

Making it Stick: Protecting the Record for Appeal

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Obtaining a conviction in a sexual assault or domestic violence case is usually a hard-won victory, whether by guilty plea or by trial. Having finally achieved a measure of justice in such a case, the last thing the prosecutor wants is to be forced back to the drawing board to re-try (or to re-negotiate) the case due to reversal on appeal. During the months or years it takes for a case to wend its way through the appellate process, evidence loses its freshness, memories fade, and witnesses who were cooperative during the initial proceedings may now be difficult to locate or reluctant to testify a second time. A reversal on appeal can be devastating to the victim, who may have been progressing in her recovery not only from the act of violence itself, but from the stress and uncertainty that accompany the criminal trial process.

Skill and diligence cannot prevent criminal appeals. Defendants convicted after trial have nothing to lose and much to gain by taking an appeal, and even defendants who have entered guilty pleas frequently challenge their convictions or sentences. A prosecutor can, however, bring a measure of finality to the criminal justice process by carefully building a strong and favorable trial court record that supports the conviction and the sentence imposed and withstands challenge on appeal.

There is no such thing as a perfect trial; mistakes are inevitable. The more evidence of guilt that is presented, however, the more likely it is that minor errors at trial will be deemed “harmless” in the context of the entire case. Thus, creation of the record must begin at the investigative stage. Police and investigators should be trained in evidence-gathering techniques that will secure the necessary evidence in a manner that will survive any motions to suppress or exclude that evidence, as well as any appellate challenges to its eventual admission.

Police reports should document in detail the officer’s observations about the victim’s appearance and demeanor. The scene itself should be similarly described, including such telling details as a phone ripped from the wall or other signs of physical struggle. The victim and the scene should be photographed if possible. The presence of children, their emotional demeanor, and any spontaneous statements from them should also be documented. All of these details may provide foundation evidence for the later admission of statements made at the scene to the responding officers, and provide important corroboration for the 911 call or the formal statement of the victim.¹

Any weapons used in the crime (including the common household objects that often become weapons during a domestic assault) should be collected. Officers are sometimes under the mistaken impression that there is a “crime scene exception” to the requirements of a search warrant, and believe that because they are at a premises shared by the victim and defendant no warrant is necessary. However, even in jurisdictions such as New Jersey, where a temporary restraining order can authorize the police to search for and seize weapons that may pose a danger to the victim, such a “domestic violence warrant” may not be sufficient to uphold a search for weapons that were used during the crime.² If a weapon is to be used as evidence at trial, a regular search warrant or valid consent to search should be obtained. Blood or bodily fluid evidence should be collected in accordance with proper protocols to ensure its admissibility at trial.

Officers should encourage the victim to get medical treatment and, if possible, offer her transportation to do so, even if her injuries are not obviously severe. Medical professionals may be able to document less-apparent physical injuries, and statements that the victim makes for purposes of medical treatment are usually admissible at trial.³ Investigators should take a formal statement from the victim (preferably on video or audiotape) at the earliest opportunity. In addition to details about the recent crime, the victim should be asked to relate the history of domestic violence.

Questioning of the suspect should be conducted with the requirements of *Miranda*⁴ in mind, and in compliance with any rules in the jurisdiction concerning recordation of interrogation.⁵ Initial on-the-scene questioning prior to arrest should be admissible, but once the interrogation becomes “custodial,”⁶ the requirements of *Miranda* must be scrupulously observed. If the right to counsel has not yet attached (typically following arraignment), a consensual intercept of a telephone conversation between defendant and the victim or a cooperative family member may yield incriminating admissions.

Decisions made at the charging stage may impact what evidence will be admissible at trial and upheld on appeal. If a defendant is charged with previously unreported acts of domestic violence occurring within the limitations period, evidence of those acts will automatically be admissible at trial without the need for 404(b)⁷ analysis. A charge of stalking covering a span of time can, similarly, bring within its ambit a host of acts of abuse constituting the “course of conduct” that stalking statutes typically require. If children were present during the crime, a charge of endangering the welfare of those children is usually appropriate. Such a charge provides a basis for admission of expert testimony about the detrimental effects on children exposed to domestic violence.⁸ Any threats or intimidation by a defendant against the victim or any witnesses during the investigatory stage should be documented, and supported, if possible, by evidence such as letters or phone calls from the jail (which are sometimes recorded) or jail visitor logs. These may support charges of witness tampering, or help support a finding of forfeiture by wrongdoing⁹ to permit admission of prior statements by the victim that would not otherwise satisfy the requirements of the Confrontation Clause under *Crawford v. Washington*.¹⁰

Other follow-up investigation may include interviews with friends or family members, who may be able to provide further corroboration of the history of the abusive relationship, thereby providing context for the victim’s failure to report previous incidents to the police, and helping to support the testimony of an expert on the behavior of domestic violence victims.

If the case is resolved by a plea agreement, the prosecutor should be sure that all of the terms and conditions of the agreement are clearly stated on the record at the time of the plea, and should carefully review any plea forms to ensure that they have been correctly completed. Any “no contact” or other special conditions of the plea, as well as all of the penal consequences (including sex-offender registration), should be clearly explained on the record. In addition to eliciting a satisfactory factual basis for the plea that encompasses all of the necessary elements of the offense, the prosecutor should supplement the record with evidence concerning relevant sentencing factors. A stipulation to certain facts surrounding the crime may be negotiated as part of the agreement.

In the absence of a plea agreement, trial preparations should begin as soon as possible. It is important to learn at the earliest opportunity whether, and to what extent, the victim is cooperative. If, as often occurs, a domestic violence victim recants her original statement or simply refuses to cooperate, the prosecutor must begin to plan how to prove the case without her cooperation or with her active opposition.

Foreseeable trial problems, such as admission of a prior statement by a missing or recanting victim, should be researched in advance, and the court provided with a trial brief supporting admission of the prior statement. Because the contours of the confrontation issues arising from *Crawford*¹¹ and its progeny are constantly evolving, give careful consideration to alternate theories under which such evidence may be admitted if the victim is unavailable. If the victim is willing or available to testify, even for the defense, prior recorded statements may be admissible, either as a prior consistent statement (after the victim’s credibility has been attacked)¹² or, in some jurisdictions, as a prior inconsistent statement that may be considered as substantive evidence.¹³ In the case of forfeiture by wrongdoing, be prepared to prove that the defendant intentionally made the victim unavailable. Trial briefs are also advisable on the admissibility of 404(b) evidence, rape shield statute issues, admissibility of expert testimony concerning victim behavior, out-of-court identification of the suspect (in sexual assault cases), and any other issues that can readily be anticipated. If the issues are thoroughly briefed in advance, the trial court is less likely to erroneously admit evidence without first making the necessary predicate findings.

A common basis for reversal on appeal is that the trial court has made what is, arguably, the correct ruling on the admissibility of the evidence, but has neglected to place its findings and reasons on the record. If the appellate court is unable to conclude that the trial court correctly analyzed the issue and considered any relevant factors, it will be unable to accord the trial court’s decision the deference it deserves. If it appears that such evidence contributed to the verdict, the appellate court is likely to reverse the conviction. It is crucial, therefore, to have the trial court place its predicate findings and reasons on the record at the time it rules on the evidence.

Consider filing a motion *in limine*, preferably before opening statements, to obtain preliminary rulings as to what evidence will be admissible at trial. This is particularly important if either side may wish to mention such evidence in its opening. If the trial court prefers to wait until it has a better “feel” for the context in which the evidence is being offered, seek a preliminary ruling that prohibits either side from mentioning the disputed evidence until the court has had an opportunity to rule on its admissibility outside the presence of the jury. Careful preparation and briefing will avoid erroneous rulings based on “seat of the pants” argument in the heat of trial. Prepare witnesses so they do not inadvertently testify to matters that have been ruled inadmissible or are clearly improper. Expert witnesses should be carefully advised as to the permissible scope of their testimony.

Be cautious during summation not to engage in any commentary that may be deemed “prosecutorial misconduct.”¹⁴ While it is acceptable and desirable to sum up in a forceful and persuasive manner, avoid characterizing the defendant or his attorney or trial strategy in terms that may be considered insulting or offensive. Avoid appeals to passion or sympathy, but do ask the jury to consider how the victim must have felt, so long as it helps to explain her behavior. All comments must be based on the evidence that was admitted at trial or on reasonable inferences drawn therefrom.

Another common basis for reversal on appeal is error in the jury instructions. If 404(b) evidence is admitted, the court must provide an appropriate limiting instruction advising the jury of the limited purpose(s) for which the evidence may be considered.¹⁵ Such instructions usually should be given at the time the evidence is admitted, and repeated again at the time of the final charge to the jury. Similar instructions should be given at the time any expert testimony to explain victim behavior is admitted, and again, at the conclusion of the trial.

At sentencing, submit a detailed memorandum outlining the evidence supporting any aggravating factors and the basis for any enhanced sentence that may be imposed. Although the victim (or, in the case of a homicide, the victim’s family) generally has the right to speak at sentencing, presentation of very lengthy or unduly emotional victim-impact materials may result in a remand for re-sentencing.¹⁶ The court should state in detail its analysis of the relevant aggravating and mitigating factors to make it clear that certain factors were not merely overlooked or ignored.

Proper creation and protection of the record during all phases of a criminal case is critical to the finality of justice. It ensures that a reviewing court will be able to conclude that the defendant received a fair trial, was convicted on properly admitted evidence, and received a just and reasonable sentence. The victim can continue to heal from the crime without the need to relive the nightmare of a re-trial. And the trial prosecutor can turn her energies to the next case demanding her attention.

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ENDNOTES

¹ Toolsi Gowin Meisner & Diana Korn, *Protecting Children of Domestic Violence Victims with Criminal No Contact Orders*, STRATEGIES (AEquitas: The Prosecutors’ Resource on Violence Against Women) Apr. 2011.

² See *State v. Perkins*, 817 A.2d 364 (N.J. Super. App. Div. 2003).

³ F.R.Evid. 803(4).

⁴ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁵ *E.g.*, N.J. Ct. R. 3:17.

⁶ “Custodial Interrogation” Police questioning of a detained person about the crime that he or she is suspected of having committed. BLACK’S LAW DICTIONARY 838 (8th ed. 2004)

⁷ F.R.Evid. 404(b).

⁸ See e.g., Sherry Hamby, David Finkelhor, Heather Turner & Richard Ormrod, *National Survey of Children's Exposure to Violence: Children's Exposure to Intimate Partner Violence and Other Family Violence*, JUVENILE JUSTICE BULLETIN (Office of Justice Programs/Office of Juvenile Justice and Delinquency Prevention), Oct. 2011; Elena Cohen, Betsy McAlister, & Kristen Kracke, *Understanding Children's Exposure to Violence*, MOVING FROM EVIDENCE TO ACTION: THE SAFE START CENTER SERIES ON CHILDREN EXPOSED TO VIOLENCE, Aug. 2009

⁹ F.R.Evid. 804(b)(6).

¹⁰ 541 U.S. 36 (2004).

¹¹ *Id.*

¹² F.R.Evid. 801(d)(1)(B).

¹³ N.J.R.Evid. 803(a)(1).

¹⁴ Criminal Justice Section, *Report to the House of Delegates*, (American Bar Association), Aug. 2009 (*accepted by the House of Delegates Aug. 9-10, 2009*)("The term 'prosecutorial misconduct' has become a term of art in criminal law that is sometimes used to describe conduct by the government that violates a defendant's rights whether or not that conduct was or should have been known by the prosecutor to be improper and whether or not the prosecutor intended to violate the Constitution or any other legal or ethical requirement"), <http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf>.

¹⁵ See for example New Jersey Model Criminal Jury Charges, Non 2C Charges, (N.J.R.E. 404b). See also *State v. Angoy*, 329 N.J. Super. 79, 746 A.2d 1046, 1052 (2000) ("the jury must be instructed as to the limited purpose of the evidence and the restricted significance they can attach to it.")

¹⁶ See *State v. Hess*, 23 A.3d 373 (N.J. 2011).

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