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Domestic Violence Evidence Issues

I. What Is Hearsay?

Problems

Which of the following statements constitutes hearsay, inadmissible for substantive purposes unless within a hearsay exception?

Neighbor testifies that she heard a commotion in the yard next door and heard the following statements by Sally, the alleged victim.

1. *"Your friends are no good. They're always drinking and always getting you to drink with them."*

2. *After the victim made the statements in a., the neighbor heard a smacking noise and heard Sally say, "Ouch. Stop."*

3. *The next day the neighbor saw Sally and asked her what happened. Sally said that her husband had hit her.*

Short Answers

1. Admissible if offered to show its effect on the defendant. Then, statement is not offered for its truth and is not hearsay.

2. Admissible. Statements are not assertions of fact but rather are exclamations and imperatives.

3. Not admissible unless within an exception to hearsay rule. Statement is assertion of fact offered for truth of fact asserted.

Rationale for Hearsay Rule

"We are interested in the declarant's credibility . . . when the out-of-court statement is being used to prove the truth of the assertion. In that circumstance, the evidence's value depends on the *credibility of the out-of-court declarant.*" ROBERT P. MOSTELLER ET AL., NORTH CAROLINA EVIDENTIARY FOUNDATIONS 289 (1998). Cross-examination of the out-of-court declarant therefore may be necessary to expose any possible errors of perception, memory, or sincerity by the declarant.

"On the other hand, if the proponent does not offer the out-of-court declaration for its truth, the opponent does not need to cross-examine the declarant. If the declaration is logically relevant on some other theory, the evidence's value usually depends on the *credibility of the in-court witness.*" *Id.* (emphasis added). Cross-examination of the in-court witness is therefore usually sufficient to establish whether he or she heard and remembered the statement correctly and is telling the truth about the statement.

Definition of Hearsay

<u>Assertive statement</u>

See, e.g., State v. Caddell, 287 N.C. 266 (1975) (cry of badly battered girl, "Please help me," not offered to prove truth of matter stated and thus was not objectionable as hearsay).

<u>Offered for truth of matter asserted</u>

See 2 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE [hereinafter BROUN] § 195, at 11–14 (5th ed. 1998) (declarations of one person may be admitted to prove particular state of mind of another person who heard them).

II. Hearsay Exceptions: Unavailability Irrelevant

The hearsay exceptions in Rule 803 are recognized because they deal with statements that carry an inference of reliability or sincerity; therefore, the availability or unavailability of the witness is not as critical.

A. Rule 803(2): Excited Utterance

Problems

In the following examples, which of the statements are admissible under the exception for excited utterances?

4. *A police officer seeks to testify that on the day of the alleged assault he went to the victim's house after being informed by the police dispatcher that a woman at the victim's address had called 911 and said, "My boyfriend is hitting me. Please help."*

5. *The officer also seeks to testify that fifteen minutes after the call to 911, he arrived at the victim's address and asked the victim what happened. The victim said, "I called 911 about my boyfriend." She pointed at the defendant and said, "That's him. He's the one who hit me." The victim was visibly upset and agitated.*

6. *On cross-examination of the officer, defense counsel asks the officer about what the defendant said in response. The defendant had said, "She was the one who came at me. All I did was push her away to defend myself, and she fell." The boyfriend was also visibly upset and agitated.*

7. *The state offers the testimony of the victim's coworker, who says that the day following the incident, the victim was crying. The coworker asked the victim why she was upset, and the victim said, "My boyfriend hit me yesterday."*

Short Answers

4. To be admissible, both the caller's and dispatcher's statement must satisfy a hearsay exception. The caller's statement to 911 may satisfy the requirements for an excited utterance, particularly if the officer's observations substantiate the startling event (the assault) and the victim's state of excitement. The dispatcher's statement would also have to satisfy a hearsay exception, perhaps the exception for present sense impression (see below).

5. Maybe. The officer's testimony about his or her observations may be important in establishing the requirements for an excited utterance.

6. Maybe. May be comparable to statement in 5. and qualify as excited utterance. Also, statement may be admissible to show that defendant did not agree with alleged victim's statement.

7. Inadmissible under the excited utterance exception because too much time has passed between the event and the statement.

Excited Utterances

This exception is a variation of the old *res gestae* doctrine (statements so closely connected to occurrence as to be part of event). The exception does not track that doctrine precisely, however. For the excited utterance exception to apply, there must be (a) a sufficiently startling experience suspending reflective thought and (b) a spontaneous reaction, not one resulting from reflection or fabrication. *See State v. Fullwood,* 323 N.C. 371 (1988) (reciting requirements), *vacated on other grounds,* 494 U.S. 1022 (1990).

Factors to consider in evaluating whether a reaction is spontaneous include: lapse of time (perhaps the most important); whether the statement was made at the scene or elsewhere; whether the statement was elicited in response to questioning or spontaneously uttered; the declarant's appearance at the time; the nature of the event; and the declarant's conduct afterward. *See, e.g., State v. Murillo,* 349 N.C. 573 (1998) (statement by victim that defendant had held gun to her head was admissible as excited utterance where victim called brother-in-law immediately after incident, her voice was cracking, and she was crying); *State v. Safrit,* 145 N.C. App. 541 (2001) (defendant's statement to sister 25 minutes after altercation not admissible under excited utterance exception even though sister testified that defendant was in state of panic, was very upset, was acting hysterically, and was bleeding from back of head and side; defendant had left scene and had clear motive for fabrication); *State v. Kerley,* 87 N.C. App. 240 (1987) (statement made within eight to fifteen minutes after outbreak of fire in house in which declarant had been sleeping, qualified as excited utterance).

Present Sense Impression

R. 803(1) creates a separate exception for present sense impressions—that is, a statement describing an event made while the declarant was perceiving the event or immediately thereafter. *See United States v. Peacock,* 654 F.2d 339 (5th Cir. 1981) (relying on federal version of rule, court allows testimony about statements made by person about telephone conversation immediately after conversation ended), *vacated in part on other grounds,* 686 F.2d 356 (5th Cir. 1982).

B. Rule 803(3): Then-Existing State of Mind

Problems

In the following examples, which of the statements are admissible under the exception for statements of then-existing state of mind?

8. *Neighbor testifies that two days before the alleged assault the victim said, "I'm scared of Rob. He's been drinking again."*

9. *A neighbor seeks to testify that a couple of days after the alleged assault the victim said, "I'm scared of Rob after what happened the other day."*

Short Answers

8. Probably admissible under NC cases holding (a) that factual statements accompanying statement of emotion are admissible to explain statement of emotion and (b) that victim's state of mind before event are relevant to relationship between victim and defendant.

9. Unclear. Proponent must show that victim's state of mind after event is relevant to issue in case.

Statements of Then-Existing State of Mind

For this exception to apply, (a) the statement must show the declarant's state of mind, (b) the declarant's state of mind must be a relevant issue, and (c) the potential for unfair prejudice must not outweigh the statement's probative value. *See State v. Hipps,* 348 N.C. 377 (1998) (reciting requirements).

In evaluating whether a statement shows the declarant's state of mind, the North Carolina courts have broken statements into three categories.

- *Statements reciting emotions* are generally admissible (assuming the other conditions of the exception are met).
- *Statements reciting emotions and the facts underlying those emotions* have been admitted in several cases. The facts serve to demonstrate the basis for the emotions only.
- *Statements reciting mere facts* are generally inadmissible under this exception. However, some cases have admitted statements of fact that do not explicitly include a statement of the declarant's state of mind if the statements indicate the declarant's state of mind.

Compare State v. Lesane, 137 N.C. App. 234 (April 4, 2000) ("[O]ur courts have created a sort of trichotomy in applying Rule 803(3). Statements that recite only emotions are admissible under the exception; statements that recite emotions and the facts underlying those emotions are likewise admissible; but statements that merely recite facts do not fall within the exception.") *with State v. Jones,* 137 N.C. App. 221 (April 4, 2000) ("our courts have repeatedly found admissible under Rule 803(3) a declarant's statements of fact that indicate her state of mind, even if they do not explicitly contain an accompanying statement of the declarant's state of mind").

When is state of mind a relevant issue? In several homicide cases, witnesses have been permitted to testify to the deceased victim's declarations about his or her state of mind in relation to the defendant, such as fear or alienation, on the ground that the declarations show the relationship between the victim and defendant before the killing, which in turn bears on the defendant's possible motive for the killing. *See* 2 BROUN § 217, at 87–89 (citing cases, but questioning relevancy of declarations in some of cases).

C. Rule 803(4): Medical Diagnosis or Treatment

For a discussion of recent cases interpreting this exception, which have arisen primarily in cases involving alleged abuse of children, *see* John Rubin, *Child Evidence Issues,* at 5–6, at http://ncinfo.iog.unc.edu/programs/crimlaw/faculty.htm (last updated Jan. 2002).

D. Rule 803(6) and (8): Business and Public Records

Problems

In the following examples, what evidence is admissible under the hearsay exceptions for business or public records?

10. In a prosecution for an assault, the state offers the investigating officer's report. The report states that when the officer arrived at the victim's apartment, the victim said that the defendant had struck her in the face and tried to choke her. The report also states that the officer observed red marks on the victim's face and neck.

11. In a prosecution for assault, the state calls as a witness a staff person from the battered woman's shelter. The witness offers an intake form prepared by another staff person from the shelter who is no longer there. The witness testifies that these forms are routinely prepared by the shelter in the normal course of its operations. The intake form states that the victim said that the previous night the defendant had struck her and choked her. The victim is not present.

Short Answers

10. Inadmissible. Even if the victim's statements to officer constitute an excited utterance, the report itself constitutes a second level of hearsay. Police reports are specifically excluded from the exception for public records when offered in a criminal case. For this reason, the officer's observations of the victim's injuries are also inadmissible.

11. Should be inadmissible. Only the staff person who prepared the report had a business duty to be accurate; the victim had no such duty. The state also may be unable to overcome the new privilege for communications between a domestic violence shelter and domestic violence victim.

Business and Public Records

"The underlying theory of the exception [is] that the business environment encourages the making of accurate records *by those with a duty to the enterprise*." 2 BROUN § 225, at 112 n.475 (emphasis added); *but see State v. Scott,* 343 N.C. 313, 471 S.E.2d 605 (1996) (intake form of home for abused women and children, filled out by resident after she arrived, was properly admitted even though resident had no business duty in filling out form).

The principal effect of having separate exceptions for business and government records is to prevent the use of the business records exception to admit police records in criminal cases. Like entries in business records, entries in government records still must be by someone with a duty to report. *See State v. Harper,* 96 N.C. App. 36 (1989) (investigating officer's summaries of third parties' declarations to him as to where to obtain drugs constituted inadmissible hearsay in criminal case; matters observed by officer and contained in his report were excluded from hearsay exception for public records and reports).

Communications with Domestic Violence Program

G.S. 8-53.12 establishes a new privilege for communications between a domestic violence or sexual assault victim and an agent of a domestic violence shelter or rape crisis center. The victim may waive the privilege. Or, the court may override the privilege and order disclosure in a criminal case if the information is relevant, material, and exculpatory; not offered for character impeachment purposes; and not cumulative or not already available to a party. For a discussion of other privileges that may arise in domestic violence cases, *see infra* pp. 19–20.

E. Hearsay Exceptions: Unavailability Required

The hearsay exceptions in Rule 804 depend to a greater degree on a showing of necessity; therefore, the proponent must show that the declarant is unavailable.

Problems

12. *Unable to satisfy any other hearsay exceptions, the state offers under the residual hearsay exception the officer's investigative report, which contains both the officer's observations and the victim's statements to the officer.*

Short Answers

12. Automatically inadmissible if state has failed to give notice of intent to offer statement.

Residual Hearsay

Rule 804(a): Unavailability

Although North Carolina's evidence rules contain a residual hearsay exception that does not require unavailability (Rule 803(24)), evidence is more likely to be admissible if the witness is shown to be unavailable. *See* 2 BROUN § 241, at 159; *Idaho v. Wright,* 497 U.S. 805 (1990) (residual hearsay exception is not firmly rooted exception for confrontation clause purposes so proponent must show particularized guarantees of trustworthiness); *State v. Wagoner,* 131 N.C. App. 285 (1998) (under Confrontation Clause and Art I, § 23 of state constitution, showing of trustworthiness and necessity required to admit hearsay under residual hearsay exception).

Rule 804(a) lists the five grounds for a finding of unavailability.

For cases under Rule 804(a)(2) (witness is unavailable if he or she persists in testifying despite court order to do so), *see State v. Linton,* 145 N.C. App. 639 (2001) (for person to be considered unavailable as witness under R. 804(a)(2), person must refuse to testify after court orders person to do so).

For cases under Rule 804(a)(3) (witness is unavailable if he or she testifies to lack of memory of subject matter of statement), *see State v. Miller,* 330 N.C. 56 (1981) (as long as witness remembers general subject matter, lack of memory as to details does not make hearsay admissible).

For examples of cases under Rule 804(a)(4) (declarant is unable to testify because of then-existing physical or mental illness or infirmity), *see State v. Carter,* 338 N.C. 569 (1994) (trial judge did not err in finding witness unavailable where witness refused to testify and witness's former psychiatrist testified that compelling her to testify would exacerbate her depression, for which she had previously been hospitalized, and could lead to suicide); *State v. Chandler,* 324 N.C. 172 (1989) (four-year-old child victim unavailable to testify when she was so overcome with fear that she was unable to respond to prosecutor's questions).

See also Rule 804(a)(5) (declarant is absent from hearing and proponent of statement has been unable to procure his or her attendance by process or other reasonable means).

Rule 804(b)(5): Residual hearsay conditions

In addition to showing the declarant's unavailability, the proponent must satisfy six conditions. *See State v. Smith,* 315 N.C. 76 (1985) (notice; hearsay not covered elsewhere; trustworthy; material; more probative than other evidence reasonably obtainable; interests of justice). In considering whether a statement has sufficient guarantees of trustworthiness, courts consider various factors. *See Idaho v. Wright, supra* (noting that courts have considered spontaneity of statements, consistent repetition, mental state of declarant, use of terminology unexpected of person of similar age, and lack of motive to fabricate); *State v. Isenberg,* ___ N.C. App. ___, 557 S.E.2d 568 (2001) (court should consider among other factors: (1) assurances of declarant's personal knowledge of underlying events, (2) declarant's motivation to speak truth or otherwise, (3) whether the declarant has ever recanted statement, and (4) practical availability of the declarant at trial for meaningful cross- examination); *State v. Triplett,* 316 N.C. 1 (1986) (ordinarily giving of written notice on first day of trial is insufficient to satisfy notice requirement; however, notice requirement satisfied here because, in addition to written notice, prosecution had notified defendant of intent to use statements three weeks before trial and defendant had filed motion in limine to exclude statements).

II. Non-Substantive Uses of Out-of-Court Statements

Problems

13. State calls the victim in assault prosecution, and victim states that she does not remember being hit or choked by the defendant. The state asks the victim whether she told the officer that the defendant had hit and choked her. The victim continues to deny any recollection of that happening. The state calls the officer, and the officer seeks to testify to the victim's statements to him. Defendant objects both to the questions by the state of the victim and the calling of the officer to testify to the victim's statements.

Short Answers

13. Depends on the circumstances. Although a party may impeach his or her own witness, a party may not call witness as mere subterfuge for introducing prior statements.

Non-Substantive Uses

To refresh recollection

A witness may refer to a writing or object during or before his or her testimony to refresh recollection. The writing or object need not be admissible in evidence. Nor must it be something that the witness prepared himself or herself. *See* 1 BROUN § 172, at 567–68. The adverse party has a right to have the writing or object produced if used during his or her testimony; production is in the judge's discretion if the witness refreshes his or her recollection before testifying. *See* Evidence Rule 612.

To impeach witness

A party may impeach his or her own witness with prior statements if impeachment is not a mere subterfuge for using the prior statements. *See* Evidence Rule 607; *State v. Hunt,* 324 N.C. 343 (1989) (state may not call witness that it knows will not reiterate prior statement for purpose of impeaching witness with that statement); *State v. Riccard,* 142 N.C. App. 298 (2001) (to introduce extrinsic evidence of inconsistent statement as opposed to merely examining witness about statement, impeachment must concern matter that is not collateral).

To corroborate

If a person testifies, a party may offer prior consistent statements to corroborate the person's testimony. *See* 1 BROUN § 165, at 529–31 & n.502 ("prior 'consistent statements' are admissible only when they are in fact consistent with the witness's trial testimony").

III. Prior Acts

Problems

14. In a prosecution for assault on a female, the state offers certified records showing that defendant was convicted twice for assault on a female within the last two years against other women. The state also asks the victim whether the defendant had assaulted her previously, and the victim testifies about an incident within the last few months in which the defendant struck her. The defendant has not testified.

15. Would your answer to 14. be different if the evidence were offered in a 50B action for a domestic violence protective order?

16. In an assault prosecution, the defendant takes the stand and the state seeks to cross-examine him about a conviction for driving while impaired within the last ten years and prior assaults against other women for which he was not charged.

Short Answers

14. The convictions involving the two other women constitute inadmissible character, or propensity, evidence unless the acts underlying the convictions are relevant to a permissible non-character purpose. The North Carolina courts likely would allow evidence of the previous assault against the victim as non-character evidence, although the non-character purpose of the evidence is not entirely clear.

15. Yes. Although the prior convictions would still be inadmissible to show that the respondent had committed an act of domestic violence on the current occasion, they would be relevant in setting the terms of any DVPO (assuming that the court finds that the defendant had committed an act of domestic violence warranting issuance of a DVPO).

16. Prior convictions are admissible under R. 609 whether or not they bear on the defendant's credibility but must be a felony or Class A1, 1, or 2 misdemeanor, which DWI is not. The prior assaults are not admissible under R. 609 because they did not result in a conviction and are not admissible under R. 608 because they do not bear on credibility.

Prior Acts

Rule 404(b): Prior acts as non-character evidence

See State v. Elliott, 352 N.C. 663 (2000), *rev'g* 137 N.C. App. 282 (2000) (in prosecution for assault inflicting serious injury, assault by defendant three years earlier against victim admissible under 404(b) to show defendant's intent); *State v. Morgan,* 315 N.C. 626, 340 S.E.2d 84 (1986) (attack on third party three months earlier was inadmissible; court states that evidence would more likely be relevant to permissible purpose if prior attack had been on victim); *State v. Willis,* 136 N.C. App. 820, 526 S.E.2d 191 (2000) (in prosecution for common law robbery, mere conviction of common law robbery was insufficient to show one of permissible purposes under Rule 404(b)).

Rule 609: Impeachment by prior conviction

Rule 608: Impeachment by prior act showing dishonesty

See, e.g., State v. Call, 349 N.C. 382, 508 S.E.2d 496 (1998) (acts of domestic violence have no bearing on truthfulness or untruthfulness and are not admissible to impeach under Rule 608).

IV. Rule 806 Impeachment

Problems

17. *In an assault prosecution, the victim does not appear, and the officer is permitted to testify under the excited utterance exception that the victim told him that the defendant had hit and choked her. On cross-examination of the officer, defense counsel asks about the victim's prior convictions for possession of cocaine with intent to sell and deliver and assault inflicting serious injury. The officer states that he is unaware of any convictions, and the defendant offers certified copies of the victim's convictions.*

Short Answers

17. Admissible. The declarant is subject to impeachment as if he or she were present.

Impeachment of Declarant

See State v. Canady, 355 N.C. 242, 559 S.E.2d 762 (2002) (defendant should have been permitted to should have been permitted on cross-examination to ask state's witness, who had testified about hearsay statements of nontestifying witnesses, impeachment questions that would have been proper if the witnesses had testified); *State v. Small,* 131 N.C. App. 488, 508 S.E.2d 799 (1998) (court recognizes that under Rule 806 hearsay declarant is subject to impeachment as if he or she had testified at trial; court upholds use of prior inconsistent statement to impeach declarant).

V. Self-Defense

Problems

In an assault prosecution, the defendant testifies that the victim had been drinking, that he thought she was going to cut him with a knife when they were arguing, and that he was only trying to defend himself. He also offers the following evidence.

18. *Defendant's sister testifies that she used to be friends with the victim and that in her opinion the victim can be a violent person, particularly when she's been drinking.*

19. *Defendant's sister testifies that before the incident the victim said she was going to mess up the defendant if he didn't stop fooling around with other women.*

20. *Defendant's sister testifies that she saw the victim cut another person last month during an argument.*

Short Answers

18. Admissible to show victim was aggressor.

19. Admissible to show state of feeling of victim toward defendant.

20. Inadmissible unless defendant knew of incident or offers evidence for non-character purpose under R. 404(b).

Self-Defense

Defendant may offer opinion or reputation testimony about pertinent trait of victim's character to show victim acted in conformity with character, whether or not defendant knew of character trait. *See State v. Watson,* 338 N.C. 168 (1994) (explaining rationale for admissibility); *State v. Rummage,* 280 N.C. 51 (1971) (evidence of victim's violent character when intoxicated admissible).

Defendant may offer evidence of threatening statements by victim to show victim's intent, whether or not threats were known to defendant. *See State v. Allmond,* 27 N.C. App. 29 (1975).

Defendant may introduce prior bad acts of victim for same purposes as state may offer prior bad acts of defendant—for example, to impeach where relevant to credibility or for non-character purpose under R. 404(b). In self-defense case, defendant may also introduce prior bad acts if known to defendant and relevant to defendant's apprehension concerning victim. *See State v. Smith,* 337 N.C. 658 (1994).

VI. Privileges

Problems

21. Cross-warrants against husband and wife for assault are joined for trial. Both husband and wife assert the Fifth Amendment privilege, refusing to testify on the ground that their answers may incriminate them. The state asks the court to order them to testify.

22. In no. 21, state tries wife first for assault, and she is acquitted. In trial of husband, state calls wife as witness, and she asserts Fifth Amendment, taking position that her answers may result in additional charges being filed. The state asks the court to order the wife to answer.

23. Wife is willing to testify about alleged assault by husband, including statements made by husband before and during assault. Husband objects on grounds of husband-wife privilege.

Short Answers

21. Claims of privilege must be sustained. Defendant in criminal case has absolute right not to take stand.

22. Court may inquire to minimum extent necessary to determine whether answer might tend to incriminate and may deny claim only if there is no such possibility.

23. The spousal privilege does not apply to prosecutions for assaulting or communicating a threat to a spouse.

Privilege against Self-Incrimination

Defendants in a criminal case have an absolute right not to testify, and no adverse inference may be drawn from a defendant's failure to testify. *See* 1 BROUN § 133, at 443; G.S. 8-54 (codifies right of criminal defendant not to testify, stating that defendant "is, at his own request, but not otherwise, a competent witness"); *compare* `Baxter v. Palmigiano,` `425 U.S. 308 (1976) (Fifth Amendment did not forbid drawing of adverse inference against party who invoked privilege in civil proceeding where adverse inference could not be sole basis for adverse action).`

Other witnesses may be called to testify but have the right to refuse to answer questions that may tend to incriminate them. "[I]f it is immediately clear that an answer might tend to incriminate the witness, the claim should be sustained. Otherwise the judge may, in the absence of the jury, inquire into the matter to the minimum extent necessary to determine that a truthful answer *might* tend to incriminate, and should deny the claim only if there is no such possibility." 1 BROUN § 126, at 416 (emphasis in original); *see also State v. Huffstetler,* 1 N.C. App. 405 (1968) (if answer might incriminate as to other crimes connected to that to which defendant pled guilty, claim of privilege should be sustained).

Generally, a criminal defendant waives the Fifth Amendment privilege by electing to testify. Other witnesses do not waive privilege by taking stand, but if they testify to a part of facts constituting transaction court may compel answers to further questions relating to same transaction. *See* 1 BROUN § 126, at 415.

If the state grants a witness immunity in accordance with the procedures in G.S. 15A-1051 and -1052, the court may compel the witness to answer. *See also Murphy v. Waterfront Commission of New York Harbor,* 378 U.S. 52 (1964) (witness who testified pursuant to state grant of immunity was protected from use or derivative use of testimony by federal courts).

Spousal Privilege

Where the spousal privilege applies, the privilege may be waived only by the party against whom the communication is offered. *See State v. Holmes,* 330 N.C. 826 (1992). The statute governing the spousal privilege provides, however, that the privilege does not preclude a spouse from testifying in a prosecution for assaulting or communicating a threat (or for trespass). *See* G.S. 8-57(b); *see also State v. McKinnish,* 110 N.C. App. 241 (1993) (threat by one spouse to another not covered by spousal privilege because "not induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by such relationship"; prosecution permitted to introduce evidence of threat in prosecution for other offense).

Privilege for Communications with Domestic Violence Program

See supra pp. 8–9.