

“She hit me, too”

Identifying the Primary Aggressor: A Prosecutor’s Perspective

Gael B. Strack, San Diego Assistant City Attorney
1200 Third Avenue, Suite 700, San Diego, California 92101
gstrack@sandiego.gov • www.sandiegodvunit.org

The historical statistics are well known: 95% of domestic violence is committed by men against women. But recent statistics have emerged that suggest this long-standing relationship is changing. The Report on Arrests for Domestic Violence in California for 1998, published in August 1999 by the Office of the Attorney General, Bureau of Criminal Information and Analysis, indicates that the percentage of women arrested from domestic violence has increased from 6% in 1988 to 16.5% in 1998.

Do the recent arrest figures indicate that in the past men have borne a statistically disproportionate share of domestic violence arrests; that today the system is finally recognizing women commit more domestic violence than was previously thought? Or are these recent arrest statistics indicative of an underlying problem in the way the system is working?

I believe the latter is true and given the gradual changes in the way police approach domestic violence situations, it should come as no surprise that new problems are emerging. These problems are not the fault of the police. Police departments’ “pro-arrest policies” are a reflection of public and political demand for a harder-line on crime. However, California’s Pro-arrest policy is a subject for a different paper. This paper is interested in the question of whether officers are properly identifying the primary aggressor.

Historical Perspective:

Over the last 30 years, police response to domestic violence has changed markedly. The preferred police response of “Mediation” in the early 70s gave way to “Pro-arrest Policies” in the mid-80s and early 90s. There have been problems with too few arrests in domestic violence cases, problems with dual arrests and now there is an alarming increase in the proportion of females being arrested for domestic violence. Between 1991 and 1996, arrests of women in California climbed 156 percent – from 3,359 to 8,609 while the arrests of men rose 21 percent – from 42,318 to 51,219.

The Turning Point:

In 1997, less than a year after California Penal Code Section 13701 (b) was passed to implement policies discouraging dual arrests and promoting the arrest of the primary aggressor, the San Diego City Attorney’s Office received a police report of domestic violence that marks a turning point in the way that the primary aggressor is viewed. In this case, Jack calls 911. He requests police assistance and says, “she hit me.” He demands that his wife, Ellen, be arrested. When the police arrive, he indicates that while he was standing in the kitchen with his back to Ellen, he “felt” something on his right shoulder. The police report indicates they had an argument about

insurance. Jack admits being angry because Ellen was going to leave him and he wants Ellen to pay for the insurance.

The police learn that Jack and Ellen have been married for 8 years. They have a 3-year old daughter, Tabitha. Ellen has a 15-year old son from prior relationship, Chris. Both kids were present during the incident. Ellen is also 7-months pregnant.

Ellen is interviewed and says since Jack has been on domestic violence probation; he's been threatening to retaliate against her. Ellen reports that they were having an argument in the kitchen and both were angry. She reached for a towel at the same time Jack was reaching for food. According to Ellen, she accidentally bumped Jack's elbow. She denied "hitting" Jack.

The police also learned that Chris left for school before the police arrived. They document "no visible injuries to either party" and "both were calm". Ellen reports at least three prior domestic incidents where Jack is the suspect. Jack is 6'1" weighing 200 lbs and Ellen is 5' weighing 120 lbs. at 7 months of her pregnancy. Jack continues to insist that Ellen be arrested and, based on Jack's representation of the reported contact to the right shoulder, she is arrested.

In reviewing the facts of this case, it does not appear that a battery was committed. It is understandable, given California Penal Code section 142 (which makes it a felony for any peace officer who has the authority to receive or arrest a person charged with a criminal offense to willfully refuse to receive or arrest such person), that the officers may have felt compelled to arrest Ellen. But there is also California Penal Code section 849 which permits any peace officer "to release from custody ... any person arrested without a warrant whenever ... there are insufficient grounds for making a criminal complaint against the person arrested." It appears the officers were not aware of or clear on how to use California Penal Code section 849 under these circumstances.

Fortunately, Ellen was later that day released from custody after the case was reviewed by a San Diego Police Department domestic violence detective and by a prosecutor from the San Diego City Attorney's office.

This report caused reflection and a review of San Diego statistics at that time. We learned that although the arrest of females had increased to 15.7% in San Diego, only 11.5% had been submitted by the Detectives for prosecution and only 6% were in fact prosecuted. Learning that the prosecution numbers were consistent with the historical statistics, our attention turned to understanding why the percentage of females arrested for domestic violence has been increasing.

Theories for the Increase in Female Arrests:

A variety of theories have been suggested:

- The increase in female arrests represents a backlash from the domestic violence laws and pro-arrest policies.
- Officers lack training in identifying the primary aggressor.

"She hit me, too" Identifying the Primary Aggressor: A Prosecutor's Perspective

- There are not enough officers to properly handle the numerous 911 calls and thoroughly investigate all the cases given the time constraints and resource limitations.
- Women are more violent today than in the past.
- Men are learning to intimidate women by threatening to report the woman's self defense as a domestic violence assault on the man. Women are therefore increasingly less likely to call the police to report a domestic violence incident out of fear that they will be arrested.
- Male batterers are manipulating the system to avoid arrest by claiming self-defense.
- Women do not understand the legal protections afforded by self-defense.
- Batterers are retaliating against their partners by having their partners arrested as punishment for calling the police in prior domestic violence incidents.
- Batterers are training each other about domestic violence laws in jail, in the courtroom and at counseling sessions.

While there are many theories, and I have struggled mightily with all of them, I have reached the conclusion, for now, that there is no way of knowing which theory or theories are right.

Relying on experience as both a defense attorney and prosecutor, I do not believe women are more violent than in the past. On the other hand it is my opinion that it is now more difficult than in the past for police officers and prosecutors to sort out who is the primary aggressor. Today, more male batterers are alleging claims of self-defense earlier: with the 911 call and at the scene. It seems we have trained our batterers well. As Gail Pincus likes to say "The jail cell is a great class room." Batterers are savvier about the laws. They have learned that calling 911 first to "tell their story" may help them avoid being held accountable. They have found that it helps to retaliate against the victim for previous police calls because the victims naturally become reluctant to make further calls to the police. With more allegations of women using violence at the scene, the case becomes "messy" and hard to sort out. It is difficult for police officers to determine whom to arrest.

If I'm right that it's more difficult to determine the offender at the scene, then our attention must focus on improving our training on how to identify the primary aggressor. The key to unraveling the mystery of the case where both parties allege self-defense, is adequate training of all those involved in prosecuting the case and a thorough investigation by those discovering the facts of the case. With adequate training and strong investigative support, a police officer can identify the primary aggressor and the prosecutor can prosecute.

San Diego's Response:

Progress is being made on this front. For example, law enforcement agencies in San Diego deserve special credit. In 1998, at the request of City Attorney Casey Gwinn who was then

"She hit me, too" Identifying the Primary Aggressor: A Prosecutor's Perspective

President of the San Diego Domestic Violence Council, all law enforcement agencies participated in updating the San Diego Domestic Violence Law Enforcement Protocol of 1990. This update included, among other things, more information on the identification of the Primary Aggressor.

The San Diego Police Department, in particular, made a significant effort to educate its officers about the Identification of the Primary Aggressor. The department increased its domestic violence training at the Academy, incorporated primary aggressor training at the Advanced Officer's Training program and added a four-hour menu class on the Identification of the Primary Aggressor. Additionally, Lt. Jim Barker, has mandated that all of his domestic violence detectives attend this class.

Further, the California Commission on Peace Officer Standard Training and the California District Attorney's Association has included specific training on the "Identification of the Primary Aggressor" in all of their domestic violence training programs.

Recommended Training for Police and Prosecutors on Identifying the Primary Aggressor:

Police officers and prosecutors must receive the same "primary aggressor" training. We need to analyze how to identify the primary aggressor consistently. Our training needs to be on-going and comprehensive. Among other things, our training must include the following components: domestic violence dynamics, mutual combat, self defense, strangulation, reasons why women use violence, distinguishing between offensive and defensive injuries, the sophisticated batterer, the law, and handling these cases at court.

The law does provide help in identifying the primary aggressor. California Penal Code section 13701 is instructive.

Section (b) provides that written policies shall encourage the arrest of domestic violence offenders if there is probable cause that an offense has been committed. These policies shall discourage, when appropriate, but not prohibit, dual arrests. Peace officers shall make reasonable efforts to identify the primary aggressor in any incident. The primary aggressor is the person determined to be the most significant, rather than the first aggressor. In identifying the primary aggressor, an officer shall consider the intent of the law to protect victims of domestic violence from continuing abuse, the threats creating fear of physical injury, the history of domestic violence between the persons involved, and whether either party acted in self-defense.

Many training programs now include additional factors to consider:

- Age, height & weight of the parties
- Criminal history
- Domestic violence probation
- Corroboration
- Presence of fear
- Offensive/defensive injuries
- Seriousness of injuries
- Motive to lie
- Strength and skill
- Use of alcohol or drugs

- 911 reporting party
- Timing of citizen's arrest
- Demeanor of parties
- Existing protective orders
- Detail of statement
- Self defense, defense of others/property

These classes also include questions to ask:

- Who is fearful of whom?
- Who in the relationship poses the most danger to the other?
- Who is seeking to stop the violence?
- Who is seeking to avoid punishment?
- Who is at most risk of future harm?
- Who has motive to lie or retaliate?
- Whose story makes the most sense?
- Do the injuries and evidence corroborate the statement?
- Is there evidence of consciousness of guilt?
- Is there a history of domestic violence, as the perpetrator or the victim?

Another good question to ask both parties at the scene is "What will your partner tell me about what you did?" Then confront the female with the male's version. Find out what she believes. Does she confirm or deny the male's version? Then ask the same set of questions of the other party. Always ask, "What was the argument about?" This question more than any other will help identify any motive to lie and/or expose any possible defenses. Finally, document the reasons why one version is more believable than the other and the reasons for your arrest.

To help prosecutors work through similar issues, prosecutors should seek assistance from experts prior to trial and use their testimony at trial. Our office frequently consults with veteran police detectives and forensic nurses to help us distinguish between offensive and defensive injuries, the reasonable use of violence and other factors.

The consequences of arresting the wrong individual, and the messages being sent to offenders, victims and children, are cause for concern:

- Offenders are being rewarded for manipulating the system. They feel invincible.
- Victims think twice before calling the police. As a result they continue to live in fear.
- Children are learning to distrust the police. In cases where both parents are arrested, children associate the presence of police with the breakup of the family.
- Police officer frustration is growing.
- Batterers are not being held accountable
- Victims are not being protected and as a result are increasingly unwilling to seek help
- Issues concerning dependency, child custody, housing, immigration and other consequences are emerging.

What is mutual combat?

In domestic violence situations it is common for both parties to assert that the other party was actively engaged in the violence. This pattern of claims is sometimes grouped under the concept

"She hit me, too" Identifying the Primary Aggressor: A Prosecutor's Perspective

of “mutual combat”. While convenient and widely used, the term “mutual combat” is not helpful in the difficult task of identifying the primary aggressor. Mutual combat is a misused and misunderstood term.

Police officers tend to classify a domestic violence case as “mutual combat” when they can’t or don’t have the time to sort out a messy case at the scene, thinking it is the prosecutor’s job to sort it out in court. Prosecutors tend to use it when both parties have injuries or both parties allege self defense at the scene. Prosecutors think if the police officers can’t figure it out, nor will the judge or the jury. Judges and juries use the term “mutual combat” to justify their not guilty verdicts.

It’s instructive to think of mutual combat in the context of the western shoot out. Recall the movie Tombstone where Doc Holiday shoots it out with Johnny Ringo. The two men are of the same physical stature. They both have a gun. They are equally matched in skill and both agree to “shoot it out”. During the big fight scene, they attempt to stare each other down, each with their hand resting squarely on their gun. The tension builds before Doc Holiday finally says “when” and shoots Johnny Ringo between the eyes. Clearly, this is mutual combat.

But this is not the situation in most homes where domestic violence is present. The parties are rarely evenly matched. Usually, one person is more powerful than the other, not just in size and strength, but also in the aspects of their personal relationship. Often, there is no opportunity to “opt out” and the options are limited: run, stay or defend yourself.

To date, there are few documented police reports that describe the scene where a wife calmly says over dinner, “Honey, I’ve had enough of your abusive behavior. It’s time to settle our differences. After dinner, let’s go out side and fight it out. Winner keeps the house and kids. Loser leaves and pays attorney’s fees. “

Clearly, it is important to have an understanding what is and what is not mutual combat. The use of self-defense against an assault is not “mutual combat”.

Under California Jury Instructions, CALJIC 5.30, “it is lawful for a person who is being assaulted to defend him/herself from attack if, as a reasonable person, s/he has grounds for believing and does believe that bodily injury is about to be inflicted upon him/her. In doing so, that person may use all force and means, which s/he believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the injury which appears to be imminent”.

Strangulation:

Strangulation has only been identified in recent years as one of the most lethal forms of domestic violence: unconsciousness may occur within seconds and death within minutes. Today, we know that victims may have no visible injuries whatsoever – yet because of underlying brain damage by lack of oxygen during the strangling – victims may have may serious internal injuries or die days or several weeks later.

A victim who is strangled may first feel severe pain, followed by unconsciousness and even death. The victim will lose consciousness by any one or all of the following methods: blocking of the carotid arteries (depriving the brain of oxygen), blocking of the jugular veins (preventing deoxygenated blood from exiting the brain), and closing off the airway, causing the victim to be unable to breathe.

Only eleven pounds of pressure placed on both carotid arteries for ten seconds is necessary to cause unconsciousness. However, if pressure is released immediately, consciousness will be regained within ten seconds. To completely close off the trachea, three times as much pressure (33 lbs.) is required. Brain death will occur in 4 to 5 minutes, if strangulation persists.

In a study conducted by the San Diego City Attorney's Office of 300 domestic violence cases, visible injuries such as tiny red spots on the face, bloody red eyes, red marks, scratches and bruising on the neck, was only visible 16% of the time. When visible injuries were present, often times those injuries were subtle and hard to find. Consequently, it is important for officers to take special care in looking for injuries around the eyes, under the eyelids, nose, behind the ears, inside the mouth, neck, shoulders, and upper chest area. Even more critical in the investigation of a strangulation case, is the documentation of symptoms such as:

- Hoarse or raspy voice
- Loss of voice
- Pain and/or difficulty swallowing
- Coughing
- Nausea and/or vomiting
- Internal neck injury
- Difficulty or inability to breathe
- Mental changes
- Light headedness
- Involuntary urination or defecation

Because visible injuries are uncommon on a victim of an attempted strangulation, police officers need to be particularly diligent in determining the primary aggressor. It is quite possible they may find the male assailant with visible injuries and the female victim with no visible injuries.

Women who use violence

It's important to acknowledge that women use violence. In *Women Who Abuse in Intimate Relationships* (Hamlett, 1998), violent women were grouped into three categories:

- One group includes women who use violence in self-defense to escape or protect themselves from their partner's violence. Saunders (1986) found that this was the most frequently reported motivation for women's use of violence.
- In a second group are women who have a long history of victimization at the hands of previous partners as well as during childhood. These women are described as taking a stance in life that "no one is ever going to hurt me that way again" and their violence is interpreted as an effort to decrease their own chances of victimization.
- Violent women in a third group are identified as primary physical aggressors who use their greater physical power to control partners.

Several years ago in a Santa Barbara study based on an analysis of police reports, it was found that in 90% of the cases (in instances where injuries were noted) the injuries were to women only. In the remaining 10%, both parties had injuries. In all cases where both parties had injuries, the woman's injuries were more severe than the man's injuries.

Women who use weapons:

When a woman uses a weapon to defend herself, such as a frying pan, a knife or any other household object, the use of weapon is sometimes construed as excessive and self defense goes out the window. However as the law states, a "...person may use all force and means which she believes to be reasonable necessary ... to prevent the injury which appears to be imminent." If the male is bigger and stronger, the defending female is entitled to use a weapon to make things fair or "equalize the power differential".

Battered Victims as Defendants

Domestic violence laws apply equally to men and women. When an individual uses violence, which is not in self-defense, it is a crime. Police officers and prosecutors must evaluate each case on the facts of the instant offense. Both the police officer and the prosecutor are guided by established standards, which cannot be ignored.

With the increase of females being arrested, it is inevitable that more females will be prosecuted and that some of these female defendants will also have a history of being battered victims. When this happens, prosecutors should consider the prior abuse as a factor in "mitigation" at sentencing.

Of concern is the lack of advocacy services for female defendants who may also be victims of domestic violence. In Minneapolis, MN, the Domestic Abuse Project has developed a program for battered victims who find themselves as defendants. For more information about this program, call Mary Jo at 612-673-3526 or dap@mndap.org. Unfortunately, prosecutors may not be in the best position to make such referrals; however, it is time to initiate work with the Public Defender's Office and the Domestic Violence Community and to begin the discussion about how advocacy services can be provided to this limited population of women.

Conclusion:

Identification of the primary aggressor is not an easy task. Today more than ever police officers and prosecutors are finding it a challenge to identify the true offender and hold that person accountable. The solution is to "continue to learn" and take advantage of the most recent courses on how to identify the primary aggressor. As City Attorney Casey Gwinn says, train everyone and then do it again. Through education, awareness and teamwork, we can hold the offender accountable, make the victim safer and end domestic violence. Prevention, not intervention, is the key to changing the world.

Epilogue:

I would like to thank Kiran Malhotra from the Statewide California Coalition for Battered Women for asking me to write this article. It has caused me yet once again to reflect on San Diego's response to domestic violence and take inventory of our policies, procedures and practices as it relates to the identification of the primary aggressor.

Resources:

Los Angeles:

Primary Aggressor Training Video developed in conjunction with the Office of the L.A. City Attorney, the L.A. Police Department and the California Alliance Against Domestic Violence. To obtain a copy call 1-800-524-4765. Also contact Sgt. Bernice Abrams from the Los Angeles Sheriff's Department to learn more about the training videos they have developed for police officers on the Primary Aggressor.

San Diego:

In a partnership with the San Diego City Attorney's Office, the San Diego Police Department and the Navy, a 4-hour primary aggressor class was developed for the San Diego Regional Academy. This class is taught by Dr. Kathleen Dully, Sgt. Dan Plein and Assistant City Attorney Gael B. Strack or Senior Deputy City Attorney Brian Erickson. Call 619-533-5620 for more information or to schedule training for your agency.

POST:

Post has developed two domestic violence courses, which include training on the identification of the primary aggressor: the First Responder's Course on Domestic Violence and the 40-hour Investigator's Course on Domestic Violence taught by many instructors throughout the state, including Inspector Tom Walsh and Candace Heisler from San Francisco and Sgt. Mike Agnew from Fresno. Call the San Diego Regional Training Center at 619-792-6501 or the San Francisco Police Department at 415-695-6900.

STOPDV

Retired San Diego Police Department Sgt. Anne O'Dell offers classes and training videos on the Identification of the Primary Aggressor. To contact Anne, visit her web site at www.stopdv.com

Additional References:

California District Attorney's Association, Advanced Domestic Violence Conference, San Diego, California, March 1996, Handout on Primary Aggressor prepared by DDA Candace Heisler, Sgt. Anne O'Dell, DCA Gael B. Strack and Inspector Tom Walsh.

San Diego Domestic Violence Council's, Domestic Violence Protocol for Law Enforcement, 1990 and Updated 1998.

Guidelines for Law Enforcement Response to Domestic Violence, published 1996 by the Commission on Peace Officer Standards and Training.

Coordinating Community Responses to Domestic Violence, Lessons from Duluth and Beyond, Melanie F. Shepard and Ellen Pence Editors, Chapter 10, "Just Like Men? A Critical View of Violence by Women by Shamita Das Dasgupta".

"Arrests of Women Soar in Domestic Abuse Cases" by Mareva Brown, Bee Staff Writer, published December 7, 1997.

"O.C. Domestic Abuse Arrests Skyrocket 431% in Last Decade" by Jack Leonard, Times Staff Writer (add date).

"A New Side to Domestic Violence" by John Johnson, Times Staff Writer.

The Police Response to Spouse Abuse: An Annotated Bibliography by Nancy Egan

"How to Improve your Investigation and Prosecution of Strangulation Cases" by Dr. George McClane and Assistant City Attorney Gael B. Strack, October 1998.