

Domestic Violence Cases See New Test

Some Victims Fear Trial as Defendants Hold Right to Confront Accusers

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By Robert Tharp, *The Dallas Morning News*

Each day, up to one-half of all domestic-violence cases set for trial in Dallas County are thrown out because of a recent U.S. Supreme Court ruling reasserting a suspect's right to confront his accuser in court.

The ruling applies to all criminal trials, but the county's two bustling courts devoted to domestic-violence offenses are affected the most. The reason: Domestic-violence victims, usually wives or partners, often refuse to cooperate with prosecutors out of fear for their safety or because they reconcile with their alleged attackers.

"Women are terrified sometimes to testify because they're scared he might kill them," said Paige Flink, executive director of The Family Place, a Dallas domestic-violence shelter. "If it's the first offense, it's not likely going to be jail time. If she sits up and tells the truth on the stand, it can really put her in jeopardy."

In the past, prosecutors rarely flinched when a battered woman changed her mind about prosecuting her mate. The widely accepted practice was to hold a trial anyway, often winning a conviction by having a police officer recount what a victim said happened at the scene of an assault.

But since the Supreme Court handed down its ruling in the case of *Crawford vs. Washington* in March, courts across the country have found it much harder to use those statements in trial unless the victim is available to be cross-examined by the defense.

In Dallas County's two domestic-violence courts:

- As many as a dozen cases or more are being dismissed each day.
- Prosecutors are now reviewing more than 3,000 active cases to determine those affected by the ruling as each case's trial date approaches.
- Long-standing prosecutorial practices of treating domestic-violence victims with a light hand are coming to an end as subpoenas are being used to compel victims to testify.
- And when a victim ignores a court order, prosecutors in a handful of cases have threatened battered women with arrest unless they appear for their mate's trial.

“This is going to knock out a bunch of cases, and it’s too bad,” said County Criminal Court Judge Lisa Fox, who presides over domestic-violence trials exclusively. “On the other hand, in every other case a defendant has a right to address, face and confront his accuser.”

The unanimous Supreme Court ruling March 8 stems from a case in which a Washington state man was convicted of assault and attempted murder. At his trial, prosecutors presented a recorded statement made by the suspect’s wife during a police interrogation as evidence that the stabbing was not self-defense.

In recent years, a battered woman’s cooperation often was not important in trial because prosecutors would have police officers testify about what victims reported at the scene. The high court ruled that type of hearsay testimony in most cases violates the Sixth Amendment right to confront an accuser.

In an opinion written by Justice Antonin Scalia, which referred to Roman law and the 1603 treason trial of Sir Walter Raleigh, the justices agreed that for hearsay testimony to be allowed in a trial, the accusing witness in most cases must be available for cross-examination.

Convictions on Hearsay

Defense attorneys, such as public defender Susan Anderson, praise the ruling, saying it levels the playing field. The reliance on the use of police officers’ hearsay statements to win convictions had become an “epidemic” across the country, she said.

“You can no longer convict based on the word of a police officer,” Ms. Anderson said. “What it’s saying is: We’re not willing to convict you on the word of someone else. We want to look them in the face and determine whether or not you’re lying to me. A lot of cases boil down to he said, she said.

“A lot of times these people are convicted on hearsay, and the DAs either won’t or don’t call the complaining witness if they’ve found that they’ve recanted or is not credible,” Ms. Anderson said.

Public defender John Carlough, a former Tarrant County family violence prosecutor, said it had been too easy for prosecutors to rely on testimony by police officers.

“Before Crawford, all we had to do was get the officer to testify and then say that the victim was too upset because of what had happened,” Mr. Carlough said. “You could make an entire case with the testimony of a police officer.”

The new ruling makes it much harder to use those statements, and individual judges are being asked to determine whether the ruling applies in each of the cases that comes before them.

The determining factor: whether the victim spontaneously blurted out what had happened to the officer or whether the information was gleaned in response to direct questions from the officer.

Until the ruling, prosecutors rarely issued subpoenas to compel domestic-violence victims to testify. The idea was that forcing a victim to testify could “revictimize” her, placing her in danger if a defendant were not convicted or did not receive jail time as punishment.

Spontaneous statements can still be used in court without the witness being available for cross-examination, but information taken in response to police questioning cannot. Judges are drawing the line somewhere between when a police officer's duties shift from keeping the peace to investigating a crime.

Battered women are now increasingly receiving subpoenas to appear in court, judges and prosecutors say. When a victim ignores the court order, prosecutors in a handful of cases have gone the extra step to threaten a battered woman with arrest unless she appears for her mate's trial.

That has occurred at least six times in Judge Dianne Jones' domestic-violence court. In each case, the threat alone was incentive enough for either the defendant to plead guilty or for the victim to voluntarily appear in court.

On Thursday, Judge Fox signed such an order for a pregnant domestic-violence victim to appear in court. If the defendant in the case had not chosen to plead guilty at that time, officers would have tracked the woman down and brought her to the courthouse in handcuffs if necessary.

"We're having to choose between holding defendants accountable and doing something that could revictimize the victims," said assistant district attorney Cindy Dyer, a supervisor over family violence cases.

As a result, advocates for domestic-violence victims fear that fewer cases will be prosecuted, meaning fewer abusers will get help. That will only extend the cycle of violence and reconciliation in troubled relationships, Ms. Flink said.

Prosecutor Heath Hyde fears women will now feel even more pressure to recant or not show up for trial. "It's given defendants all of the incentive to make sure witnesses don't show up in court," he said.

Ms. Dyer said her office is still working out a uniform response to the ruling and waiting for guidance as appellate courts begin reviewing trial outcomes. But just because a battered woman does not want to press charges does not mean that the state will not aggressively prosecute her case.

Showing up for Trial

"This is a criminal case," Ms. Dyer said. "The county has said this behavior is wrong. The burden of proving it up is on the DA's office on behalf of the community. It is not on behalf of the victim."

For now, when a victim can't or won't show up for a trial that falls under the ruling, the charges are being dismissed in most cases. On a recent weekday in Judge Fox's court, seven of the 12 cases set for trial were dismissed after prosecutors declared they were "not ready" because they had no victim – known in court as a complaining witness – to testify in cases that fell under the court ruling.

And in at least two local domestic-violence cases, prosecutors have picked juries and moved forward to trials thinking their evidence was on solid legal ground only to have judges rule that key witness statements could not be admitted unless the victim showed up to testify.

Unable to compel them to appear, prosecutors were placed in the unusual position of presenting a trial with no evidence, resulting in acquittals.

The two domestic-violence courts are not alone in the upheaval. Prosecutors are also re-examining the way they have used statements from criminal accomplices in trial.

An appeals court has already overturned an April 2002 aggravated robbery conviction of a Dallas County man because prosecutors used a statement taken by police from his accomplice without making the man available in the trial to be cross-examined. The appeals court ordered a new trial in that case.

Even so, many judges, attorneys and legal experts such as Southern Methodist University law professor Fred Moss welcome the high court's ruling because it adheres to long legal tradition as well as constitutional law.

"Crawford means the Constitution trumps evidence law," he said. "They totally redesigned the rules because the rules as they existed were absolute nonsense."

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DOMESTIC VIOLENCE

Here's what a study released June 29 by the Texas Council on Family Violence found about domestic violence in Texas:

- At least 140 Texas women – nearly three a week – died violently in 2003 at the hands of current or former husbands and boyfriends.
- 18 of them were Dallas County victims.
- The number of women killed by domestic violence in Texas has increased each year since 1999.
- Three in four Texans have suffered domestic violence or know someone who has.
- One in three people never report the abuse.

RESOURCES

The National Domestic Violence Hotline is at 1-800-799-SAFE (7233).

An online pdf domestic violence service directory is available at www.tcfv.org/shelters_and_programs.htm or by following links from the Texas Council on Family Violence home page at tcfv.org/index.htm

SOURCES: Texas Council on Family Violence; research by staff writer Kim Horner.

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