

BARRIERS TO SURVIVOR PARTICIPATION IN CRIMINAL PROSECUTIONS OF DOMESTIC VIOLENCE CASES

by the
Domestic Violence Project, Inc./SAFE House¹

Introduction

This article attempts to identify the kinds of barriers typically experienced by survivors at various points in the criminal process. These barriers can be categorized in the following general ways:

- 1) *Assailants' behavior*: What assailants do or don't do oftentimes prevents survivors from testifying. This behavior can run the gamut from promises of change to threats, stalking and new assaults.
- 2) *Environmental barriers*: The circumstances in each particular survivor's life can pose barriers to her participation in the criminal prosecution of her assailant. These circumstances can include financial constraints, religious beliefs, the existence or absence of family support or family pressure, and social stigma.
- 3) *Systemic barriers*: These are barriers created simply by the way in which the criminal justice system operates and the manner in which actors within that system -- police, prosecutors, judges, probation officers and the like -- interact with the survivor and her assailant. Court proceedings can be frightening and intimidating for laypeople under the best of circumstances. The process can be made much worse when subpoenas are served in an untimely way, when police or prosecutors openly display contempt or disdain for survivors who appear reluctant to help convict the batterers, when courts issue bench warrants for survivors who fail to appear in contravention of subpoenas, or when the assailant, the assailant's family, and/or the assailant's attorney pressure or intimidate the survivor in or outside the courtroom.²

¹ Legal Advocacy Department: Lore A. Rogers, J.D., Erin House, Lisa Farst, Brenna Burns, Martha Rehder, Joy Miller, Shanon Muir, Neha Lall, Joyce Freeman, Kristin Schultz and Shira Katz, and by Susan G.S. McGee, Executive Director

² It is important to realize that these categories are not mutually exclusive. The barriers in one category often overlap with and compound the effect of a barrier in another category. Consider, for example, the situation where an assailant with "no contact" conditions of his bond is making repeated phone calls to his victim/partner. In those phone calls, he has begged her not to testify against him and also attempted to make her feel guilty by reminding her how hard it would be for their children to have their father in jail. Further, the assailant has not paid the house

Those factors most often described to us by survivors as barriers to their participation in criminal prosecution are as follows:

I. Systemic Barriers

A. *Subpoenas*

Survivors receive little or no notice when they are required to come to court. We often hear from survivors that they were served with a subpoena in the few days before the trial. With such short notice, it is extremely difficult to arrange for childcare, time off work, and transportation. Not only does the short notice create logistical problems, but it also denies survivors the necessary time to emotionally prepare for testifying. There is often not enough time for survivors to arrange for supportive people to be present at the trial. Survivors also need time to safety plan for the potential repercussions of their testimony.

Subpoenas served late at night. Survivors often report feeling harassed or frightened when an officer arrives unexpectedly at their house in the middle of the night to serve a subpoena. While this is often because of officers' schedules, survivors may not understand this and may feel as though they are being treated disrespectfully.

Survivors' experiences with officers serving subpoenas. Survivors often report that they are served with subpoenas in a gruff and unfriendly manner. Survivors are often handed subpoenas with little or no explanation about what it means. The officer may also stress possible sanctions for non-compliance, making survivors feel threatened by the system. These threats only reinforce survivors' perceptions that they are being put on trial or are being blamed by the system. They often end up feeling as if the system is unsympathetic and that they are being treated as criminals themselves. A friendly demeanor and a few words of explanation could dramatically reduce this negative reaction. It is important that officers know the varied reasons why a survivor might not want to testify, and understand how to deal with these responses so they do not alienate her. It is important for survivors hear from the officers that they are simply witnesses and not on trial themselves.

payment since being arrested. The batterer's behavior (violating bond, manipulating and pressuring his partner, not making house payments), the environmental context (the survivor has children with her assailant, she is unable to pay for the roof over their heads without the batterer) may combine with systemic barriers: the survivor may not know there is a "no contact" condition of bond, may not know what such a condition means, may not know how to report a violation, and may not be successful in having the assailant arrested on the violation if she does report it.

B. Past experience and perceptions of the criminal justice system.

Many times, survivors have already had unpleasant contact with actors in the criminal justice system. Other times, women have pre-conceived beliefs about how the system deals with domestic violence based on what friends or relatives may have experienced. A survivor's assailant may have been arrested before, and she may feel as though he received no consequences from the system. With a negative view of the court system, it is likely that survivors would not have high expectations of the legal process and be less willing to participate in that process.

In particular, communities of color have a long-standing distrust of the legal system. Negative interactions with police or court officials reinforce this distrust and lead a survivor to feel that the system is not there to protect her.

The initial interaction between the arresting officers and the survivor may also have lasting implications in her perception of the criminal justice system. Because a survivor is likely to speak with the police immediately after she has been assaulted, if the arresting officers make her feel supported and act as if they believe her, she is much more likely to have positive perceptions of what the system can do to protect her. On the other hand, if a survivor feels blamed or as though her claims are not being taken seriously, she is much less likely to want to follow through with the court case.

C. Unfamiliarity with the legal process and court procedures_

More often than not, prosecutors do not brief survivors ahead of time about what will happen when they get to court, leaving survivors uninformed about the legal process. Survivors don't know who the prosecutor is, what kinds of questions will be asked, or what to expect when they are in court. A lot of this confusion and uncertainty could be alleviated if prosecutors were able to communicate with survivors before trial. Currently, most prosecutors meet with survivors only a few minutes before the trial, if at all. Survivors would feel more prepared if they were contacted by prosecutors and informed about the status of their assailant's case significantly before the day of trial.

D. Time delay between assault and prosecution

If assailants have been violent, threatening, or stalking while awaiting prosecution, survivors may not feel as if any potential sentence from the court case could adequately protect them. Their feelings of fear are especially present when there have been bond violations that have not been sanctioned. When

survivors see that it has taken months for their assailants to be held accountable for an assault, survivors often end up feeling as if nobody in the system cares about what happened to them.

By extension, they also feel that nobody will care enough about them in the future to help protect them if they take the stand to testify. These perceptions of the system's inability to protect survivors are reinforced by the fact that so few assailants are held in custody between conviction and sentencing dates.

On the other hand, some batterers are on their best behavior while a criminal case is going on. Therefore survivors are reluctant to do anything that they believe might cause the violence to escalate once again. She might fear that testifying will incite her assailant into threatening or assaulting her. In some cases, if survivors are no longer with their assailants and he has left her alone, survivors feel there is no point in testifying if it might bring him back into contact with her. By testifying, survivors put their well being in jeopardy, especially if their assailants have left them alone while the criminal case was pending. It is also very difficult emotionally for survivors to come physically face-to-face with their assailants after they have left them.

II. Batterer Behavior

A. Threats/Coercion by batterers

If a batterer knows that preventing his partner from testifying means that he will probably be exonerated, there is great incentive to use a range of coercive and threatening tactics until something works. In the past, when women were allowed to ask that charges be dropped, assailants could simply pressure their partners to drop the charges. Now that the prosecution has a "no-drop" policy, though, assailants must coerce their partners into changing their stories. Some survivors say there was no assault, or that they instigated the assault, or made up the assault for the purpose of revenge.

Batterers make a wide variety of threats to their partners about what will happen to them if they participate in the trial, or if they do not actively work to get him off. Some batterers coerce their partners by threatening physical harm, rape, or murder. Other typical threats focus on economic deprivation. A batterer may say that he will lose his job because he will go to jail and she and the children will suffer the economic consequences. Some of batterers' money-related threats could be prevented if there were bond conditions requiring them to pay for childcare, bills, and food.

Extortion is also common. A batterer may threaten to report his partner to Children's Protective Services or reveal any illegal act she has ever committed. Threats against children, such as kidnapping or using the legal system to get custody, are common as well.

While some batterers threaten to hurt their partners or their children if they proceed with the case, more pervasive are everyday threats and tactics that batterers use to make life difficult for their partners. Sometimes batterers do not need to actively threaten or pressure survivors, because their partners have learned the batterers' rule of absolute loyalty--they know they must work to protect their assailants at all times (Note: see Barbara Hart's article, "Rule Making in Battering Relationships").

While batterers have some of the most direct opportunities to badger their partners, the assailants' counsel may also threaten them. Oftentimes, survivors may not know the difference between the prosecutor and the opposing counsel, and may see defense counsel as part of the court system. Survivors often do not know that they do not have to talk to the opposing counsel. A batterer's family members and friends might also harass the survivor, particularly when there are bond conditions or a Personal Protection Order prohibiting contact with the assailant himself. Harassment by family members sometimes even happens in the courtroom.

B. Promises of change

A batterer may also coerce and manipulate his partner by doing everything he can to please her -- he attempts to persuade her that he is still the person that she fell in love with, rather than the person who assaulted her. This sort of manipulation often continues throughout the court proceedings and makes it appear as though the assailant is taking responsibility for his behavior and promising to change. Because their behavior is calculated and not impulsive, it is easy for batterers to stop being abusive for a few weeks or even several months. It is often at this time that assailants enter counseling, start going to church, and begin to enter drug and alcohol treatment programs to convince their partners that they want to change. Some survivors think their assailants are really changing at this time and do not want to "punish" their partners further by putting them on trial.

C. Batterers lie to their partners.

Batterers deliberately mislead their partners in many different ways. They might lie to their partners about the severity of their sentence, oftentimes telling their partners that they will be sent to jail, when in reality they are unlikely to receive any jail time at all. A batterer may tell her the wrong court dates, that charges have been dropped, or that he is pleading guilty so she does not have to be present.

A batterer might emphasize how difficult the process will be for her. He will tell his partner that no one will believe her. He may threaten her by saying he will claim self-defense, or accuse her of child abuse. He also may claim that the prosecutor will charge *her* based on her testimony, and sometime the batterer's attorney will support his story. As well, batterers threaten to reveal embarrassing personal history -- such as past drug use, romantic or sexual affairs -- about their partners in court.

Batterers also lie about the events in question. They often use the time between the assaults and the trial to manipulate their partners into "remembering" the assault a different way. A batterer may eventually convince his partner that they were both equally violent on the night of the assault, that *she* started it, or that he was acting in self-defense. This manipulation is often successful because of the ongoing emotional abuse the survivor has endured throughout the relationship.

III. Environmental Barriers

A. Concerns about children's testimony

Courts are intimidating for both survivors and her children. This fear is compounded by the fact that the child might be forced to testify against someone whom they may love. Many survivors recognize this and decide to spare their children the pain of testifying. Survivors may be trying to protect their children from feeling responsible for the problems in the home. They may also feel that testifying may put their children in danger. In special cases, a survivor might want her child to testify, but not in front of her assailant. If the court could always accommodate these important concerns, survivors might feel safer bringing their children in to court to testify.

B. Survivors first concern is for the violence and abuse to stop

Most of the time survivors call the police because they are afraid and need immediate police protection. They are not focusing on possible outcomes of police intervention or thinking: "I want my partner convicted and sent to jail" at

the time they call 911. Most survivors still care about their partners at the time of the first police intervention. Although they want the violence to stop, they are not ready to participate in the court process. Some survivors call the police in the hope that it will make their assailants believe that the violence is being taken seriously, and that he will stop being violent. This does not mean that a survivor always wants there to be criminal consequences. She may simply want her assailant/partner to understand that his behavior is wrong and to get "help." She may not have come to the point where she perceives his behavior as deliberate and meant to control her.

Conclusion

In assessing the factors that make it difficult for survivors to participate in criminal prosecution of their batterers for domestic violence offenses, it is important to keep in mind that every survivor is first and foremost an individual. While we can identify frequent or common barriers for many or most survivors, this does not mean that every survivor will view the same event or consequence as a barrier to prosecution. Each survivor is in a different stage in her relationship with her partner-assailant and the stage of that relationship may mean she is more or less willing to participate given certain consequences.

As well, the level of violence and threats used by her partner may affect a survivor's willingness to play a part in criminal prosecution. The same information given to two different survivors may result in one being willing to participate and the other not. For example, the typical sentence for a first conviction of a misdemeanor domestic violence offense in Washtenaw County is a term of probation with conditions that include going through a batterers' intervention program. The batterer is not likely to receive any jail time. A survivor who is in the early stages of a relationship, whose assailant has "only" pushed or shoved her and has acted remorseful, may participate in prosecution because she believes her batterer will change with "counseling" and because he won't go to jail. This first survivor may perceive that participation in prosecution will enhance her safety, because she sees the consequences as likely to change her assailant while allowing the relationship to continue. She believes that her partner won't retaliate against her -- either through violence or ending the relationship -- since he is not being "unduly" punished.

On the other hand, a survivor who is in the later stages of the relationship, whose assailant has used more severe forms of violence, and who no longer believes that he is likely to change, may not be willing to participate in prosecution if her batterer is not likely to serve a significant period of time in jail when convicted. One must remember that the batterer may have been arrested

for a simple assault (slapping, hitting, punching) but have used near lethal violence in past, unreported, assaults. This second survivor has a clear understanding of the lengths to which her partner may go to punish her for disloyalty. She thus may perceive that participation in criminal prosecutions will not enhance her safety, when her assailant will not be imprisoned or jailed if she testifies against him.

In attempting to reduce or eliminate barriers to survivor participation in criminal prosecution, then, actors within the legal system must view that survivor as an individual and attempt to learn as much as possible about the context within which she is making decisions to enhance her safety.

We hope that in identifying some of the barriers for survivors, we can work together with others concerned about the safety of survivors and their children to reduce and eliminate those circumstances that prevent many of them from participating in criminal prosecutions. However, we must at the same time recognize that it will not be possible to remove *all* barriers for *all* survivors in *all* cases. While it is important to work to reduce these barriers, focusing solely on survivor participation at trial continues to place the burden of successful prosecution on the wrong party: the victim of the crime. Instead, we must continue to find ways to hold batterers accountable when survivors do not participate in one or more stages of criminal prosecution.