

Prosecuting Domestic Violence Cases

Libby Shelton

Tucson City Prosecutor's Office

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7 Points to Learn

1. What makes a crime a DV Offense?
2. What are the common challenges in DV cases?
3. A 21st Century case study – Charlie Sheen
4. How do you prepare for a DV trial?
5. Your victim recants – what do you do?
6. Your victim doesn't appear for trial – what do you do?

LEGAL DEFINITION OF DOMESTIC VIOLENCE

- A.R.S. 13-3601 Defines Domestic Violence
 - Qualifying Offense: Defendant committed a specific offense
 - Qualifying Relationship: Defendant committed that offense against a person who he/she has a specific relationship with

LEGAL DEFINITION OF DOMESTIC VIOLENCE

OFFENSES

FELONIES:

- Negligent Homicide (13-1102)
- Manslaughter (13-1103)
- 2nd Degree Murder (13-1104)
- 1st Degree Murder (13-1105)
- Endangerment (13-1201)
 - If substantial risk of imminent death
- Aggravated Assault (13-1204)
- Custodial Interference (13-1302)
 - If child not voluntarily returned, injured, or more than 48 hours
- Unlawful Imprisonment (13-1303)
 - If victim not released voluntarily
- Kidnapping (13-1304)
- Sex Assault (13-1406)

LEGAL DEFINITION OF DOMESTIC VIOLENCE

OFFENSES

FELONIES:

- Aggravated Harassment (13-2921.01)
- Stalking (13-2923)
- Surreptitious Photographing (13-3019)
- Cruelty to Animals (13-2010(A)(8, 9))
- Aggravated Domestic Violence (13-3601.02)
- Child/Vulnerable Adult Abuse (13-3623)
- Dangerous Crimes Against Children (13-705(P)(1) Minor under 15 YOA)

LEGAL DEFINITION OF DOMESTIC VIOLENCE

OFFENSES

MISDEMEANORS

- Criminal Trespass 3rd Degree (13-1502)
- Criminal Trespass 2nd Degree (13-1503)
- Criminal Trespass 1st Degree (13-1504)
- Criminal Damage (13-1602)
- Interfering with Judicial Proceedings (13-2810)
- Custodial Interference (13-1302)
 - If child voluntarily returned, uninjured, or less than 48 hours
- Harassment (13-2921)
- Disorderly Conduct (13-2904(A)(1, 2, 3, 6))
- Preventing the Use of Telephone in an Emergency (13-2915(A)(3))
- Use of Telephone to Terrify (13-2916)
- Threatening or Intimidating (13-1202)
- Assault (13-1203)
- Endangerment (13-1201)
 - Risk of Physical Injury
- Unlawful Imprisonment (13-1303)
 - If victim released voluntarily

“Domestic Violence” only applies when you have certain relationships between defendant and victim:



DV RELATIONSHIPS 13-3601(A)(1-6)

- *Married or Formerly Married*
- *Persons Residing or Previously Residing in Same Household*
- *Child in Common*
- *Pregnancy*
- *By Blood or Court Order as: Parent/Child, Grandparent/Grandchild, Brother/Sister*
- *By Marriage as: parent-in-law, grandparent-in-law, stepparent, step-grandparent, step-child, step –grandchild, brother-in-law, sister-in-law*
- *Victim is child who resides or has resided in same household as Defendant and is related to former spouse of Defendant or to person who has resided in same house as Defendant*
- *Currently or Previously a Romantic or Sexual Relationship*

“Romantic Relationship”

Considerations:

Type of relationship

Frequency of interaction

Length of relationship

Time since break-up

*Ramifications of
Domestic Violence Allegations*

A.R.S. 13-3601.01 :

- A) First offense – mandatory DV treatment
26 weeks*
- B) Second offense – Supervised probation and may get jail*
- C) Third offense – BECOMES THE FELONY
Automatic 4 months jail*
- D) Fourth offense – FELONY
Automatic 8 months jail*

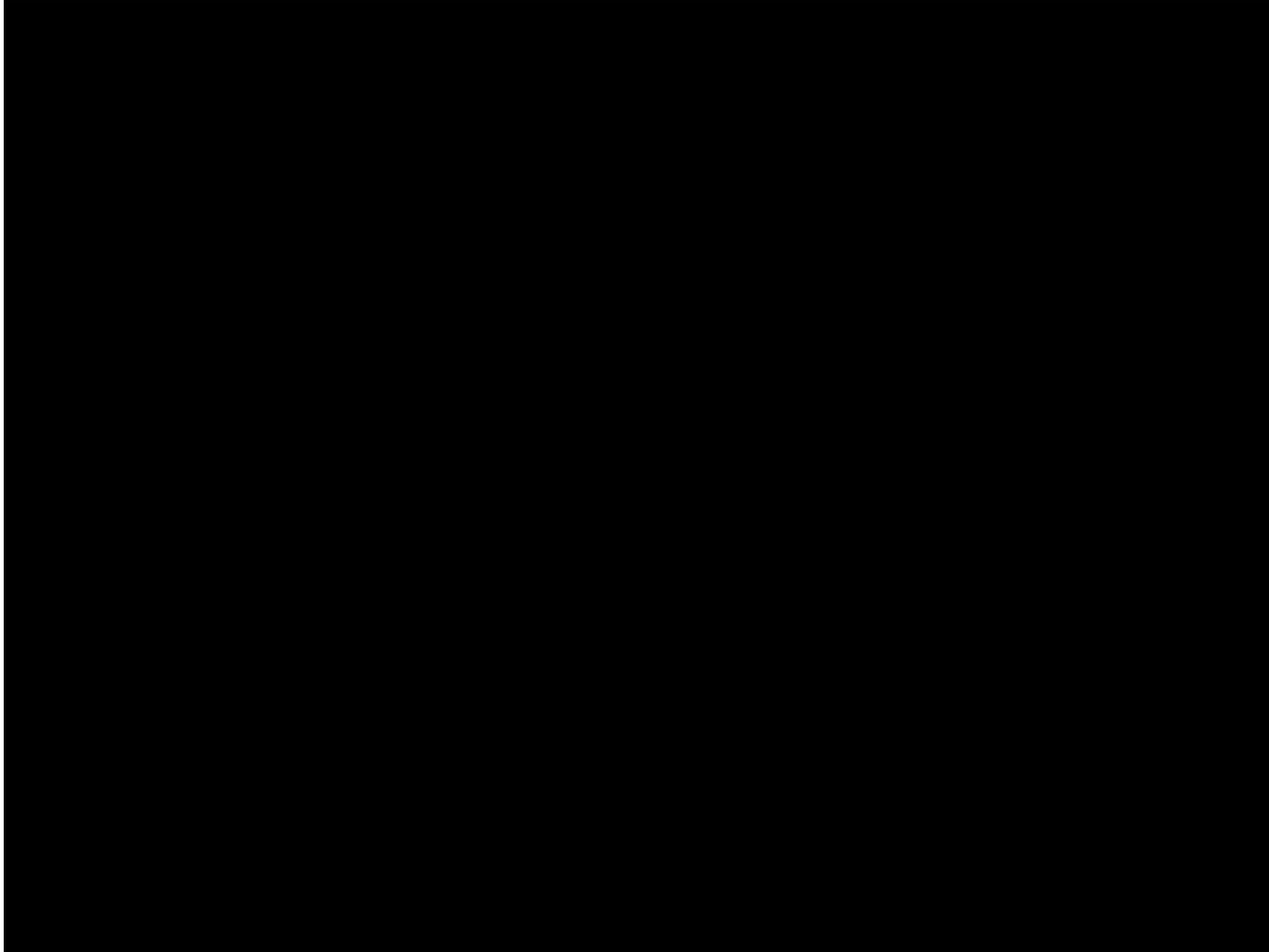
Common Challenges in Domestic Violence Cases

- Extremely volatile cases.
- Victims often do not cooperate.
- Victims often recant.
- Victims often refuse to go to court.

Common Challenges in Domestic Violence Cases

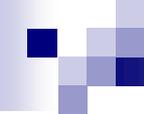
- Judges don't understand the DV cycle.
 - Judges draft vague / hard to enforce orders of protection, or joint custody orders.
 - Victims that seek justice are really using the Criminal Court system to punish their 'Ex-'
- Jurors don't understand the DV cycle.
 - They judge the victim too.
- Prosecutors don't understand the DV cycle.

What are the Victims Facing?

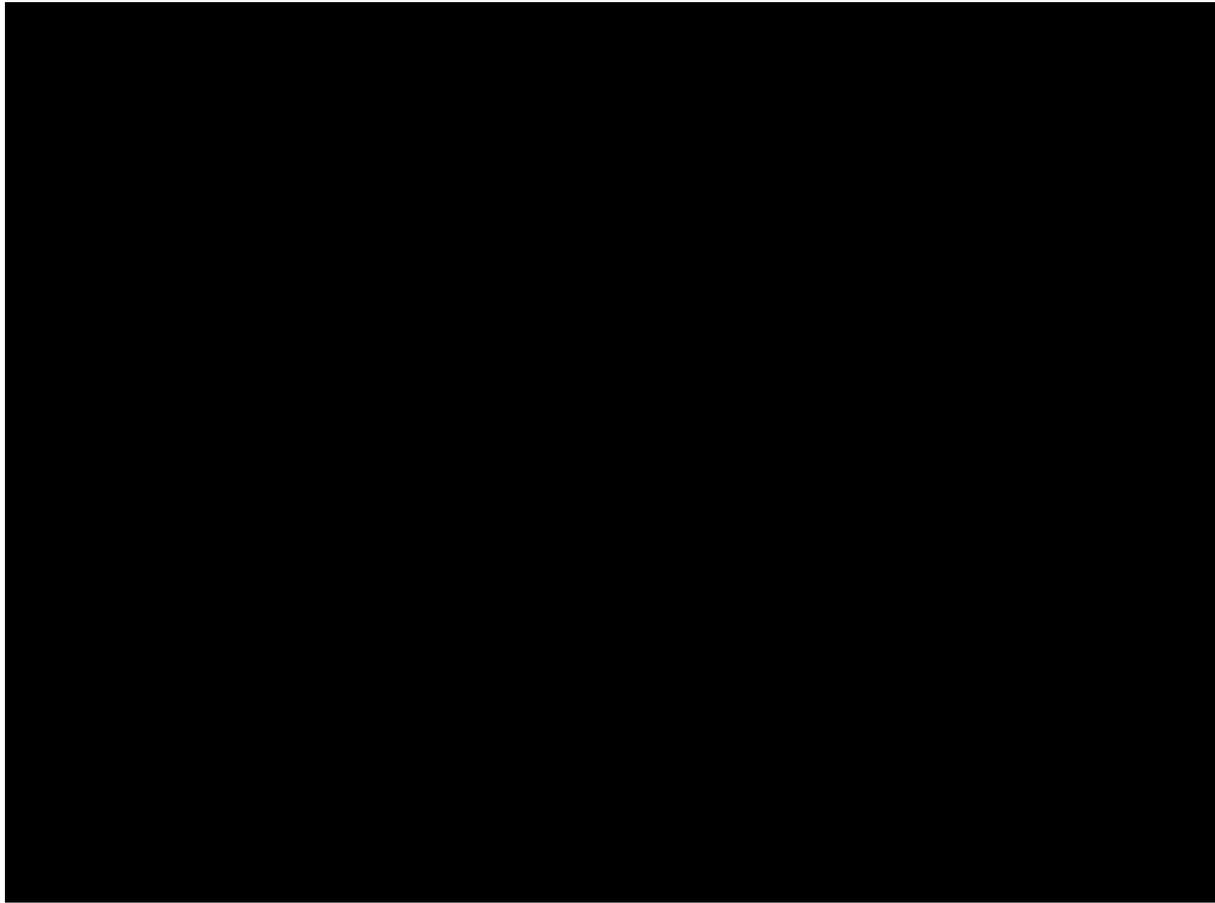


Common Challenges in Domestic Violence Cases

- The nature of DV cases make them ripe for witness influence / tampering
- Victim may be threatened to lose children, financial security, family, home, or prestige if they hold the batterer accountable.



Pressures faced by Victims



Common Challenges in Domestic Violence Cases

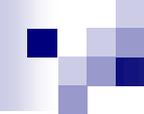
- A prosecutor must master the Rules of Evidence, especially Hearsay, Confrontation Clause issues, and know how to impeach a recanting witness.
- Often the amount of 'evidence' you have is scant.

IMPACT OF DOMESTIC VIOLENCE

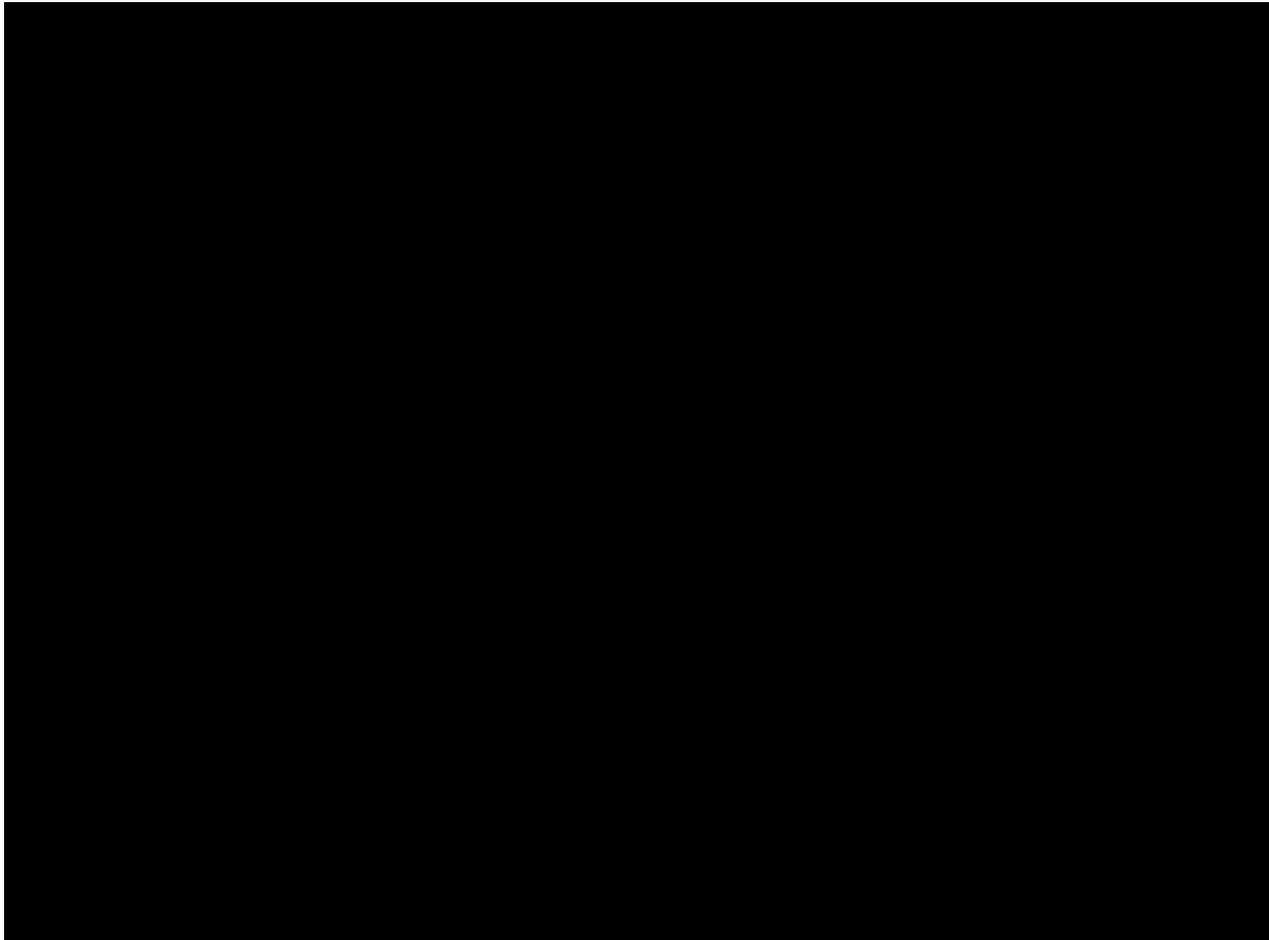
- Likely most common crime committed in any county
- Present in every segment of society
- Victims are people we know or associate with
- Children are often present in the home
- Domestic Violence has physical and psychological impact on children

IMPACT OF DOMESTIC VIOLENCE

- Domestic Violence has impact on people other than the Victim: co-workers, family, friends, new partners
- Domestic Violence can lead to violence against others
- Drains resources: police, paramedics, medical, courts, prosecution, probation, social services, child protective services, etc.
- Victims often turn to drugs and alcohol
- Violence often escalates
- People shouldn't have to live in fear or be held hostage in their own homes



Impact of Domestic Violence



WHY DO THEY STAY/GO BACK?

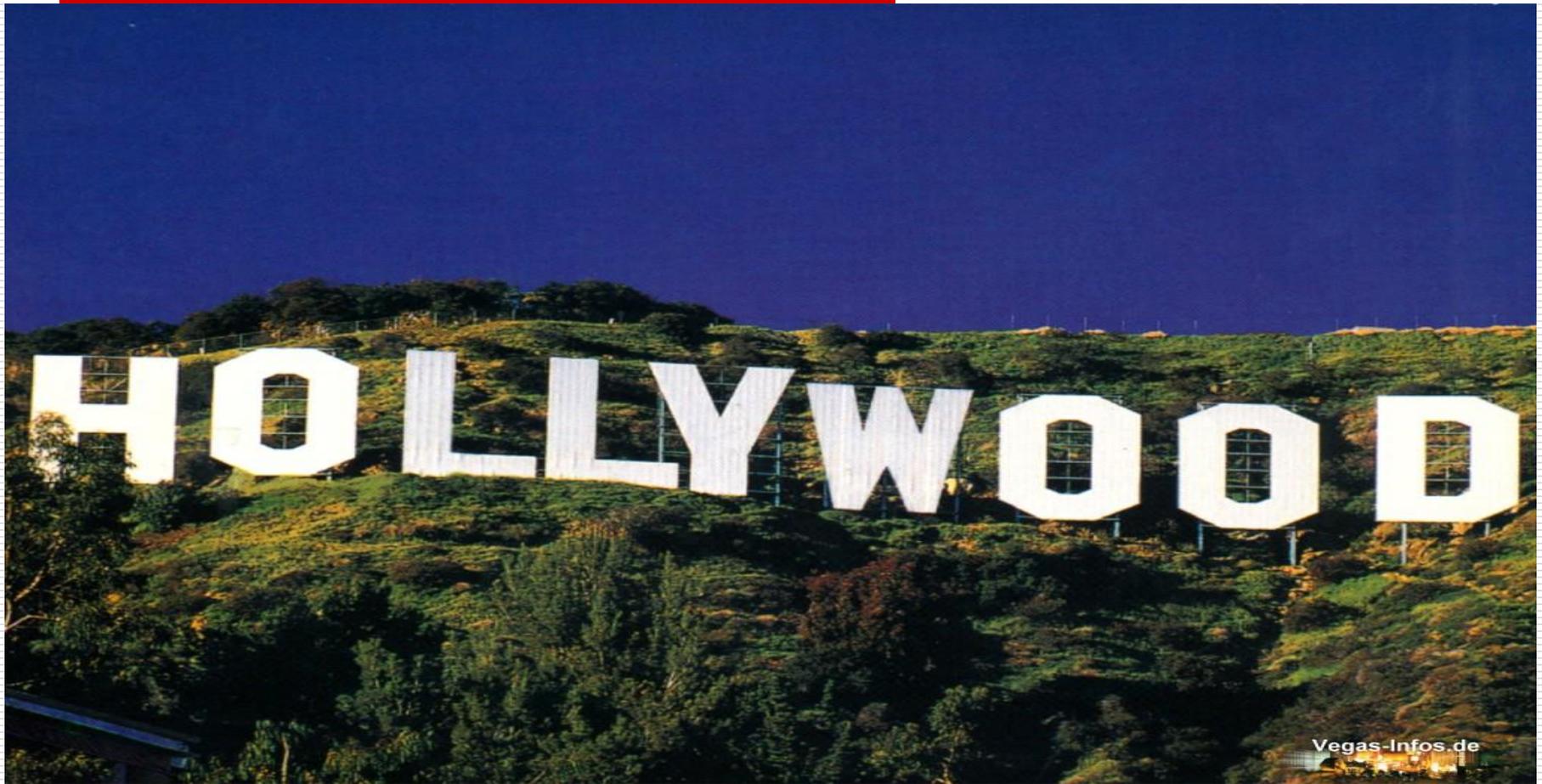
It tends to be all about power/control.

- Kids
- Isolation from friends and family
- Financial reasons
- Family pressure
- Physical safety – in most danger when?
- Low self esteem

WHY IS IT IMPORTANT TO PROSECUTE?

- Victims do want accountability
- Victims do want to be safe
- Logical reasons for staying with the abuser
- Help people who are unable or unwilling to help themselves
- Homicide and Suicide prevention
- Victims' feelings of helplessness are perpetuated if we don't

A 21st Century Case Study - Look to Hollywood



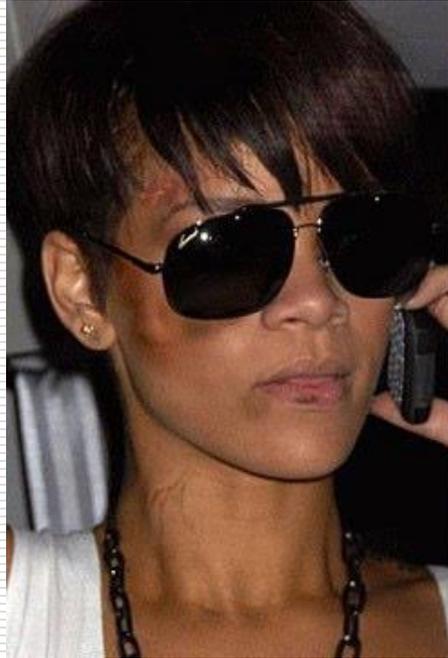
Recognize the happy couple?



This Hollywood couple brought the subject of Domestic Violence to Oprah

EXCLUSIVE

TMZ



Report: Rihanna Tells Cops Brown's Hit Her Before



If Chris Brown did indeed hit Rihanna early Sunday morning, it may not have been the first time.

According to TMZ.com, the pop star told cops that her R&B singer boyfriend had a history of abusing her before a weekend attack that reportedly left her bruised and bloodied, and the violence was getting progressively worse.

Us Weekly magazine also quoted unnamed sources close to Rihanna who claim this isn't the first time Brown's beaten and bruised her.

2nd Most Downloaded Song in 2010

'Love the Way You Lie'

R&B diva Rihanna joining Eminem to tell the story of an abusive couple who can't stay apart, despite bringing out the worst in each other. "It's something that, you know, [Eminem and I have] both experienced ... On different sides, different ends of the table,"

Charlie Sheen

- Two and a Half Men



Sheen has a history of being abusive to the women in his life.

He shot actress Kelly Preston in the arm in 1991 while they were engaged.

It was deemed an "accident" but since the engagement ended shortly after --something serious happened between Preston and Sheen.

Sheen has a history of being abusive to the women in his life.

- ❑ In 1996 Charlie Sheen abused his girlfriend Brittany Ashland.
 - ❑ That domestic dispute involved Charlie causing Brittany to become unconscious when his violence knocked her to the floor.
 - ❑ The *Los Angeles Times* notes that he "pleaded no contest to a misdemeanor charge of battery with serious bodily injury."
-

Sheen has a history of being abusive to the women in his life.

Sheen's prior wife, Denise Richards, also claimed that Sheen abused her too according to the *Chicago Sun Times*.

December 25, 2009
911 call



21st Century Case Study

DV Relationship – Defendant Sheen is Victim Brooke Mueller's husband. The two married in 2008.

Crime – Aggravated Assault with a Deadly Weapon / Dangerous Instrument.

December 25, 2009 | 5:24 pm

Police responded to a 911 call early Christmas morning.

Charlie Sheen was arrested in Aspen, Colorado, on felony charges related to alleged domestic violence.

The Victim told the police on Christmas Day that Sheen has been violent with her before. She said he previously sent her flying to the floor and she hit her head. She did seek medical care after the incident.

The Spin begins.....

Sheen's publicist, Stan Rosenfield, cautioned that "appearance and reality can be as different as night and day. It would benefit everyone not to jump to any conclusion."

The Victim and the Defendant get back together.

- ❑ *WITHIN A WEEK OF SHEEN'S ARREST, ATTORNEYS FOR BOTH HUSBAND AND WIFE SAID THE COUPLE WANTED TO **RECONCILE**.*
 - ❑ *SHEEN'S ATTORNEY ASKED THE JUDGE TO MODIFY A RESTRAINING ORDER -- STANDARD IN COLORADO DOMESTIC ABUSE CASES -- THAT KEPT THEM FROM CONTACTING EACH OTHER.*
 - ❑ *SHEEN AND MUELLER HAVE SINCE **APPEARED IN AN ASPEN COURT TOGETHER**, WHERE THE "TWO AND A HALF MEN" STAR WAS FORMALLY CHARGED ON SUSPICION OF FELONY MENACING, MISDEMEANOR THIRD-DEGREE ASSAULT AND MISDEMEANOR CRIMINAL MISCHIEF.*
-

The Victim wants the charges dropped.

On Feb. 8, the judge agreed to drop the Order, and the couple reunited and hugged in an Aspen courtroom.

Yale Galanter, Brooke's attorney, said it was too soon to say whether she would take the stand if the case goes to trial.

Galanter declined to comment on the possibility of a plea deal but said **Brooke still wants the charges against her husband dropped.**

Your Victims Often Have Baggage

Authorities tested the blood alcohol level of both parties, and Mueller registered a .13 while Sheen registered a .04.

Mueller goes to Rehab.

The Case Gets Set For Trial

Sheen pleaded not guilty to domestic violence charges, nearly three months after his wife told Colorado police in a 911 call he put a knife to her throat and threatened to kill her.

Sheen showed little emotion and said nothing during his brief arraignment in Pitkin county district court. The plea was entered by Richard Cummins, a Colorado attorney who represents sheen.

A judge scheduled a jury trial for July 21, 2010.

The Victim does not cooperate and Defendant gets a favorable plea deal.

June 7th, 2010

Sheen is reportedly going for a plea agreement which would allow him to spend a month as a theater intern in Aspen and spend his nights in jail.

August 2, 2010

Charlie Sheen's plea deal to resolve felony domestic violence charges in Aspen, Colorado, will allow the actor to serve his jail term at a Malibu, California, rehab center, his lawyer said Monday.

The Victim does not cooperate and Defendant gets a favorable plea deal.

The felony count was dropped in exchange for Sheen's guilty plea to a misdemeanor third-degree assault count.

"We're very pleased with the plea," defense lawyer Yale Galanter said after Monday's sentencing.

Galanter, who also has represented Sheen's wife, said she is "totally on board" with the plea agreement.

"Brooke wanted the charges dismissed completely and still does," Galanter said.

Postscript

Oct. 27 --Just days before the three-month probation from his Aspen, Colo., domestic violence case ends, Charlie Sheen is high on cocaine and naked in a Hotel Room with a Porn star locked in the bathroom.

Nov. 2 – Sheen and Mueller each filed for divorce. The couple agrees that they have been separated since last Christmas, when Sheen was arrested for domestic violence after a fight.



Prepare for the DV Trial

- 1. Anticipate that the victim will either recant or refuse to appear in court.
- 2. Look for ways to prove your case without the victim's cooperation.
- 3. Know your hearsay rules and exceptions (Excited Utterances, Present Sense Impression are most common)

Preparing for Trial

WordPerfect 12 - [C:\Users\eshelto1\Desktop\APAAC DV BT.wpd (unmodified)]

File Edit View Insert Format Table Tools Window Help

Times New Roman 12 B I U <None> abc abc Service

State v.
Case No.
Defense Counsel:

Disclosure Complete?
609:
404B
Witness priors to disclose:
co-Defts/use immunity needed?:

Witnesses: Service? Exhibits: Multimedia needed

CHARGES:

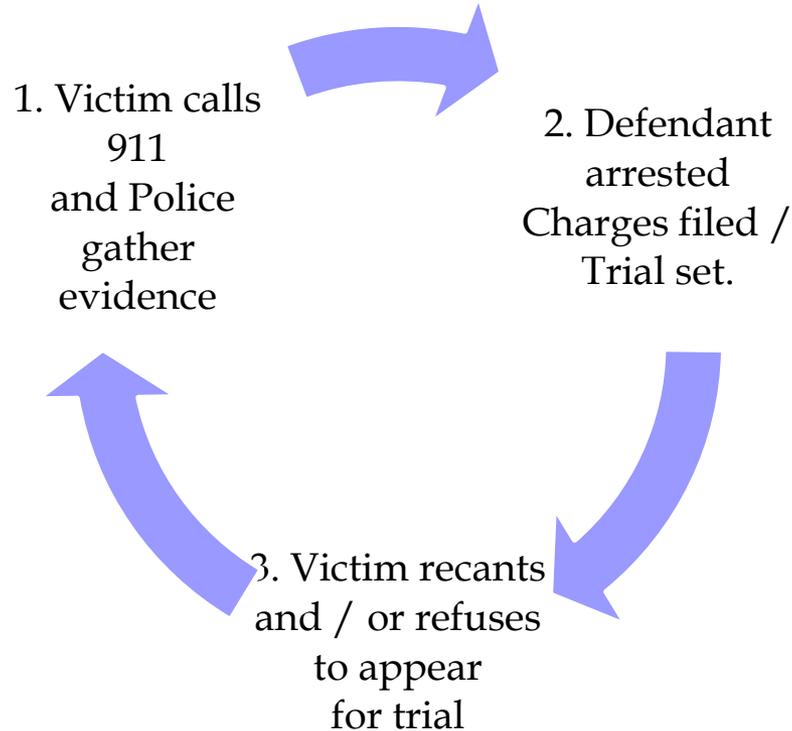
ID: in person/MVD/Booking
 Jurisdiction:
 DV Relationship:
 Date and Time:
 ELEMENTS OF SPECIFIC CHARGES THAT NEED TO BE PROVEN

Officer Smith:
Personal Observations:
Statements Made by Victim/Witness/Defendant

Sentencing considerations:
___ Jail Fees ___ Contact with Victim/return ___ Priors

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TYPICAL DOMESTIC VIOLENCE CYCLE



Recanting Victim

- Review what evidence the police gathered:
 - Photos
 - Statements (train police to records these)
 - Witnesses (present or neighbors)
 - 911 call
 - Court orders

Recanting Victim

- What other evidence will likely be out there?
 - Victims usually talk to either friends or family about what happened.
 - Statements to friends or family about prior acts of violence.
 - Medical Records
 - Statements by victim made to get Order of Protection (often recorded)

Recanting Victim

- What other evidence will likely be out there?
 - Statements by victim to quash / cancel Order of Protection.
 - Text Messages
 - Email
 - Social Media

Recanting Victim

- Remember the victim makes numerous statements about the same event:
 - On the 911 call
 - To the first responder
 - To her neighbor
 - To her mother
 - To the Detective

Recanting Victim

- Know the victim's demeanor during each of her statements.
 - Afraid / Frightened
 - Nervous
 - Difficulty Speaking
 - Shaking / Crying
 - Shortness of Breath
 - Excited



Recanting Victim

- Know the length of time between the event and the timing of the victim's statements.



Recanting Victim

- Rule 801(d)(2) Party Admission
 - Nonhearsay - offered against party
- DO NOT forget to examine the Defendant's statements!!
 - How do his words square with the physical evidence?
 - Are they consistent with witness or victim statements?
 - He will likely make several statements too.
 - Does he admit DV relationship?

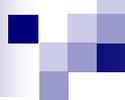
HEARSAY

- Out of court statement
 - Can be oral, written, or non-verbal
 - assertion
- Made by a person – “declarant”
- Offered to prove the truth of the matter asserted

Rule 803(1) of the Arizona Rules of Evidence: Present Sense Impression

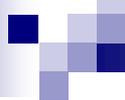
- Availability of the declarant (victim) is immaterial.





Rule 803(1) of the Arizona Rules of Evidence: Present Sense Impression

- A Statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.



Rule 803(1) of the Arizona Rules of Evidence: Present Sense Impression

- Often comes up when 911 caller is describing what he or she is seeing happen.
- We perceive events with our ears as much as with our eyes.

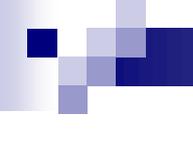
Rule 803(1) of the Arizona Rules of Evidence: Present Sense Impression

- In *State v. Romanosky*, 162 Ariz. 217, 782 P.2d 693 (1989), the court noted that present sense impression exception to the hearsay rule has three requirements:
 - (1) an event or condition must be described or explained;
 - (2) there must be a perception by the declarant;
and
 - (3) the statement must be made immediately after the event.

Rule 803(2) of the Arizona Rules of Evidence: Excited Utterance

- Availability of the declarant (victim) is immaterial.





Rule 803(2) of the Arizona Rules of Evidence: Excited Utterance

- A Statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

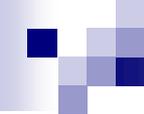
Rule 803(2) of the Arizona Rules of Evidence: Excited Utterance

- The Arizona Supreme Court has stated that for this exception to apply, four things must be proven:
 - (1) a startling event
 - (2) a statement made soon after the event to ensure the declarant has no time to fabricate
 - (3) a statement which relates to the startling event.
 - (4) Additionally, we require that the hearsay declarant personally observe the matter of which he speaks.
- *State v. Bass*, 198 Ariz. 571, 577, ¶ 20, 12 P.3d 796, 802 (2000)



Other Common Hearsay Exceptions -- WITNESS AVAILABILITY IMMATERIAL (803)

- Then existing mental, emotional, or physical condition
- Statements made for purpose of medical diagnosis or treatment
- Recorded recollection
- Reputation as to character



Other Common Hearsay Exceptions -- WITNESS UNAVAILABLE (804)

- Former Testimony (i.e. Preliminary Hearing)
- Statement under belief of impending death
- Statement against interest
- Statement of personal or family history

DEFINITION OF “UNAVAILABLE”

- Exempted by court on grounds of privilege
- Persists in refusing to testify despite court order
- Testifies to lack of memory
- Unable to be present due to physical/mental illness
- Proponent unable to procure attendance by process

When Your Victim Testifies

JURY SELECTION

- Prepare them for recantation/ minimization
- Raise issue: if victim doesn't care, why should I?

When Your Victim Testifies

JURY SELECTION

- Raise issue: Why is this case going forward even if victim doesn't want it to?
- Raise issue: What if victim doesn't appear?
- Who believes stranger crimes are more serious than crimes in the family?

OPENING STATEMENT

- Don't Promise Anything
- Concede you don't know what the victim will say
- Tell the story but don't say "the victim will tell you"
- Remember: You have no idea what the victim will do
- Highlight injuries, 911 call, demeanor

DIRECT EXAMINATION

- Start slow to see what Victim is going to do
- No matter what Victim does, remember that person is your witness – don't be hostile

DIRECT EXAMINATION

- Have a plan and be methodical and organized:
 - Victim testifies truthfully
 - Victim plays I don't remember game
 - Victim offers a different account
 - Remember your hearsay exceptions: Prior inconsistent statement, recorded recollection
 - Feigning memory loss

When Your Victim Recants

- Show jury recantation is false and that the ORIGINAL STATEMENT to the police is true.
 - Do this through corroborating evidence that substantiates the victim's ORIGINAL STATEMENT

When Your Victim Recants

- Show jury recantation is false and that the ORIGINAL STATEMENT to the police is true.
 - Show jury what has happened since the DV offense to make the victim change story.
 - Consider using an expert witness for this.

When Your Victim Recants

IMPEACHMENT AVENUES TO EXPLORE:

- Has Victim had contact with Defendant?
- Have they reconciled?
- Do they have children?

When Your Victim Recants

IMPEACHMENT AVENUES TO EXPLORE:

- Does Defendant help with bills?
- Does the Victim still love Defendant?
- Statements made to officer?
- Statements made on 911?
- Photographs

Recanting or minimizing victim:

Recanting = different story

Minimizing = modified story

**** Must disclose new information to defense ****

Prepare to impeach victim with prior statement:

- *May do directly with victim*
- *Always have backup plan;
subpoena officer who took original statement*

Impeachment

- Did Defendant Hit You?
 - No
- Do you Remember Telling Officer Smith that the Defendant Hit you?
 - No
- Call Officer Smith
 - Did the Victim say the Defendant hit her?
 - Yes

ABSENT VICTIMS



PROSECUTE IT LIKE A MURDER SO IT
DOESN'T BECOME ONE!

LOCATE VICTIMS

- Get good contact information from the victim early in the process before the victim stops cooperating.
 - Get good contact information for friends and family members who are favorable to the victim standing up to the batterer.

LOCATE VICTIMS

- Locate victims:
 - Your case agent
 - Through victim's family
 - Facebook
 - Prior orders of protection
 - Employment
 - Kids' school
 - Jail calls / Defendant

LOCATE VICTIMS

- Make sure victim isn't absent:
 - Have victim ordered to appear at each court date.
 - Get victim personally served.
 - Victim advocate.
 - Let supportive friends and family know the court dates.
 - Get victim ride to and from court with escort if necessary.
 - Jail calls / Defendant

ABSENT VICTIMS

- Show the Court the efforts you made to produce the victim.
 - Demonstrate subpoena service or attempts.
 - Produce copies of reminder letters, emails, etc.
 - Show offers to provide transportation.
- Be prepared to admit non-testimonial evidence.
- Demonstrate to the court that the defendant's behavior is responsible for the victim's absence.

ABSENT VICTIMS

- When you can show the court the efforts you have made to get the victim to court:
 - The court may be less hesitant to admit out-of-court statements since you have put so much effort into locating victim.

ABSENT VICTIMS AND ADMISSIBLE EVIDENCE

If your victim doesn't appear, what evidence is left?

Defendant has 6th Amendment Right to Confront Witnesses, but there are exceptions:

1. Forfeiture by wrong-doing.
2. Non-testimonial evidence.

Forfeiture by Wrongdoing

- *Giles v. California*, 554 US 353 (2008):
 - Statement can be admitted if Defendant's actions were designed to prevent witness from testifying.
 - Defendant cannot make a witness unavailable for trial and then claim 6th Amendment right to confront witness
 - “evidence may support a finding that the crime expressed the intent to **isolate the victim** and to stop her from reporting abuse to the authorities or **cooperating with a criminal prosecution** – rendering her prior statements **admissible** under the forfeiture doctrine.”

Forfeiture by Wrongdoing

- Rule 804(b)(6): Witness unavailable, hearsay exception when:
 - Statement offered against a party
 - Where that party has engaged or acquiesced in wrongdoing
 - The wrongdoing was intended to and did procure the unavailability of the declarant as a witness

FORFEITURE BY WRONGDOING

- Promises

- Child care / support
- Financial promises
- Bribes
- Defendant to purchase items for victim in consideration for dropping charges.
- Emotional promises

FORFEITURE BY WRONGDOING

Giles: “Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry”

Threats

- Contemporaneous to the crime (trying to get victim off the 911 call)
- Prior – “if you tell anyone I’ll get back at you through your family”
- Post threats
 - Jail tapes
 - Text messages and email.
 - Messages sent through children.

FORFEITURE BY WRONGDOING

- Forfeiture by wrong-doing – look for:
 - 404(b) evidence of prior acts of violence and prior recantation by defendant.
 - I'll be ruined if you report this!
 - I'll lose my job
 - I'll go to prison / jail
 - I'll get deported
 - I'll shut off the utilities and we'll lose the house.

Nontestimonial Statements

- *Crawford v. Washington*
 - If it is testimonial, the 6th amendment requires: 1) unavailability and 2) prior opportunity for cross examination
 - If it is nontestimonial, need a hearsay exception to admit the statement

Nontestimonial Statements

The “Primary Purpose” test

Hammon v. Indiana

- Statements made to police after event in response to police questions
- No emergency in progress
- Holding: primary, if not sole purpose was to investigate a possible crime after the fact
- TESTIMONIAL

Davis v. Washington

- 911 Caller facing an emergency and speaking about events as they happened
- Cry for help
- Environment not formal, rather frantic
- Holding – primary purpose was help with ongoing emergency
- NONTESTIMONIAL

Testimonial v. Nontestimonial

Testimonial

- Interrogation “What happened?”
- Questions regarding past crime
- Calm declarant
- Police on-scene after emergency ends

Nontestimonial

- Request for help “What is happening?”
- Questions to resolve ongoing emergency
- Frantic Declarant
- Declarant, police or public unprotected and in danger

ABSENT VICTIMS AND ADMISSIBLE EVIDENCE

- Where to look for Non-Testimonial Evidence in a DV case:
 - 911 call
 - Victim disclosures to neighbors, family, and friends
 - Statements to EMT, nurse, medical doctor.

OTHER ACT EVIDENCE

- If Defendant claims certain things, prior acts of Domestic Violence may be admissible
- Self Defense or Accident
- Forfeiture by Wrongdoing = pattern of abuse and control
- Order prior reports and disclose them

AT THE END OF THE DAY DO THIS.....

- Goal = hold offender accountable while doing our best to keep Victims safe whether they are cooperating with us or not
- Accept Reality
- DV Court – target repeat offenders
- Aggressive prosecution of repeat offenders
- Preliminary Hearings
- Push for speedy justice
- Vertical prosecution
- Strict compliance and accountability for violation of probation and conditions of release
- Evidence based investigation and prosecution



[http://www.youtube.com/watch?
v=2u251Gilo7A](http://www.youtube.com/watch?v=2u251Gilo7A)

THANK YOU!!
....and Bear Down!



Libby Shelton
Associate City Prosecutor
City of Tucson
(520) 791-4104
elizabeth.shelton@tucsonaz.gov

