- I was thinking to survive. And I was thinking that it was -- that I really was lucky that he wasn't going to take me in the bathroom and drown me.

Q. Jane, what things about his past influenced your decision to go ahead and have sex with him that night? What things about his past that he had told you influenced that decision?

DEFENSE COUNSEL: Objection, asked and answered.

THE COURT: Overruled.

A. Well, Tanya Hill [pseudonym] had survived.

Q. And who was Tanya Hill?

A. She was the girl that he had raped and kidnaped in Arizona. She was the one he went to prison for. And she survived.

Q. What other things that he had told you about his past, Jane, affected your decision?

A. And the fact that he killed three people in prison.

Q. What else?

A. And I was trying to survive. All the things he had told me and --

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Q. All the things that he had told you?

A. And I just thought that if I go along with this and I'm nice to this man and I tell him whatever he wants to hear, he will let me live.

Discussion**A. Defense Themes and Strategies, Abuse Dynamics and Myths About Domestic Violence**

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

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

Batterer minimization is another common abuse dynamic. Batterers use a variety of tactics to avoid responsibility for the abuse, ranging from outright denial, to minimizing the abuse or its impact on the victim, to blaming the victim, drugs or alcohol, or other life circumstances for the abuse.¹⁷ The four defense themes used all fall within the common denial or minimization tactics used by batterers. Self-defense or provocation claims attributed the

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violence to the victim's behavior ("I was provoked," "I was defending myself"). The going-for-a-lesser charge defense often minimized the impact of the abuse on the victim when arguing that the defendant did something, it just was "not that bad." Blaming the abuse on alcohol or drugs or other life circumstances ("I have PTSD from serving in the military") were common topics in the diminished capacity defenses. In these cases, the defendant was denying responsibility for the abuse due to incapacitation.¹⁸ The "didn't do it" defense involved an outright denial of the offense.

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

The defense manipulation of abuse dynamics was particularly apparent in the victim character assassination. Batterers commonly attack their victim's character as a way of maintaining their power and control.²⁰ During the trials, the victim's weaknesses were maximized in an effort to undermine her credibility and challenge the prosecution's evidence. In murder cases, this character assassination was easier to accomplish because the victim was not available to rebut these claims. The defense sometimes used character assassination to suggest that the crime was not as serious (a lesser charge should be considered) because of the victim's shortcomings. The defense attack of the victim's lack of self-defense or protective action taken before or during the offense manipulates the abuse dynamic of victim fear. The reason an abused woman might not try to escape is that she was experiencing real fear not necessarily based on

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what the abuser *was doing at the moment*, but on what she knew he *was capable of doing*.²¹

B. Jury Decision Making

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

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

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

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for believability and test whether the story supports a finding of guilt. Pennington and Hastie posit that jurors will construct a story, based on the evidence presented *and* the juror's own life experience.²⁶ That is, jurors may "fill in the blanks" of the story, consciously or unconsciously, based on their own life experiences.

C. Juror Decision Making and the Dynamics of Abuse

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

Thus, jurors need information about the context of the abusive relationship, because domestic violence is not a commonly understood phenomenon that would make decision making routine for them. Rather, it may be necessary to explain how violent relationships differ from non-violent relationships, how the violence affects interactions, and how victims put in a powerless position may respond differently from persons in a more egalitarian relationship. Given that many of the attributes of a violent relationship are unlike those of a non-violent relationship, jurors may be asked to assess evidence that they genuinely believe they understand, but that they actually do not.

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

What is commonplace experience for domestic violence victims may not be

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

E. The Role of Expert Witnesses in Educating Jurors

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

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

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

Conclusion

This study examined the trial themes and strategies in domestic violence felonies related felony cases. Findings show that prosecutors and defense attorneys use a variety of strategies and techniques to tell their version of the "story" of the offense during trial. Some strategies and techniques may be unique to domestic violence cases, others may be common to all criminal cases.

The prosecution themes and strategies focused on the public nature of the private violence, the need to take the violence seriously and to hold the abuser accountable for the violence. The defense themes and strategies seemed to parallel the abusive behaviors used by batterers, including minimizing, denying and blaming the victim for the abuse. The defense's manipulation of the myths about domestic violence and abuse dynamics may make it difficult for fact finders to fully understand and make an informed decision about innocence and guilt. Thus, prosecutors must continue to focus on "telling an accurate story" of domestic violence, using such means as expert witnesses, to fully educate the fact finders in the trial.

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2. Elizabeth Pleck, *Domestic Tyranny* (New York: Oxford University Press, 1987).
3. Lawrence Sherman, *Policing Domestic Violence* (New York: Free Press, 1992).
4. David Ford, "Prosecution as a Victim Power Resource: A Note on Empowering Women in Violent Conjugal Relationships," *Law & Society* 25 (1991): 313-314.
5. Linda McGuire, *Domestic Abuse Prosecution Handbook* (Des Moines, IA: Iowa Prosecuting Attorneys Council, 1994). Citing Iowa Code of Professional Responsibility, DR 7-103 and *National Prosecution Standards*, Standard 9.1 *et seq.* (NDA 1977).
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7. Rosenbaum (n.6 above), p. 53.
8. The *elements of the crime* refer to the components of the crime that are set out by the criminal statute. In proving the elements of a crime, the prosecution has to show that the act is prohibited by law, that it involved criminal intent, and that any injuries sustained were the result of the defendant's actions.
9. Mildred D. Pagelow, *Family Violence* (New York: Praeger, 1984): pp. 301-324.
10. Iowa Judicial Department, *Iowa Domestic Abuse Benchbook* (1994).
11. Lynn Hecht Schafran, "Credibility in the Courts: Why is There a Gender Gap." *The Judges Journal* 34 (1995): 5-9, 40-42.
12. For a more detailed description of the study methodology, analysis procedures and description of the cases, see Carolyn Copps Hartley and Roxann Ryan, *Prosecution Strategies in Domestic Violence: Anticipating and Meeting Defense Claims* (1998). Final report submitted to National Institute, Office of Justice Programs, U.S. Department of Justice, Justice Grant Number 95-WT-NX-0003.

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13. An *excited utterance* is defined 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." Iowa Rule of Evidence 803(2). A *present sense impression* is defined as "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Iowa Rule of Evidence 803(1).

14. The term *assassination* may be seen as too strident, however we chose to use this term because we think it best captures the essence of this defense strategy.

15. McGuire (n.5 above), pp. 9-13 to 9-19.

16. Catherine Kirkwood, *Leaving Abusive Partners* (London: Sage, 1993).

17. Kerry Healey, Christine Smith, and Chris O'Sullivan, *Batterer Intervention: Program Approaches and Criminal Justice Strategies* (Washington, DC: U.S. Department of Justice, Office of Justice Programs, 1998).

18. Donald G. Dutton, *The Domestic Assault of Women: Psychological and Criminal Justice Perspectives*, (Vancouver: UBC Press, 1995).

19. Ibid.

20. Lenore Walker, *The Battered Woman* (New York: Harper & Row, 1979), p.74.

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22. Ola Svenson, "A Psychological Process Perspective on Decision Making" in *Computer-Aided Decision Analysis*, ed. Stuart S. Nagel. (Westport, CT.: Quorum Books, 1993).

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24. Ibid.

25. Reid Hastie, *Inside the Juror* (New York: Cambridge University Press, 1993).

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