
DOMESTIC VIOLENCE
a/k/a
FAMILY VIOLENCE ASSAULT
a/k/a
SIMPLE ASSAULT
POLICE TRAINING

Prepared by

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INTRODUCTION

The instances and statistics of assaults of intimates escalating from a simple offensive contact to death are staggering. These intimate or familial-based assaults are commonly known as “family or domestic violence” assaults. The state has granted law enforcement broad authority and placed a heavy obligation to investigate and prosecute these offenses, and especially, protect the victim. This paper addresses procedures and provides guidelines on how to confront this all too common crime.

I. OFFENSE DEFINED

“(a) A person commits an offense if the person:

- (1) intentionally, knowingly, or recklessly causes bodily injury to another, *including the person’s spouse*;
- (2) intentionally or knowingly threatens another with imminent bodily injury, *including the person’s spouse*; or
- (3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

(b) An offense under Subsection (a)(1) is a Class A misdemeanor, except that the offense is a felony of the third degree if the offense is committed against:

* * *

- (2) a member of the defendant’s family or household, if it is shown on the trial of the offense that the defendant has been previously convicted of an offense against a member of the defendant’s family or household under this section.

* * *

(e) In this section:

- (1) “Family” has the meaning assigned by Section 71.003, Family Code.

“Individuals related by consanguinity or affinity.... Individuals who are former spouses of each other, individuals who are the biological parents of the same child, without regard to marriage, and a foster child and foster parent, without regard to whether those individuals reside together.”¹

- (2) “Household” has the meaning assigned by Section 71.005, Family Code.

“A unit composed of persons living together in the same dwelling without regard to whether they are related to each other.”²

- (f) For the purposes of this section, a defendant has been previously convicted of an offense against a member of the defendant’s family or a member of the defendant’s household under this section if the defendant was adjudged guilty of the offense or entered a plea of guilty or nolo contendere in return for a grant of deferred adjudication, regardless of whether the sentence for the offense was ever imposed or whether the sentence was probated and the defendant was subsequently discharged from community supervision.”³

FAMILY VIOLENCE means

“an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself.”⁴

II. PROTOCOL FOR INVESTIGATION – POLICE DEPARTMENT

“The primary duties of a peace officer who investigates a family violence allegation or who responds to a disturbance call that may involve family violence are to protect any potential victim of family violence, enforce the law of this state, enforce a protective order... and make lawful arrests of violators.”⁵

1. Identification of case as domestic violence
2. Pro-Arrest Policies – in case of bodily injury or to prevent further bodily injury
3. Complete investigation
 - A. Detailed offense reports – document every fact
 - (1) Suspect’s relationship to victim
 - (2) Describe scene... items broken, turned over, damaged, location of offense
 - (3) Describe victim:
 - a. Physical Demeanor: crying, shaking
 - b. Statements: excited utterances
 - c. Physical Injuries: swelling, cuts, bruises, red marks
 - B. Ask questions - who, what, where, why and how
 - C. Investigate - even the class C's

4. Police Report Must Contain⁶
 - A. names of suspect and complainant
 - B. the date, time and location of the incident
 - C. any visible or reported injuries
 - D. a description of the incident and a statement of its disposition.

5. **Must** Give Statutory Notice for Victim's Rights and Remedies⁷

Family Violence Packet contains all necessary information.

6. Role of Law Enforcement – On Scene Investigator

FOCUS on Defendant's unlawful behavior and not whether the victim wants to prosecute.

 - A. Interviews
 - (1) Interview victim and suspect separately and out of suspect's line of sight
 - (2) Interview Potential Witnesses – including children
 - a. Get written statements, medical release form, or affidavits while at scene
 - b. Victims are not likely to be cooperative later.
 - c. Note if victim refuses to give statement – can sign non-prosecution affidavit

 - B. **DO NOT ASSUME FACTS**
 - (1) investigate history of violence;
 - (2) injuries to the victim;
 - (3) any fears of the victim;
 - (4) notice any disarray of items or furniture;
 - (5) take photos of all visible injuries;
 - (6) document names of all persons present at the scene including back up officers who should do supplemental report of observations and statements.

 - C. Emphasis on what officer sees and does because victim may change story
 - (1) who was drinking
 - (2) who showed up - who was there
 - (3) what did witness/victim say (excited utterance)

- D. Get voluntary statements from victim as soon as possible - take pictures of victim/scene
- E. Record any statement from defendant
- F. **HEARSAY IS CRITICAL**

Note excited utterances from the victim – Key because availability of declarant – the victim immaterial to admission of the statements.

Defined: Excited Utterance

“A statement relating to a startling event or condition made while declarant was under the stress of excitement caused by the event or condition.”⁸

The exception is founded in the belief that such statements are made involuntarily and do not allow the declarant an adequate opportunity to fabricate, ensuring the trustworthiness of the statements.⁹

Examples

Officer’s testimony of what assault victim told him during investigation was admissible under excited utterance exception where officer testified that victim was visibly upset, shaking, afraid when officer arrived at scene and was still under stress of the assault when she reported it to him.¹⁰

Officer’s testimony concerning statement of wife and children were admissible under excited utterance exception to hearsay rule where statement that accused hit her were made while victim was dominated by fear, emotion, pain and excitement resulting from assault, that victim made statement while accused was holding her, she was upset and crying, observed swelling and bruises on face and abrasions believed to be recent due to freshness of cuts and swelling. Children’s statements made while they were still in the grip of excitement of witnessing the fight between their parents and were made as a result of witnessing the incident.¹¹

- G. Eliminate Artificial Barriers to Investigation
 - (1) Attitude
 - (2) Physical
 - (3) Procedure

- H. **PRESERVE EVIDENCE**
 - (1) Excited Utterances
 - (2) 911 Tapes (retain)
 - (3) Crime Scene Observations

- (4) Photos
- (5) Witnesses/Children

I. No spousal privilege under Rule 504 if crime is against the spouse or a child.

J. Evaluation of Batterer

- (1) Determine whether batterer is likely to kill
- (2) Assess circumstances on every call no matter how many service calls to residence
- (3) Use all available information on batterer – past and current behavior

K. Warning Signs of Intimidation

- (1) Retraction of Statement
- (2) Accused's monitoring or physical control of victim

III. PROSECUTION

1. Early Intervention is Critical. – Why prosecute

- A. Reduces Escalation of Violence: many incidents start off as Class C and victim ends up dead
- B. No drop policy – emphasis on educating public that this type of conduct is neither acceptable or tolerable
- C. Preventive mechanism for present and future batters
- D. Protect the safety, health and life of the victim
- E. Intervention may stop future violence and holds the batterer accountable

2. State files charges to take the burden off of victim

3. Evidence Based Prosecution

Assume victim will not appear or cooperate

- Absent victim
- Non-prosecution
- Hostile witness or recants statement

4. Victim does not control charges

- No drop policy
- Defendant may seek probation or counseling

5. Aggressive Prosecution

Hope to avoid recurrence or escalating violence

IV. PARAMETERS OF RIGHT TO PRIVACY: WARRANTLESS SEARCHES

1. Fourth Amendment to the United States Constitution provides that:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. Art. I, Section 9, of the Texas Constitution similarly states:

The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.

3. In Texas, warrantless arrests are authorized in only limited circumstances, governed primarily by Article 14 of the Texas Code of Criminal Procedure; Specifically

“(a) Any peace officer may arrest, without warrant:

* * *

(2) persons who the peace officer has probable cause to believe ***have committed an assault resulting in bodily injury*** to another person and the peace officer has probable cause to believe that ***there is a danger of further bodily injury*** to that person;

* * *

(4) persons who the peace officer has probable cause to believe ***have committed an assault resulting in bodily injury to a member of the person’s family or household.***

* * *

- (b) If reasonably necessary to verify an allegation of a violation of a protective order or of the commission of an assault against a member of the family or household, a peace officer shall remain at the scene of an investigation to verify the allegation and to prevent the further commission of family violence.”¹²

4. Reasonableness has two elements:

- A. must be supported by probable cause; and
- B. search must be made under the authority of a search or arrest warrant, or conducted under circumstances which dispense with the warrant requirements.

5. Probable Cause

- A. Probable cause exists where
 - (1) facts and circumstances;
 - (2) within knowledge of arresting officer;
 - (3) and of which he has reasonably trustworthy information;
 - (4) which would warrant a reasonable and prudent man;
 - (5) in believing that a particular person has committed or is committing a crime.¹³
- B. Is also defined as
 - (1) reasonable ground of suspicion;
 - (2) supported by circumstances sufficiently strong in themselves;
 - (3) to warrant a cautious man to believe;
 - (4) that the person accused is guilty of the offense for which he is charged.¹⁴

1. Examples:

Officer had probable cause to arrest where he ascertained that arrestee and daughter had been physically fighting, arrestee had pulled out daughter’s earrings causing bleeding, knew that both had been advised not to see each other without police presence and that an ambulance had been called. Probable cause to arrest is not destroyed by suspect’s denial.¹⁵

Officer had probable cause to arrest where wife called police for help, wife had cut on face from husband's slap and wife indicated she wanted husband arrested for hitting her. Officer feared future violence despite fact that husband's behavior at the time appeared normal and not excited.¹⁶

Officers had probable cause to arrest without a warrant where officers had previous dealings, knowledge and experience with the accused (earlier altercation –resisting arrest), statement by victim that she had been assaulted, evidenced by red marks and bruises on wrists confirming statement she had been tied with a phone cord, sufficient for officers to believe that the accused would return and cause harm.¹⁷

Officers had probable cause to arrest upon observing wife's obvious injuries, cut lip, blood in hair, scratches on arm, swollen right eye, statement by victim that she feared husband would return to harm her again, compounded with accused being found a block away and giving false name to officers.¹⁸

D. Exclusionary Rule¹⁹

(1) Evidence unlawfully obtained cannot be admitted into evidence

- Officers received information that defendant had marijuana on the property and found marijuana which was concealed. Could not see from adjacent property or the air and obtained a search warrant on their findings. Evidence excluded because officers violated trespass laws to obtain the evidence.²⁰

(2) Search incident to valid warrantless arrest, evidence admissible.

- Cocaine found incident to valid warrantless arrest for family violence assault.²¹

6. A search is defined as an intrusion into an area covered by a reasonable expectation of privacy. Private areas are generally held to include houses, offices, rooms, cars, lockers, purses or a person's body. Areas such as public streets and walkways, public areas or common areas, a person's physical characteristics, open fields and woods are not reasonably considered private.

7. Scope of search. If officers obtain a warrant for a house, under the concept of "curtilage," they are entitled to search all outbuildings, vehicles and structures considered within the immediate area of the house.

8. Two Questions Should be Asked:

A. Is the search itself lawful?; and

B. If lawful, is the search carried out in an objectively reasonable manner?

9. Exceptions to Search Warrant Requirement:

A. Exigent Circumstances. Where officer is faced with an emergency or believes evidence may be destroyed, he or she may conduct a warrantless search or take precautionary measures to prevent the destruction of evidence.

(1) Police Officers may make warrantless arrests for felonies or misdemeanors committed in their presence.²²

(2) Arrest without warrant - Residence

a. An officer is prohibited from making an arrest without a warrant in a place of residence unless

· a person in the residence consents to the entry; or

· exigent circumstances exist.²³

B. Consent. The person consenting must have actual authority to consent i.e., ... car owner and not passenger must give consent for search.

(1) "I guess so" - not positive, unequivocal consent; therefore, not legally effective

C. Plain View. If an officer is in a place where he or she has a right to be, and if the officer sees or finds something connected to a crime, then the officer may seize the evidence. This exception is based upon the idea that if anyone could have seen the evidence, then there is not violation of any privacy interests by the officer seeing that same evidence.

a. not embedded in frame

V. PROBABLE CAUSE AFFIDAVIT AFTER ARREST - WHY?

1. Searches conducted without the prior approval of a judge or magistrate are *per se* unreasonable under the Fourth Amendment, subject to very limited exceptions.²⁴

A. Generally required to have search warrant

2. To determine the validity of a warrantless search the court must find that:

A. the search was supported by probable cause;

B. the failure to obtain a search warrant was excusable because:

- (1) it was incident to a lawful arrest or
 - (2) justified by an exception to the warrant requirement such as exigent circumstances;²⁵ and
 - C. the scope of the search was consistent with its purposes.²⁶
- 3. Burden of proving reasonableness of warrantless search is on the state.²⁷ As a general matter, a warrantless search requires a greater showing of probable cause than a search conducted with a warrant.²⁸
- 4. Officers may arrest, without warrant:
 - A. persons found in suspicious places and under circumstances which reasonably show that such person is guilty of some felony, breach of the peace or about to commit some offense;
 - (1) even if outside the officer's jurisdiction if the person commits an offense in your presence, such as a felony, breach of the peace or public intoxication
 - B. persons the officer has probable cause to believe has committed an assault resulting in bodily injury and that there is danger of further injury or is an assault resulting in bodily injury to a member of the person's family or household; and
 - (1) family violence assault
 - C. persons the officer has probable cause to believe have violated protective orders.²⁹
 - D. where a credible person has represented by satisfactory proof to the officer that a felony has been committed and the offender is about to escape, officer may pursue and arrest the accused.³⁰
- 5. Police officer, absent an arrest warrant, cannot arrest a citizen unless the citizen has committed an offense or is committing an offense in the officer's presence.³¹ The arrest must be made with probable cause even if exigent circumstances preclude the ability to obtain an arrest warrant.

VI. WHAT CONSTITUTES AN ARREST?

Under both Federal and State Constitutions, the arrest or seizure of a person has not occurred until:

- a reasonable person would believe that he was not free to leave; AND

- the person had yielded to the officer's show of authority or had been physically forced to yield.³²

CONCLUSION

The only way to eradicate family violence is to actively investigate and prosecute all instances of domestic abuse. This requires set procedures, consistent and detailed investigation and cooperation between the police department and the prosecutor's office. We do have the power, means and authority to make a difference.

ENDNOTES

¹ Tex. Family Code, § 71.003 (West 2001)

² Tex. Family Code, § 71.005 (West 2001)

³ Texas Penal Code § 22.01 (West 2000)

⁴ Tex. Family Code, § 71.004 (West 2001)

⁵ Tex. Code Crim. Pro. Art. 5.04(a)(West 2001)

⁶ Tex. Code Crim. Pro. Art. 5.05(West 2001)

⁷ Tex. Code Crim. Pro. Art. 5.04(b)(West 2001)

⁸ Tex. Rule of Evid. 803(2)

⁹ *Couchman v. State*, 3 S.W.3d 155 (Tex. App. – Ft. Worth 1999, pet. Ref'd)

¹⁰ *Scogozza v. State*, 949 S.W.2d 360 (Tex. App. – San Antonio 1997, no writ)

¹¹ *Reyes v. State*, 48 S.W.3d 917 (Tex. App. – Ft.Worth 2001, no writ)

¹² Tex. Code Crim. Procedure, Art. 14.03 (West 2001) (emphasis added)

¹³ *Lewis v. State*, 598 S.W.2d 280 (Tex. Cr. App., 1980)

¹⁴ *Thomas v. State*, 288 S.W.2d 791 (Tex. Cr. App., 1956).

¹⁵ *Glenn v. City of Tyler*, 242 F.3rd 307 (5th Cir. 2001)

¹⁶ *Atkins v. State*, 919 S.W.2d 770 (Tex. App. – Houston [14th Dist.] 1996, no writ)

¹⁷ *McClatchy v. State*, 758 S.W.2d 328 (Tex. App. – Houston [14th Dist.] 1988, pet. For discretionary review ref'd)

¹⁸ *Romero v. State*, 709 S.W.2d 53 (Tex. App. – Ft.Worth 1986, no writ)

¹⁹ Tex. Code Crim. Proc., § 38.23(a) (no evidence obtained in violation of Constitution or laws of the State of Texas or Constitution or laws of U.S. shall be admitted into evidence against the accused in a criminal trial)

²⁰ *State v. Hobbs*, 824 S.W.2d 317 (Tex. App. -- San Antonio 1992, pet. for discretionary review ref'd, motion for reh'g denied.)

²¹ *See Atkins*, *supra*

²²*United States v. Watson*, 423 U.S. 411 (1976)

²³Tex. Code Crim. Proc., art. 14.05. *Taylor v. State*, 945 S.W.2d 295 (Tex. App. -- Houston [1st Dist.] 1997, pet. for discretionary review ref'd)

²⁴*Jones v. United States*, 357 U.S. 493 (1958); *Kolb v. State*, 532 S.W.2d 87 (Tex. Cr. App., 1976); *Hudson v. State*, 588 S.W.2d 348 (Tex. Cr. App., 1979)

²⁵*Chambers v. Maroney*, 399 U.S. 42 (1970), *reh. denied* 400 U.S. 856

²⁶*Maldonado v. State*, 528 S.W.2d 234 (Tex. Cr. App., 1975), *overruled o.g.*, *Sullivan v. State*, 564 S.W.2d 698 (Tex. Cr. App., 1977)

²⁷*Rains v. State*, 604 S.W.2d 118 (Tex. Cr. App., 1980)

²⁸*United States v. Ventresca*, 380 U.S. 102 (1965)

²⁹Tex. Code Crim. Proc. art. 14.03

³⁰Tex. Code Crim. Proc. art. 14.04

³¹Tex. Code Crim. Proc. art. 14.01 and art. 14.02

³²*Johnson v. State*, 912 S.W.2d 227 (Tex. Cr. App. 1995), *Wooden v. State*, 886 S.W.2d 385 (Tex. App. -- Houston [1st Dist.] 1994, no writ)