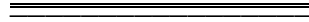
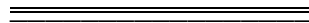


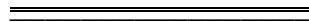
**The Bill Blackwood  
Law Enforcement Management Institute of Texas**



**Evidence Based Prosecution: Good or Bad**



**A Leadership White Paper  
Submitted in Partial Fulfillment  
Required for Graduation from the  
Leadership Command College**



**By  
Doug Rude**

**Plano Police Department  
Plano, Texas  
June 2022**

## **ABSTRACT**

Unfortunately, domestic/family violence cases occur daily. Domestic violence impacts more than just the specific victim, it impacts children in the household and society in general. Law enforcement can and will arrest the abuser when there are signs of physical abuse. However, many prosecutors will drop the criminal charge if the victim declines to testify and will not cooperate any further. A lot of times when cases are dropped the cycle of violence continues. Law enforcement and district/county attorneys should implement evidence-based prosecution. Evidence based prosecution does put more emphasis on the initial police investigation. The crime scene should be thoroughly investigated, and any additional witnesses need to be identified and interviewed. Police Officers can request an Emergency Protective Order as well. Once this is completed and there is enough evidence that a crime was committed, the domestic violence case will proceed through the court system without the involvement of the victim (if needed). Ultimately, this will keep the victim and the victim's family safe for a limited time. Victim advocates will also be involved to help the victim obtain assistance and possibly counseling. Ultimately, the goal is for the victim to be empowered and begin to live a normal, healthy life in a productive atmosphere.

**TABLE OF CONTENTS**

	Page
Abstract	
Introduction .....	1
Position .....	3
Counter Arguments .....	6
Recommendation .....	8
References .....	11

## INTRODUCTION

Evidence based prosecution is not necessarily new to some law enforcement or to District Attorney's offices. However, it is relatively new in the Dallas/Fort Worth area. Collin County informed the Plano Police Department this year that they would be applying this type of prosecution to domestic/family violence cases. All criminal cases must have some level of evidence that a crime was committed. Normally, other than homicide, there is a victim who is required to appear in court and testify that the specific crime was committed.

Since the 1980's, law enforcement has seen changes in the arrest and prosecution of domestic violence suspects. Initially police officers in the 1980's (and before) had discretion on whether or not to arrest a domestic violence suspect when the victim was uncooperative. An arrest was normally only made if there were very obvious injuries to the victim. By the mid 1990's, it became almost mandatory (unless there were extenuating circumstances) to arrest a domestic violence suspect when there was evidence of bodily injury regardless if the victim was cooperative. In those instances, the State of Texas would proceed on with the case against the suspect. However, if a victim insisted on "dropping" the charges they were told to contact the district or county attorney's office. Most of the time, if a victim signed a "refusal to prosecute" the District or County Attorney's office would later drop the charge. This process appeared to be counterproductive. The police are telling the suspect and victim at the time of the offense that the State of Texas is going to file the charge, but in reality, if the victim later insists on dropping charges then it was normally dropped. There are several reasons why a victim of domestic violence would want to drop the criminal charges such as the

suspect apologized and seemed remorseful, the suspect is the sole provider in the family, the victim has become immune to the abuse and the suspect threatened to hurt someone that the victim cares about if the suspect is prosecuted.

These are just a few of the reasons why a victim of domestic violence may try to drop the criminal charges. If this is allowed, the suspect will learn that they can pressure the victim to contact the prosecutor's office and drop charges and the cycle continues. The suspect may also be more apt to blame the victim knowing that they have the power to drop the criminal charge.

Legislation has changed over the last couple of decades in an effort to protect the victim. The State of Texas is allowed to continue to prosecute a domestic violence case, when the victim is not cooperative, to take the weight off of the victim (in theory) so the suspect would not blame the victim for being arrested. While the suspect was in custody, it would give the victim some time (albeit a short amount of time) to leave the residence. The victim also had the option to file for an Emergency Protective Order (EPO) immediately when the suspect was arrested. If the EPO was granted it would give the victim additional time to make arrangements to leave the location or possibly start the divorce and/or protective order paperwork. Also, the suspect would be held accountable for the crime committed.

Recently, more prosecutor's offices have developed an evidence-based approach, also called a "no-drop" policy, towards domestic violence cases. This again would take the weight off of the victim in an effort to protect the victim from future assaults and threats. It would also give less discretion to the Prosecutor's office in dropping cases. This would create a higher volume of cases which could put a strain on

the current resources (Davis, O'Sullivan, Farole, & Rempel, 2008). It would put more emphasis on the initial response from law enforcement. Law enforcement must treat the scene as if the victim is not going to testify or cooperate as the case progresses. The responding officer would need to collect as much evidence as possible. The responding officer must realize this is their only chance to collect the necessary evidence to support the criminal charge. This would include body camera video, photographs of the crime scene and the victim's injuries and recordings of the initial 911 call. The initial 911 call can be extremely important to the prosecution of these cases especially cases involving strangulation (Reckdenwald, Nordham, Pritchard, & Francis, 2017). The officer and detectives would need to conduct a very thorough investigation and interview all of the parties involved. Law enforcement agencies and prosecutor's offices should implement evidence-based prosecution.

## **POSITION**

Evidence based prosecution recognizes that domestic violence crimes are a societal problem and not a victim-based problem. It shows the victim that law enforcement is willing to protect them and their children and that they (the victim) are not alone. It also addresses the high rate of domestic cases which are dismissed (Gewirtz, Weidner, Miller, & Zehm, 2006). It is ultimately an effort to give the victim the strength and resources to better themselves and leave an abusive atmosphere.

Once victims see that they do have the support from law enforcement and the prosecutor's office, then they will report reoccurring abuse to the police. One study showed, "in cases involving physical or sexual violence, the victim was slightly more

than seven times more likely to report increased violence in evidence-based prosecution jurisdictions” (Buzawa & Buzawa, 2013, p. 492).

Evidence based prosecution will add an additional opportunity to save children, especially young children, from an extremely negative and possible harmful atmosphere. Children are frequently present during family violence situations. Unfortunately, children who have grown up in an abusive household and witnessed the abuse of one of their parents are more probable to suffer from emotional or psychological problems in the future. Boys that grow up in an abusive atmosphere are much more likely (10 times more) to abuse females as they get older (Basile, Jones, & Smith, 2019). These are reasons why it is so important for law enforcement to intervene when someone is injured during a family violence incident.

Investigators should also remember that children may be valuable witnesses to the investigation which can assist in the prosecution. There may also be additional criminal charges due to child neglect or a history of child abuse (injury to a child). Although the children may not be injured during the specific domestic violence incident, they are still witnesses to the abuse and may possess knowledge of past abuse. As the case progresses through the legal system, victim advocates from the investigating agency, can begin to build a rapport with the victim and family. The victim advocates, along with the investigating agency, will be able to see if the victim and children need additional resources to include a temporary shelter and possibly make a referral to Child Protective Services (CPS). The children are in essence the secondary victims of domestic violence due to the mental abuse of seeing one of their parents being abused (Gewirtz, Weidner, Miller, & Zehm, 2006).

Another reason why law enforcement agencies and prosecutor's offices need to implement evidence-based prosecution is because sometimes the victim does not have the internal will or motivation to protect themselves. The victim has been abused, both physically and mentally, for so long that they have come to accept it as their life. The victims have become "brain washed" and do not think that they can leave the situation. They truly believe that the suspect loves them and that they deserved the abuse.

It is especially important for prosecutors to proceed with domestic violence cases involving strangulation. Strangulation cases have proven difficult for law enforcement, when the victim will not cooperate, due to lack of evidence. There may be limited visible injuries to the victim other than possible redness around the victim's neck (which may not always be present). It is vitally important that the initial officer on scene completes a thorough investigation. Officers must be sure to utilize recording devices (such as in car cameras and body worn cameras) to capture how the scene looked upon arrival. This is also important to capture the victim's demeanor and appearance as well as the suspect's. A crucial part of this evidence is the initial 911 call. If dispatchers are trained well, they can capture additional evidence (cries for help, distress, sounds of the abuse) which may be admissible in court. Homicide researchers found that prior history of strangulation is a serious risk factor in domestic violence related femicide (Reckdenwald, Nordham, Pritchard, & Francis, 2017). The first time that a Police Officer responds to a strangulation incident is probably not the first time this incident has ever occurred in the household. According to research, 68% of women who had gone to shelters had a history of strangulation (Reckdenwald, Nordham, Pritchard, & Francis, 2017). Therefore, it is imperative when a victim of strangulation is persisting on



dropping the charge, the prosecutor's office must weigh the evidence to determine if the case can proceed based on the evidence alone. The prosecution of these cases may end up saving the victim, who was not able to save themselves.

## **COUNTER ARGUMENTS**

There are two counter arguments that have been noted against evidence-based prosecution. The first argument and most prevalent is that evidence-based prosecution denies the suspect his or her Sixth Amendment right. The Sixth Amendment Confrontation Clause gives the suspect the right to cross-examine the witnesses against them (face the accuser). The Supreme Court in 2004 (*Crawford vs Washington*) impacted the Confrontational Clause in their ruling. Defense attorneys believed that due to *Crawford V. Washington*, 911 recordings were no longer admissible if the person calling 911 would not testify (Jaros, 2005). This would be a strong hit against evidence-based prosecution since 911 recordings have been very important to some cases. This case gave defense attorney's new life on evidence-based prosecution. Defense Attorneys were now "excited" or "eager" to get their case to trial (Jaros, 2005). The ruling did severely limit what evidence could be admitted into evidence without someone testifying to the event.

However, when researching the *Crawford V. Washington* case, the Supreme Court did place limitations on certain statements. The court ruled that evidence deemed as "testimonial" would require a witness to appear in court for cross examination, but it did not specifically rule out 911 recordings (or other type of recordings). If the 911 call was deemed as "non-testimonial" then it may be entered into court as evidence (Basaria, 2012). The question was for the trial courts to define what is considered to be

testimonial or non-testimonial evidence because testimonial evidence would require cross examination. Since *Crawford V. Washington*, some 911 recordings have been allowed to be admitted into evidence when the recording involved a call requesting police assistance due to an emergency sometimes referred to as an “emergency utterance.” However, if the victim or witness calls 911 to report a delayed occurrence these calls may fall under testimonial evidence because there was not an immediate emergency (Bloom, 2005). The Supreme Court stated that if the caller or victim knew or should have known that their 911 call or comments to the Police would later be used in trial then it would fall under a testimonial (Bloom, 2005).

Another counter argument which has been made against evidence-based prosecution is that it takes away the power from the victim. Victims of domestic violence have normally incurred the abuse for months or years before it is reported to the police and an arrest is made. During this time, the victim has been mentally and physically abused and feels that they are no longer empowered to make decisions in their life. The argument against evidence-based prosecution is that it is also taking away the power from the victim because the prosecutor’s office is again not allowing the victim to be empowered by allowing them to decide how to proceed with the case when the victim refuses to cooperate (Gewirtz, Weidner, Miller, & Zehm, 2006).

The ultimate need for evidence-based prosecution is that sometimes the victims are not able to see that there is a better life waiting for them if they can have the courage to leave. They may have lived in a situation for so long that to them it is normal and they do not recognize there is a way out of the situation and potential for a better life. A study by the National Institute for Justice showed that assaults did decline when

the suspect was arrested (Klein, 2009). The study also noted that the only time abuse increased was when the victim was left to make the decision (Klein, 2009). This is when it is imperative that victim advocates immediately start to build up a relationship with the victim. Hopefully, the victim advocates or other support groups can begin to work on the victim's self-esteem and show the victim that they do have power over their life.

## **RECOMMENDATION**

Law enforcement agencies and district attorneys should implement evidence-based prosecution. During the last several decades, Texas has continually addressed domestic violence situations by adding or re-writing laws. As laws change, it appears that the States have recognized that victims of domestic violence may not be able to make the right decision to get out of a dangerous relationship; therefore, law enforcement officers are able to make domestic violence related arrests even without the victims "approval." This will further prevent the propensity of violence without having to put the victims of family violence in an awkward position to file charges against their abuser. Police officers are also able to file Emergency Protective Orders on behalf of the victim in an effort to protect the victim. The state will need to progress and recognize that domestic violence situations are ultimately crimes against society and not just an individual victim. At some point, the State of Texas will need to pass legislation which makes family violence arrests as crimes against society. This will allow police officers to list the victim as the State of Texas instead of naming an individual as the victim. This should be like any other self-initiated arrest in which the arresting officer lists the victim as the State of Texas. The officer could then list the

victim as a witness to the offense such as assault with bodily injury (family violence).

The cases would then proceed through the criminal justice system. This will take some of the pressure off the victims. The suspect will not be able to “blame” the victim or pressure the victim into dropping the charge because the victim is no longer in the decision-making process. As mentioned earlier in the National Institute of Justice report, there is not any indication of increased abuse (assault) when the suspect is arrested for domestic violence (Klein, 2009). Some jurisdictions that have already adopted a mandatory prosecution policy (similar to evidence-based prosecution) have shown to have an increase in guilty pleas and higher prosecution and conviction rates. These same jurisdictions have also shown that mandatory prosecution policies on family violence have been a deterrent (Finn, 2013).

Although, *Crawford V Washington* did impact certain evidence which had been submitted easier during trials; it did not rule out the evidence completely. Prosecutors may still be able to get 911 recordings admitted into evidence if it is deemed an “excited utterance” or medical records of the abuse into evidence if the records were for medical purposes and not for the trial (Rouhanian, 2017). This will put more weight on police agencies to conduct more thorough investigations at the crime scene. They will no longer just collect a statement and take photographs of the victim’s injuries. The responding officer will need to record everything when they arrive on scene. The officer will need to understand the importance of a very good initial interview of both the suspect and the victim. Agencies that are large enough should consider creating (if they do not already have one) a specific detective unit for family violence cases. These detectives will be more versed on the evidence needed to proceed with an evidence-

based case for the District Attorney's office. Over time these detectives will understand what may or may not be submitted as evidence during a trial. This unit will be able to collect additional evidence such as the 911 recordings or any other emergency phone call recordings as well as interviewing neighbors, at a later date, who may have heard or seen the incident when it occurred.

The police department or district attorney will need to have their victim advocates trained in dealing with victims of family violence. These advocates will be available to obtain necessary resources for the victim and the victim's family. The advocates must also immediately start building a rapport with the victim. The advocates will be able to recommend specific counseling and continue to keep in contact with the victim just to let them know that someone does care. This is all in an effort to build up their self-confidence so that the victim is empowered. The ultimate goal will be for the suspect to face consequences for their actions to include possible counseling. The victim will also receive support and counseling until the victim and the victim's family can finally start living in a healthy atmosphere. This will not be cheap, easy, or quick, but prosecutors must implement evidence-based prosecution if Texas is seriously going to try and decrease re-occurring events of family violence incidents.

## REFERENCES

- Basaria, K. (2012). Summary Exhibits and the Confrontation Clause: Looking beyond the Hearsay Rule for Evidentiary Implications of Crawford's Progeny. *Journal Criminal Law & Criminology*, 102(3), 851-899. Retrieved from <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7439&context=jclc>
- Basile, K, Jones, K, & Smith, S (2019). Effects of domestic violence on children. Office on Women's Health. Retrieved from <https://www.womenshealth.gov/relationships-and-safety/domestic-violence/effects-domestic-violence-children>
- Bloom, D. D. (2005). Utter excitement about nothing: Why domestic violence evidence-based prosecution will survive *Crawford v. Washington*. *St. Mary's Law Journal*, 36(3), 717-752.
- Buzawa, E. S., & Buzawa, A. D. (2013). Evidence-Based Prosecution. *Criminology & Public Policy*, 12(3), 491–505. <https://doi-org.ezproxy.shsu.edu/10.1111/1745-9133.12056>
- DAVIS, R. C., O'SULLIVAN, C. S., FAROLE JR., D. J., & REMPEL, M. (2008). A Comparison of Two Prosecution Policies in Cases of Intimate Partner Violence: Mandatory Case Filing Versus Following the Victim's Lead. *Criminology & Public Policy*, 7(4), 633–662. <https://doi-org.ezproxy.shsu.edu/10.1111/j.1745-9133.2008.00532.x>

- Finn, M. A. (2013). Evidence-Based and Victim-Centered Prosecutorial Policies. *Criminology & Public Policy*, 12(3), 443–472. <https://doi-org.ezproxy.shsu.edu/10.1111/1745-9133.12049>
- Gewirtz, A., Weidner, R. R., Miller, H., & Zehm, K. (2006). Domestic Violence Cases Involving Children: Effects of an Evidence-Based Prosecution Approach. *Violence & Victims*, 21(2), 213–229.
- Jaros, David (2005). The Lessons of People V. Muscat: Confronting Judicial Bias in Domestic Violence Cases Interpreting Crawford V. Washington. *The American Criminal Law Review*. <file:///D:/People%20v%20Muscat.pdf>
- Klein, A. (2009). Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors, and Judges. National Institute of Justice. <https://www.ncjrs.gov/pdffiles1/nij/225722.pdf>
- Reckdenwald, A., Nordham, C., Pritchard, A., & Francis, B. (2017). Identification of Nonfatal Strangulation by 911 Dispatchers: Suggestions for Advances Toward Evidence-Based Prosecution. *Violence & Victims*, 32(3), 506–520. <https://doi-org.ezproxy.shsu.edu/10.1891/0886-6708.VV-D-15-00157>
- Rouhanian, A. (2017). A Call for Change: The Detrimental Impacts of Crawford V. Washington on Domestic Violence and Rape Prosecutions. *Boston College Journal of Law & Social Justice*, 37(1), 1–72. Retrieved from <https://lawdigitalcommons.bc.edu/jlsj/vol37/iss1/2/>