

## Criminal Domestic Violence Cases Involving Reluctant Victims

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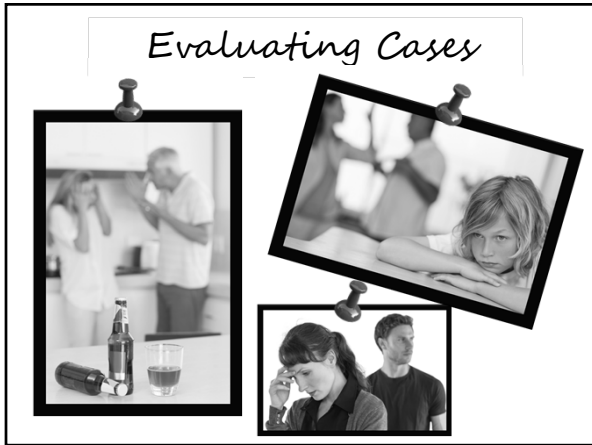
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### Types of Uncooperative Victims

- Denying victim
- Minimizing victim
- Coerced victim
- Self-blaming victim
- No-memory victim

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**Credibility Indicators**

- Why is what she initially said to the police credible?
  - Detail
  - Demeanor
  - Interest
  - Common sense
  - Corroboration

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**Possible Areas of Questioning**

- Living arrangements
- Financial dependence
- Size difference
- Prior arguments
- Prior history of violence
- Is she afraid of defendant? Would she lie for him?

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**Possible Areas of Questioning**

- How did she get to court today and how is she getting home?
- How does she feel about testifying?
- Breakdown the event – using impeachment methods if necessary
- Did she get a protective order?
- Why would she lie to police?

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**Possible Areas of Questioning**

- What communication has she had with defendant since event?
- Communication with defendant's friends/family?
- Has he or family made promises?
- Has anyone threatened her?
- With whom will she and her kids live after today?

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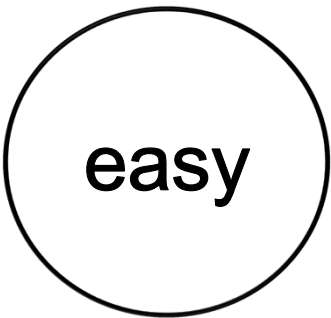
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**Biggest Legal Issue?**



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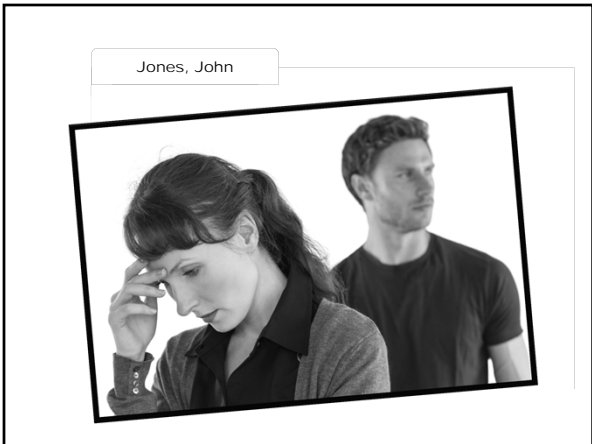
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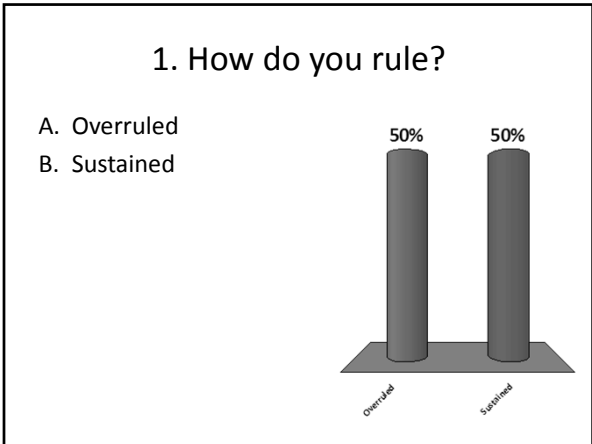
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- Past Recollection Recorded  
Rule 803(5)
1. Witness had personal knowledge
  2. Insufficient current recollection
  3. Record was made (or adopted) by witness when matter was fresh in memory and correctly reflects witness's knowledge
  4. If admitted, record may be read into evidence, but not received as exhibit unless offered by adverse party

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### Prior Inconsistent Statement

- Rule 607: Credibility of witness may be attacked by any party
- But impeachment is not permissible if it is subterfuge to get in otherwise inadmissible evidence
- Good faith and absence of subterfuge
  - Testimony extensive and vital to case;
  - Party calling the witness was surprised; or
  - Effective limiting instruction

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### Remember . . .

- Prior inconsistent statement is not **substantive** evidence.
- Only bears on witness’s credibility.

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### What about extrinsic evidence?

- Cannot introduce substance of prior statement to impeach witness’s **denial that she made statement**
  - Truth or falsity of that **denial** is collateral matter
- But if witness testifies inconsistently with prior statement, then **substance** of prior statement may be proved by extrinsic evidence—so long as prior statement was material

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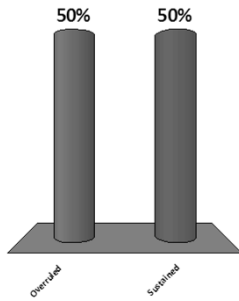
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2. How do you rule?

- A. Overruled
- B. Sustained



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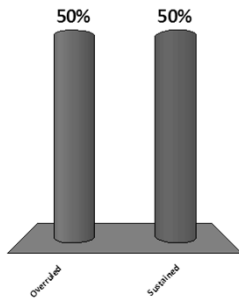
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3. How do you rule?

- A. Overruled
- B. Sustained



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**Crawford v. Washington**  
541 U.S. 36 (2004)

“Testimonial” hearsay statements by declarants who do not testify at trial may not be admitted unless the declarant is unavailable and there has been a prior opportunity to cross-examine.

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**Confrontation Clause Considerations**

- Are Sally’s statements to Officer Smith hearsay?
- Are Sally’s statements testimonial?

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**When is a statement testimonial?**

- Testimony = a solemn declaration used to establish or prove some fact
- Responses to police interrogation are testimonial if primary purpose is to establish facts for prosecution
- Statements to police/911 operators are non-testimonial if primary purpose is to address ongoing emergency

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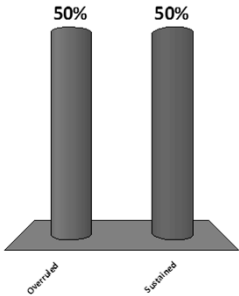
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4. How do you rule?

A. Overruled  
B. Sustained



Category	Percentage
Overruled	50%
Sustained	50%

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Forfeiture by Wrongdoing

- Based on equitable principle that person should not benefit from his own wrongdoing
- Defendant who secures the absence of a witness cannot then complain of inability to cross-examine witness

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Forfeiture by Wrongdoing

- *Davis v. Washington*, 547 U.S. 813 (2006)
  - Domestic violence crime “is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial.”
- *Giles v. California*, 544 U.S. 353 (2008)
  - Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecution.
    - Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help are “highly relevant” to forfeiture inquiry
    - As is evidence of ongoing criminal proceedings at which victim would be expected to testify

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### Forfeiture by Wrongdoing

- State must show that defendant caused witness to be absent for the purpose of preventing witness from testifying
- What is the standard?
  - Preponderance of the evidence?
  - Clear, cogent and convincing?
- Do the rules of evidence apply?
  - State courts disagree

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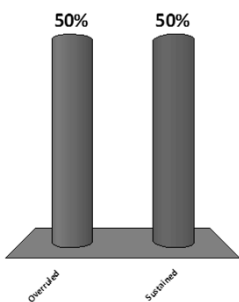
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### 5. How do you rule?

- A. Overruled
- B. Sustained



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### Rule 45(c)(2)

Where the subpoena commands any custodian of . . . hospital medical records . . . to appear for the sole purpose of producing certain records in the custodian's custody, the custodian subpoenaed may, in lieu of personal appearance, tender to the court in which the action is pending . . . certified copies of the records requested together with a copy of the subpoena and an affidavit by the custodian testifying that the copies are true and correct copies and that the records were made and kept in the regular course of business . . .

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### Rule 803(6)

Records of Regularly Conducted Activity.--A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, **all as shown by the testimony of the custodian or other qualified witness**, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

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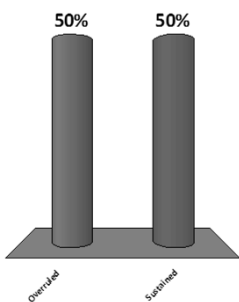
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### 6. How do you rule?

- A. Overruled
- B. Sustained




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### Statements to Friends & Family

- *Giles v. California*, 554 U.S. 353, 376 (2008):  
 “Statements to friends and neighbors about abuse and intimidation and statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules.”
- NC court of appeals has found statements made in the context of a private conversation, outside the presence of any police officer, to be non-testimonial and outside the scope of *Crawford*.  
 – See, e.g., *State v McCoy*, 185 N.C. App. 160 (2007);  
*State v Williams*, 185 N.C. App. 318 (2007)

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