

## Chapter 3: Gathering Evidence in Domestic Violence Cases

### Section 3A: Admissibility of Police Records

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Generally, public records, reports, statements, or other data compilations of a public office or agency “setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to a duty imposed by law and as to which there was a duty to report, or factual finding resulting from an investigation made pursuant to authority granted by law” are admissible pursuant to a recognized exception to the hearsay rule regardless of whether the declarant is available. KRE 803(8). This rule, however, specifically provides that “[i]nvestigative reports by police and other law enforcement personnel” are **not within this exception** to the hearsay rule. KRE 803(8).

However, in Skeens v. Commonwealth, Ky. App., 912 S.W.2d 455, 456 (1995) the court distinguished “charging documents” from documents that are “solely” investigative reports. In Skeens, *supra*, the Court addressed the admissibility of a uniform citation to prove the date of commission of a prior DUI offense and stated, “In a PFO prosecution, the dates of commission of prior offenses can be proved with testimony from indictments. Montgomery v. Commonwealth, Ky., 819 S.W.2d 713, 719 (1991), *citing* Hayes v. Commonwealth, Ky., 698 S.W.2d 827, 831 (1985). The adoption of KRE 803(8) did not affect the holding in these cases. Uniform citations, like indictments in felony cases, are charging documents in the prosecution of DUI offenses and are not solely “investigative reports by police.” See RCr 6.02(2), RCr 8.12. The date of the offense recorded on the uniform citation from a prior DUI offense is trustworthy. A certified copy of a uniform citation from the record of a previous conviction of DUI can be used to prove the date of commission of the prior offense.

Although investigative reports of law enforcement agencies do not come within the 803(8) exception to the hearsay rule, extrajudicial statements made to law enforcement officers or other employees of law enforcement agencies, are admissible if they are otherwise admissible pursuant to the Kentucky Rules of Evidence. For example, an extrajudicial statement made to a police officer may be admissible for a non-hearsay purpose or may fall within other recognized exceptions to the hearsay rule.

In Sanborn v. Commonwealth, Ky., 754 S.W.2d 534, 541 (1988) the Court stated “[t]he rule is that a police officer may testify about information furnished to him only where it tends to explain the action that was taken by the police officer as a result of this information and the taking of that action is an issue in the case. Such information is then admissible, not to prove the facts told to the police officer, but only to prove why the police officer then acted as he did.” See also, Preston v. Commonwealth, Ky., 406 S.W.2d 398, 401 (1966). Similarly, in Carter v.

**Representing Victims of Domestic Violence: A Kentucky Lawyer Handbook**  
**Section 3A: Admissibility of Police Records**

- 63 -

Commonwealth, Ky., 782 S.W.2d 597, 600 (1989) the court stated “[b]ackground information supplied to a police officer may be admissible under the ‘verbal act’ doctrine in circumstances where it has a ‘proper nonhearsay use’ to explain ‘the action subsequently taken by the police officer.’”

Statements by victims to police dispatchers have also been held to be admissible. In Smith v. Commonwealth, Ky., 788 S.W.2d 266 (1990) statements made in a 911 call to the dispatcher were held admissible under the “excited utterance” exception to the hearsay rule, even though 26 minutes had elapsed between the shooting and the statements. In Cecil v. Commonwealth, Ky., 888 S.W. 2d 669(199\_\_\_\_\_) the Court held that the victim’s call to the police dispatcher, six days before he was shot by appellant in which he complained of harassment by appellant was admissible both under the excited utterance exception to the hearsay rule and the present sense impression exception to hearsay rule. Finally, statements made to a police officer who arrived at the scene of a domestic altercation within five minutes after receiving a call from the dispatcher were properly admitted under the excited utterance exception to the hearsay rule. However, statements made by the victim to the second police officer who arrived and **in the domestic violence report** were improperly admitted because they did not fall within any of the exceptions to the hearsay rule.

## Chapter 3: Gathering Evidence in Domestic Violence Cases

### Section 3B: Admissibility of Medical Records

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Physicians and other medical personnel may be among the first persons to see victims of domestic violence after their partners have assaulted or injured them. Approximately 12-30% of women who seek medical treatment from emergency departments have been battered by their intimate partners, and more than 50% of all women in emergency departments reported experiencing domestic violence at some time in their lives. Lawyers who represent victims or batterers rely on medical staff to compile records which may be used as evidence in court to corroborate a history of domestic violence or a specific violent episode.

- Medical records generally must be certified by the records custodian or the physician who recorded the notes.
- Subpoena medical staff to testify from their own personal knowledge: Did they see the bruises? Were the physical and emotional symptoms they observed consistent with the victim's description of the incident? How did the batterer behave in the hospital?
- Introduce the medical records, including the victim's prior statements. The records are double hearsay: in most states, you can introduce the medical records as a business exception, and the content of the records through other hearsay exceptions, such as excited utterances.
- Mandatory reporting of suspected domestic violence by medical professionals is becoming more common. Mandatory reporting laws seek to promote legal intervention in domestic violence cases. Some advocates fear that mandatory reporting laws discourage battered persons from seeking medical treatment for fear that their batterers will retaliate or the police will get involved and respond inappropriately. Experts report that such cases have already occurred in California. Some physicians have therefore refused to report suspected domestic violence without the consent of their patients.
- The following paragraphs describe how physicians and medical personnel should appropriately document injuries when victims seek medical treatment, in order to preserve evidence for subsequent court proceedings. As a lawyer who works with medical professionals or intends to use medical records as evidence, you should advise medical staff as follows.
- Physician records play a vital evidentiary role in both criminal and civil proceedings. They may derive from emergency department visits, office or clinic appointments, operative

reports, or counseling sessions. Often the records are supplemented by related laboratory, radiology, and pathology reports.

- Maintain the confidentiality of medical records. Do not disclose related information except where needed for treatment and evidentiary purposes. If the victim does not want medical records to be kept, ask why and take extra precautions to protect the records. The victim may be afraid that the batterer will gain access to the records and retaliate if she admitted the abuse, or deny access to medical treatment the next time.
- Interview the patient alone. Batterers may refuse to allow their partners to speak to doctors or medical staff alone, and victims are likely to fabricate the cause of the injuries if questioned in the presence of their batterers.
- Report any unusual or suspicious circumstances surrounding the visit. For instance, note whether there has been an obvious delay in seeking care, whether the spouse or partner is unwilling to leave the patient alone with the physician, whether there have been unexplained prior appointment cancellations, and whether the patient's explanations of the injuries are consistent with the physical symptoms.
- Document any physician contact with the police, reporting bodies, or victim services agencies. Give patients the appropriate referrals and contact social workers or battered persons advocates when needed.
- Record patient reports in as much detail as possible. Make liberal use of verbatim quotations and minimal use of paraphrasing to preserve the patient's narrative of events.
- Use language that persons without medical training can comprehend when documenting a diagnosis or treatment. When medical records are introduced as evidence in court, the judges, juries, parties, and lawyers may not understand technical medical terms.
- Describe all physical injuries. Include the type, number, size, location, and age of injuries. Note whether the injuries are adequately explained by the patient's account of their cause.
- Include sketches or photographs of injuries to supplement any description. Many emergency departments have available instant cameras for such recordings.
- Record any observations about the patient's behavior or emotional state that might be relevant. For instance, note whether the patient appears to be excessively fearful or startles easily.
- Note whether the patient consistently needs medical treatment. The following patterns suggest that a patient is being battered: multiple injuries, injuries on the face, neck, throat, chest, abdomen, and genitals, injuries during pregnancy, or a repeated need for medical treatment.

- Tell patients what has been included in their medical reports and that the reports may not be released without their permission. Remind patients that insurance companies and employers, for instance, may not have access to the records without their consent.

**Medical Records Checklist:**

1. \_\_\_ Subpoena medical staff to testify about their own observations where needed
2. \_\_\_ Certify medical records through a records custodian
3. \_\_\_ Introduce medical records using hearsay exceptions where appropriate
4. \_\_\_ Be aware of mandatory reporting laws in your state and how they affect your client

**Advise doctors and medical personnel to:**

1. \_\_\_ Maintain the confidentiality of records
2. \_\_\_ Interview the patient alone
3. \_\_\_ Report any unusual circumstances surrounding the visit
4. \_\_\_ Document physician contact with other social service providers
5. \_\_\_ Record patient reports in as much detail as possible
6. \_\_\_ Use language that persons without medical training can comprehend when documenting a diagnosis or treatment
7. \_\_\_ Describe the patient's physical injuries, emotional state, and behavior
8. \_\_\_ Supplement the description with sketches and photographs of injuries
9. \_\_\_ Note whether the patient repeatedly seeks medical treatment

## Chapter 3: Gathering Evidence in Domestic Violence Cases

### Section: 3C: Admissibility of Photographic Evidence

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The Kentucky Supreme Court stated the following regarding the admissibility of photographs into evidence:

Photographs are most commonly admitted into evidence as demonstrative evidence on the theory either that they are merely a graphic portrayal of oral testimony or that a qualified witness adopts the photograph as a substitute for words. See *McCormick on Evidence*, Sec. 214 (1972); 3 *Wigmore on Evidence*, Sec. 790 (Chadbourn rev. 1970). When a photograph is used as demonstrative evidence, the witness need not be the photographer, nor must he have any personal knowledge of the time, method, or mechanics of the taking of the photographs. The witness is only required to state whether the photograph fairly and accurately depicts the scene about which he is testifying. See Commonwealth, Dept. of Highways v. Arnett, Ky., 390 S.W.2d 187 (1965); Carson v. Comm., Ky., 382 S.W.2d 85 (1964); G. Lawson, *Kentucky Evidence Law Handbook*, Sec. 12.05 (1979).

Photographs can be admitted as real evidence in a proper case. As stated in *Wigmore*:

"With later advancements in the art of photography, however, and with increasing awareness of the manifold evidentiary uses of the products of the art, it has become clear that an additional theory of admissibility of photographs is entitled to recognition. Thus, even though no human is capable of swearing that he personally perceived what a photograph purports to portray (so that it is not possible to satisfy the requirements of the 'pictorial testimony' rationale) there may nevertheless be good warrant for receiving the photograph in evidence. Given an adequate foundation assuring the accuracy of the process producing it, the photograph should then be received as a so-called silent witness or as a witness which 'speaks for itself.'" 3 *Wigmore on Evidence*, Sec. 790 (Chadbourn rev. 1970).

This language was expressly adopted in the Old Dominion in Ferguson v. Commonwealth, 212 Va. 745, 187 S.E.2d 189 (1972). Other courts have also held that a photograph can be admitted into evidence not merely as illustrative of testimony but as probative evidence of what it shows. People v. Bowley, 59 Cal.2d 855, 31 Cal.Rptr. 471, 382 P.2d 591, 96 A.L.R.2d 1178 (1963); People v. Doggett, 83 Cal.App.2d 405, 188 P.2d 792 (1948). We agree and hold that where a reasonable foundation indicating the accuracy of the process producing the photograph is laid, it can be received as real evidence having inherent probative value and such credibility and weight

as the trier of fact deems appropriate.

Litton v. Commonwealth, Ky., 597 S.W.2d 616, 619 (1980).

Since the rendition of Litton, *supra*, the Kentucky Rules of Evidence have been adopted. The following rules are applicable to the introduction of photographs:

- **Authentication**

**KRE 901 REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION**

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims<sup>1</sup>.

- **Best Evidence Rule**

**KRE 1001 DEFINITIONS**

For purposes of this article the following definitions are applicable:.

(2) Photographs. "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

**KRE 1002 REQUIREMENT OF ORIGINAL**

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules, in other rules adopted by the Kentucky Supreme Court, or by statute.

**KRE 1003 ADMISSIBILITY OF DUPLICATES**

A duplicate is admissible to the same extent as an original unless:

(1) A genuine question is raised as to the authenticity of the original; or

(2) In the circumstances it would be unfair to admit the duplicate in lieu of the original.

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<sup>1</sup>"Because KRE 901 contains no specific provisions on authentication of photographs, the rulings in *Litton* will continue to be important". *Lawson, supra*, p. 326.

# Chapter 3: Gathering Evidence in Domestic Violence Cases

## Section 3D: Use of Expert Witnesses

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Evidence of battering and its effects may be introduced through expert testimony in criminal and civil matters. General testimony is offered for the purpose of educating the jury and the court about basic concepts regarding domestic violence, as well as clarifying specific myths and misconceptions relevant to the case at hand (e.g., alcoholic women may also be battered). Case-specific testimony offers conclusions about the specific facts or litigants before the court.

When considering the use of expert testimony in the area of domestic violence, examine the following four questions:

1. What is the evidence of domestic violence?
2. What have been the effects or impact of domestic violence on the battered partner and on children who have witnessed or experienced battering?
3. What strategies has the victim used in an attempt to resist, stop, avoid, or escape the violence?
4. What is the theory that links battering and its effects to the legal elements of this case?

### Evidence of Domestic Violence

- Domestic violence is a pattern of coercive behavior that changes the dynamics of an intimate relationship within which it occurs. Once the pattern of coercive control is established, both parties understand differently the meaning of specific actions and words. Domestic violence is not simply a list of discrete behaviors, but is a pattern of behavior exhibited by the batterer that includes words, actions, and gestures, which, taken together, establish power and control over an intimate partner.
- Physical abuse involves the intentional use of physical force by one person against another. Specific types of physical abuse range in severity and may or may not result in actual physical injury or harm. Examples include pushing, slapping, punching, choking, kicking, throwing objects, physical restraint, burning, running over with a vehicle, use of a weapon, and forced consumption or deprivation of food, alcohol, or drugs.
- Sexual abuse includes a broad range of behaviors, both those that do and do not meet legal criteria for criminal behavior. The force or coercion used in sexual abuse includes implicit



and explicit threats as well as actual physical force. Forced or coerced sexual behavior may include forced nudity, forced viewing of sexual behavior, insertion of objects into the vagina or anus, intercourse, and sexual activity with others.

- Psychological abuse accompanies nearly all physical and sexual abuse, but it can also occur alone. Unlike "negative" interactions in nonviolent relationships, psychological abuse is distinguishable by the presence of a credible threat of violence based on the victim's knowledge of actual or threatened prior physical or sexual violence.

### **Effects of Domestic Violence on Battered Persons**

Domestic violence affects battered victims and children. Psychological effects of battering include: (1) changes in cognitive perceptions, beliefs, and attitudes about self, others, and the world; (2) emotional reactions; and (3) specific symptoms of traumatic stress, and related psychological disorders. The impact of domestic violence on battered victims also includes social isolation, job loss, and lost productivity. Children who witness domestic violence experience detrimental behavioral, emotional, cognitive and social effects. The broader social context in which battering occurs can influence the effects that result from violence.

### **Strategies to Resist Violence**

Battered victims use varied strategies to resist, avoid, stop, or escape violence directed against them or their children. The use of many of these strategies contradicts the myth that battered women are passive, helpless victims. Instead, battered women use many direct and indirect means to protect themselves and their children. By understanding a battered victim's perceptions of fear and ongoing attempts to protect herself, and her social and cultural context, many aspects of a battered victim's behavior become more clearly understood.

### **Theory of the Case: Links to Domestic Violence**

Determine the theory that links domestic violence to specific legal elements of the case. Does information about a history of battering and its effects better explain a criminal defendant's reasonable perception of danger or coercive threat essential to self-defense or duress claims? Does it offer information useful to mitigation? Or does information about battering and its effects explain a mother's behavior with regard to her children? Is it the basis for a claim of assault and battery or intentional infliction of emotional distress against an abusive partner? What puzzling or seemingly inconsistent behavior may be better understood in light of domestic violence? Mapping these issues against evidence of a cumulative history of battering, its psychological and social effects on the victim and her children, and the strategies used to resist violence provides a framework for deciding whether to use expert testimony and determining the purpose for which it is introduced.

### **A Cautionary Note About "Battered Woman Syndrome"**

"Battered Woman Syndrome" has been recognized in court to refer broadly to the dynamics of battering and the psychological effects of violence. While expert testimony about battering and its effects can be useful, there are a number of problems with referring to this testimony as "battered woman syndrome." First, it can be misleading and confusing. The term functions as a rubric under which various types of information are provided, but does not refer to a specific

diagnostic condition. Limiting the definition of battered woman syndrome narrows the application of expert testimony, which is not justified by the scientific literature.

As illustrated above, the scientific literature documents a range of psychological effects of battering, and the potential relevance of these effects depends upon the particular issues of a specific case. Further, battered woman syndrome can suggest to the fact-finder that to bolster a claim of self-defense, duress, or mitigation of sentencing, for example, a battered woman must demonstrate a disordered psychological condition. While this is sometimes the case, it is not always so. Clarity is enhanced simply by reference to expert testimony concerning battering and its effects.

### **Expert Witness Testimony Checklist:**

Examine the following to determine whether expert testimony will be helpful:

1. \_\_\_ What is the evidence of domestic violence?
2. \_\_\_ What have been the effects or impact of domestic violence on the battered partner and on children who have witnessed or experienced battering?
3. \_\_\_ What strategies has the battered victim used in an attempt to resist, stop, avoid, or escape the violence?
4. \_\_\_ What is the theory that links battering and its effects to the legal elements of this case?