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Ruling Ties Prosecutors' Hands; Cross-Examination Right Reaffirmed

By Sarah Huntley, Rocky Mountain News

When Jefferson County deputies pulled up to the Abundant Way Chalet in Evergreen on May 22, 2003, they followed a woman's piercing screams to a horrifying sight.

Through a window, they saw an enraged 24-year-old man holding his girlfriend in a headlock. Investigators later learned the man had tried to strangle her with an electrical cord, pounded her head into a tile floor and left bite marks in her scalp and back, according to the arrest affidavit.

The victim, Tamzon Gorman, told authorities she had been fighting for her life for about 45 minutes and was about to give up when she was rescued.

Prosecutors charged the suspect, Kristopher Klipner, with attempted murder, but Gorman left the state and refused to testify.

That dilemma was nothing new. Domestic violence victims, especially those who reconcile, often are reluctant to cooperate at trial. Prosecutors, in turn, must choose whether to coerce victims into taking the stand or proceed without their direct testimony in court.

This time, however, the district attorney's office faced a new conundrum: a recent U.S. Supreme Court ruling that reaffirms the right of defendants to confront their accusers at trial.

The 9-0 decision, in effect, gives new voice to victims in influencing whether a prosecution goes forward. Ironically, the ruling addresses a concern of advocates that many abused women hesitate to call police because they can't control what happens in court.

But prosecutors and many of those same advocates worry that the new ruling may do more harm than good, undermining thousands of cases across the country.

Confronting Accuser in Court seen as a Question of Rights

The ruling reversed the assault conviction of a Washington state man named Michael Crawford, finding that his lawyer should have been allowed to cross-examine Crawford's wife, who had given statements to police.

In the past, courts allowed statements from witnesses who don't attend trial if the defendant had a previous opportunity to cross-examine the person, if other courts have historically allowed similar statements or if the statement is deemed reliable by a judge.

“Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty,” Justice Antonin Scalia wrote in the opinion. “This is not what the Sixth Amendment prescribes.”

Defense attorneys are hailing the decision, issued last year, saying it protects a core right.

“Without a confrontation clause, an individual could be convicted on what someone else told the police months or even years earlier without having a pesky defense lawyer do anything to establish whether there was any truth to what was said. It goes to the very heart of a right to a fair trial,” said Scott Robinson, a defense attorney who provides legal analysis for the Rocky Mountain News.

“(This) is definitely a watershed decision, and anyone who says otherwise is just putting on a brave face,” he said.

Law enforcement officials and victims advocates worry the ruling will endanger justice in some of the most difficult cases confronting prosecutors.

“The *Crawford* decision affects every office. There have been some cases we have not been able to go forward on,” said Vince DiCroce, who oversees the Denver city attorney's prosecution unit.

Sgt. Matt Murray, former head of the Denver Police Department's domestic violence squad, called the impact “humongous.”

Jefferson County Deputy District Attorney Doug Cohen, who handled the Evergreen case, worries that victims will feel even more pressure to back away from prosecution. He believes juries can make their own judgments about why a victim does or doesn't testify.

“It's an uphill battle to begin with because there are a lot of dynamics in prosecuting domestic violence cases,” he said. “It takes a lot of courage for someone who is being abused by their spouse or boyfriend to even call the police.”

Time, Litigation to Settle the Question of Impact

Although attorneys say the ruling is likely to leave its biggest imprint on domestic violence and child sex assault cases, the *Crawford* case did not involve either.

Crawford was accused of stabbing a man in retaliation for the attempted rape of his wife. Crawford's wife refused to testify against her husband, invoking marital privilege. But the judge allowed prosecutors to present her taped statement to police that she saw no weapon in the victim's hand when her husband stabbed him.

A jury found Crawford guilty of assault. The Supreme Court reversed the conviction and sent the case back to a lower court.

While the decision is prompting review of many cases, determining its impact is likely to take time – and a significant amount of litigation.

The Colorado Court of Appeals tackled the issue twice within three months of the ruling. One decision favored prosecutors, allowing them to use a domestic violence victim's statements to a friend. The other was pro-defense, reversing a man's conviction for sexually assaulting a 7-year-old child because prosecutors used the boy's statements to police instead of putting him on the stand.

Local defense attorney Chris Beasley said the *Crawford* ruling could affect past convictions as well as new ones.

“Are people going to go back and try to reopen old cases? I think that's a possibility,” said Beasley.

‘I Still Love Him,’ Woman in Evergreen Case Declares

In the Evergreen case, reverberations from the Supreme Court's ruling led to a plea deal.

Prosecutor Cohen subpoenaed the victim, Gorman. But she told prosecutors, according to court records, that she would not testify because she did not want Klipner to go to prison.

Although she said she was “glad the cops got there. I didn't know what was going to happen,” Gorman said Klipner had never laid a hand on her until that night.

“I still love him. You don't just shut it off. I don't care what he did to me,” she was quoted as saying.

Both Gorman and Klipner, who were ending a four-year relationship, had been drinking. They quarreled, court records say, over a CD that one of them had taken.

Gorman alleged that Klipner's eyes rolled back in his head as he tried to strangle her. She told investigators he repeatedly said, “There's nothing else I can do with you. I just have to do this.”

When deputies told Klipner the charges against him, Klipner said, “(Expletive) it, you can charge me with whatever you want. I'll beat it,” according to the arrest report.

Gorman later told her mother that Klipner had called her from jail and threatened her, saying, “I'll finish the job when I get out,” according to court records.

Cohen, faced with what he called “a very difficult decision,” decided to let Klipner plead to lesser charges of menacing. Klipner was sentenced to 30 days in jail and 42 months on probation.

“Without *Crawford*, I wouldn’t have made that offer,” Cohen said. “I was left with the choice, if the victim didn’t show, of possibly losing the whole case.”

Klipner’s attorney, deputy public defender Bridget Klauber, declined to comment.

Klauber’s boss, state Public Defender David Kaplan, would not discuss details of Klipner’s case but said the deal could reflect problems with the evidence.

“It is unfair to presume the accuracy of the allegations,” Kaplan said.

Kaplan lauded the *Crawford* ruling.

“Cross-examination has been called the engine of the truth-finding function of a court,” Kaplan said. “Through the years, that right has been whittled away.”

Klipner did not return a call to his mother’s home, where he is living.

Gorman declined to comment, but her mother, Suzanne, is angry about the plea agreement.

“This guy tries to kill my daughter – that’s literally what he did – and now he’s walking,” Suzanne Gorman said. “He got off with a slap on the wrist, basically. As a mother, that grates on me. I know if the police hadn’t come, she’d be dead, and I’d be looking at a grave site right now.”

INFOBOX

What Happened

The Supreme Court last year reaffirmed the right of the accused to face their accusers in court.

Justice Antonin Scalia wrote: “Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.”

What it has Led to

The state finds it more difficult to prosecute abusers if the victim refuses to appear at trial.

Jefferson County Deputy District Attorney Doug Cohen, on offering a plea bargain to an offender rather than going to trial: “I was left with the choice, if the victim didn’t show, of possibly losing the whole case.”

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