

Using Danger Assessment in the Prosecution of Domestic Violence Cases

by Jamie Balson

Lethality assessments are a valuable tool for prosecutors who charge and try cases involving domestic violence (DV). An assessment can be used to help the prosecutor develop insight into the relationship and the type of control an abuser has over a domestic violence victim, and to provide information to more effectively use the court process to help keep the victim safe. Such assessments can forewarn the prosecutor of issues that may arise as a result of the abusive relationship, allowing the prosecutor to adjust his or her approach to a domestic violence case, and making the probability of securing a conviction much more likely. There are limits, however, on how a prosecutor can use this information in the “case in chief,”¹ and on whether the information is admissible at all.

HOW PROSECUTORS OBTAIN LETHALITY ASSESSMENTS

Prosecutors do not conduct lethality assessments with DV victims; the prosecutor obtains the assessment by way of the police report, from the responding officer, or from the initial police officer who responds to the scene of a domestic violence incident. In Maricopa County, Arizona, the domestic violence protocol manual developed by the county attorney’s office and used by many departments states “police departments should develop and use domestic violence risk assessments to gain greater insight into the nature, frequency, and severity of violence in the relationship.”²

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¹ The portion of a trial whereby the party with the burden of proof in the case presents its evidence. The term differs from a rebuttal, whereby a party seeks to contradict the other party’s evidence. *Black’s Law Dictionary*. (Thompson West (8th ed.) 2004).

² <http://www.maricopacountyattorney.org/pdfs/protocols/Domestic-Violence-Protocol.pdf>, p. 8.

The level of detail included in the lethality assessment varies across police departments and police officers. The amount of attention given to obtaining an accurate and thorough assessment, with the appropriate follow up inquiry into each question, falls to the officer completing the assessment. This is largely a product of the culture of the particular police department, the level of training of that police department, the training officer that taught the responding officer, and the degree of importance placed on DV cases.

The guidance to develop and use risk assessment is interpreted differently across police departments. One police department in Maricopa County, Arizona uses what they term a “course of conduct interview”:

1. How frequently and seriously does your partner intimidate you or threaten you? Describe.
2. How frequently does your partner demand you do things and verify that you did them? Describe.
3. Describe the most frightening or worst event involving your partner.
4. Have you ever made it known to your partner that you wanted to leave? How did your partner react?

Contrast this with another Maricopa County police department’s assessment:

DV Lethality Assessment Card:

1. Has your partner ever used/threatened the use of a weapon against you?
2. Has he/she threatened to kill you, your children or your pets?
3. Do you think he/she might try to kill you?
4. Does your partner have a gun?
5. Has your partner ever tried to kill himself/herself?
6. Is your partner jealous or does he/she try to control you?
7. Has your partner ever forced you to have sex when you did not want to?
8. Do you feel the violence against you is escalating in severity?
9. Have you tried to leave/end your relationship?
10. Are there children in the home?
11. Is your partner unemployed?
12. Does your partner use drugs or alcohol?
13. Does your partner monitor your phone calls, e-mail, social media?

This second assessment follows more closely the Danger Assessment developed by Jacquelyn Campbell,³ and provides more information that the prosecution can utilize to build its case. The more detailed assessment also allows advocates working in the police department or prosecutor’s office to better identify victims in need of advanced safety planning and to provide this assistance.

³ <https://www.dangerassessment.org/>.

As with any witness in a criminal investigation, the victim is in control of what information is shared with the police. It is not uncommon for victims to refuse to participate in a lethality assessment because they are afraid of their abuser, or for other reasons. There is little an officer can do to obtain the information sought by the assessment if the victim is unwilling to provide it.

HOW PROSECUTORS CAN MOST EFFECTIVELY USE LETHALITY ASSESSMENTS

Prosecutors charge cases based upon a “reasonable likelihood of conviction” or another similar standard. This decision to charge a case is based upon victim credibility, the victim’s reluctance/refusal to prosecute, physical evidence, the availability of witnesses and whether they are credible, and the confession/denial of the abuser, among other things. Prosecutors look at the totality of the available evidence at the time the case is submitted for their review to make the charging decision.

In DV cases, it is common for victims not to want to prosecute (or to recant) their initial story for a variety of reasons, including their safety and well-being.⁴ When a victim recants, the prosecutor has to make a decision whether to proceed with the case—and if a reasonable likelihood of conviction exists—without the victim. In Maricopa County, Arizona, the county attorney has set forth the following regarding charging DV cases: “Based on the nature of domestic violence cases, the likelihood of recidivism, and the ongoing danger to the victim and others, a domestic violence case will be charged (if it meets the criteria) even if the victim does not wish to proceed with prosecution.”⁵ When this occurs, the prosecution can use an evidence-based prosecution⁶ approach to successfully obtain a conviction in the case.

Courts have recognized that an abuser may induce the victim to be unavailable for trial. In such instances, the prosecutor can use the information contained in a lethality assessment to combat this issue. For example, if through a lethality assessment a prosecutor learns that the abuser employs excessively controlling behaviors towards the victim and that such behavior is likely to result in the victim being unavailable for trial, the prosecutor can anticipate and seek out information to support a forfeiture by wrongdoing motion from the very beginning of a case.⁷ If granted, this would permit

⁴ Buzawa & Buzawa, *Domestic Violence: The Criminal Justice Response*, 178-181 (3d ed. Sage Pub. 2003).

⁵ <http://www.maricopacountyattorney.org/pdfs/protocols/Domestic-Violence-Protocol.pdf>, p. 39.

⁶ “Evidence based prosecution” describes the process by which a prosecutor utilizes evidence to prove a case without the assistance of the victim or the victim’s testimony. See http://www.aequitasresource.org/Benefits_of_Specialized_Prosecution_Units_in_Domestic_and_Sexual_Violence_Cases_Issue_8.pdf.

⁷ Forfeiture by wrongdoing is an exception to a defendant’s right to confront witnesses who will testify against him or her. If the accused induces a witness to be unavailable for trial through wrongful acts, the witness’s prior testimonial statements are admissible against him. See http://www.aequitasresource.org/The_Prosecutors_Resource_Forfeiture_by_Wrongdoing.pdf.

the prosecution to introduce statements made by the victim through other witnesses. The lethality assessment can help the prosecutor in other ways at different points throughout the prosecution of the case as well. For instance, the information obtained in the lethality assessment can be used not only in making a decision to charge the case, but also in response to motions to modify release conditions, for impeachment at trial, to aggravate the defendant's sentence, at bail hearings to support no bond or a high bond amount, and for support in probation revocation and/or termination hearings.

Arizona legislatures, recognizing the dangers that violent criminals—including DV offenders—pose by being released into the community while new criminal charges are ongoing, have officially sanctioned the prosecutor's use of the lethality assessment at bond hearings,⁸ and have made it mandatory that judges consider information obtained through a lethality assessment in A.R.S. 13-3967, which states: "In determining the method of release or amount of bail, the judicial officer, on the basis of available information *shall* take into account all of the following: . . . The results of a risk or lethality assessment in a domestic violence charge that is presented to the court" (emphasis added). This provision was added to Arizona's law in 2015.⁹

The information contained in the lethality assessment is especially important if the prosecutor cannot get in touch with a victim early on—or at all—in the case. Often, the victim has left his or her home to seek safety. This renders useless the contact information provided to the police at the scene of the crime. The provision in A.R.S. 13-3967 is also important when the victim wants the abuser released from custody. The prosecutor, using the lethality assessment to determine the history between the victim and the abuser, can use the information to keep the defendant in custody in an effort to protect the victim. In cases such as this, the prosecutor has no way of knowing whether the victim truly wants the defendant to be released or if the defendant is pressuring the victim to make statements in support of his or her release to the court. Abusers often use jail calls, jail mail, third parties, or other means to message the victim to do "whatever it takes" to get them out of custody.

In one instance in Maricopa County, the defendant instructed his sister to bring the victim to court so the victim could tell the court to release the defendant. The defendant's sister brought the victim to court, and the victim told the court that she wanted the defendant released. Later, it was learned that that victim felt pressured to make the statement and appreciated that the prosecutor successfully argued to keep the defendant in custody. For prosecutors handling DV cases, a constant struggle exists to balance the wishes of the victim and the state's interest in keeping the victim—and the community—safe.¹⁰

⁸ http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/52leg/1r/summary/h.hb2164_03-25-15_astransmittedtogovernor.doc.htm&Session_ID=114.

⁹ The amended bill was signed by Arizona's governor on March 30, 2015.

¹⁰ See <http://www.azcentral.com/story/news/local/scottsdale/2015/02/03/domestic-violence-preceded-scottsdale-murder-suicide/22828675/#>; <http://www.azfamily.com/story/28587038/mom-blames-sons-drug-use-for-attack-on-her-his-subsequent-death>; <http://www.cbs5az.com/story/28925743/man-killed-after-confronting-domestic-violence-suspect>.

LIMITATIONS OF LETHALITY ASSESSMENTS

When taking a domestic violence case to trial, there are significant limitations on how much, if any, of the information contained in the lethality assessment will be admissible. For example, Federal Rule of Evidence 404, after which most state rules of evidence including Arizona's are based, addresses the admissibility of character evidence and the admissibility of crimes and/or other acts at trial. The rule states that evidence of a person's character, and evidence of a crime, wrong, or other act is *not* admissible to prove that on a particular occasion the person acted in accordance with that character or trait. Because much of the information elicited in a lethality assessment would fall under this category, it is highly likely that the information would be deemed inadmissible under Rule 404.

However, Rule 404(b) *does* permit evidence of "crimes, wrongs or other acts" for several other purposes, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. The information contained in the lethality assessment may, in some cases, fall under one of the listed purposes. If a prosecutor can successfully argue one of these alternative purposes, some or all of the information contained in the assessment may be admitted at trial. It is important to note that other considerations regarding the use of lethality assessments by the prosecution may exist. For instance, in Arizona, in addition to Rule 404, case law also limits a prosecutor's ability to utilize the information in a lethality assessment and serves as a warning to the prosecution to proceed with extreme caution when attempting to admit such evidence.

The case in question is **State v. Ketchner**.¹¹ Darrell Ketchner's ex-girlfriend, Jennifer, had left him, and he was enraged. Ketchner went to Jennifer's home and violently attacked her and her minor daughter. While Jennifer survived the attack, her daughter died as a result of numerous stab wounds. Ketchner was found guilty of first degree murder and several other charges. He was sentenced to death.

During the trial, a domestic violence expert testified about risk factors for lethality in a domestic violence relationship, including the presence of a gun in the house, stepchildren in the home, prior threats to kill, drug and alcohol use, forced sex, and strangulation. The expert described how when a victim is leaving the abuser, it is an extremely dangerous time for the victim. The defense appealed the case based on the testimony of the domestic violence expert.

The appellate court ruled that the admission of evidence regarding the lethality indicators constituted inadmissible "profile evidence." The court explained that the evidence, although useful for different types of hearings, "may not be used as substantive proof of guilt" because it improperly invites the jury to find the defendant guilty based on other abusers' actions and, thus,

¹¹ *State v. Ketchner*, 339 P.3d 645 (Ariz. 2014).

the “abuser profile.” Ketchner’s case was remanded for a new trial on the first degree murder charge. In its decision, the court noted several similar results in courts in Wyoming, Arkansas, Georgia, Massachusetts, Maryland, and Washington. Prosecutors must carefully consider whether to use such evidence at trial, and weigh the benefits and risks of using the information contained in lethality assessments.

STRANGULATION, LETHALITY, AND PROSECUTION OF STRANGULATION CASES

Strangulation is one of the most lethal forms of violence an abuser can use on a victim. During strangulation, the abuser literally has the victim’s life in his hands—a strangulation victim can be unconscious within seconds and dead within minutes.¹² Research has shown that women who experience strangulation are up to seven times more likely to become victims of homicide¹³ and that more than half of female domestic violence victims will experience strangulation at least once in their lifetimes.¹⁴

The connection between strangulation and lethality has in recent years been gaining attention in the criminal justice system with legislatures taking action to address strangulation in their communities. In Maricopa County, Arizona, for instance, the law specifically addressing strangulation in domestic violence relationships was adopted in 2010.¹⁵ Prior to this, DV strangulation was grouped under the general category of “assaults” and considered a misdemeanor crime. With the 2010 law, strangulation was reclassified as an aggravated assault, was directly identified in the law,¹⁶ and became a felony in Arizona. Many other states have followed suit; currently 37 states have active laws specifically addressing strangulation.¹⁷

Strangulation cases historically have been difficult cases to prosecute; many times there is no visible injury present and little physical evidence exists to corroborate that the strangulation occurred.¹⁸ Due to the prevalence and deadly nature of strangulation cases, increased attention is warranted when a victim indicates in a lethality assessment that strangulation has occurred during the present offense or in the past.

¹² Strack, G., et al. (2011). On the edge of homicide: Strangulation as a prelude, *Criminal Justice* 26(3). 32-33.

¹³ Glass, Nancy, et. al (2008), Non-fatal strangulation is an important risk factor for homicide of women, *The Journal of Emergency Medicine*, 35(3), 329-335.

¹⁴ Wilbur, L. et al. (2001). Survey results of women who have been strangled while in an abusive relationship, *The Journal of Emergency Medicine*, 21, 297-302; Berrios, D.C. et al., (1991) Domestic violence: Risk factors and outcomes, *Western Journal of Medicine*, 155, 133-135.

¹⁵ A.R.S. 13-1204B.

¹⁶ “The person intentionally or knowingly impedes the normal breathing or circulation of blood of another person by applying pressure to the throat or neck or by obstructing the nose and mouth either manually or through the use of an instrument.”

¹⁷ 19(6) DVR 1 (Aug/Sep 2014) Law Reform Targets the Crime of Strangulation.

¹⁸ *Id.*

In Maricopa County, prosecutors are directed to give “special attention” to DV strangulation cases.¹⁹

One way to identify that strangulation has occurred either in the present offense or in the past is through attention to responses on a lethality assessment. Paying close attention to the words a victim uses in the lethality assessment can provide the prosecutor valuable information regarding the crime. A victim may refer to strangulation as being “choked,” placed in a “sleeper hold,” being “arm barred” or any number of other terms. Because there are usually little to no visible injuries immediately after a strangulation, a victim may not think that it is important to go into detail regarding the strangulation and may focus on the abuser’s actions that caused injury. Careful review of the lethality assessment with these ideas in mind can help a prosecutor identify whether additional charges for strangulation are appropriate. In turn, actively pursuing strangulation cases will help keep victims safe and alive.

CONCLUSION

Lethality assessments are a valuable tool in the prosecution of DV cases. The information obtained during the assessment can provide the prosecutor with insight into the relationship and permit a more effective prosecution. However, there are limitations to how the information can be used. The questions asked and the level of attention given to obtaining responses to the questions on the lethality assessment varies by police department. Once prosecutors have the information from the lethality assessment, rules of evidence, case law and other legal authority may limit the admissibility of the information.

¹⁹ <http://www.maricopacountyattorney.org/pdfs/protocols/Domestic-Violence-Protocol.pdf>, p. 39.



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