When a Defendant Forfeits the Right to Confront Witnesses:

Nevada Supreme Court Sets Important Precedent for Domestic Violence Prosecutions

BY CHAD PACE, ESQ.

The U.S. Supreme Court first considered the forfeiture doctrine in the 1878 case, *Reynolds v. United States*.[1] In *Reynolds*, an accused polygamist concealed one of his wives to preclude subpoena service. The court held that Reynolds forfeited his Confrontation Clause rights, and the court admitted the wife's prior testimony into evidence.[2] The court stated, "The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away."

More than 140 years later, the Nevada Supreme Court took its first look at the forfeiture doctrine. *State v. Anderson* recognized, "a defendant may forfeit the right to confrontation. In particular, 'one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.'"[3]

"No Face, No Case." Chronic Witness Tampering is Widespread in Domestic Violence Prosecution.

Prosecutors and advocates have known for many years that witness tampering is a significant problem in domestic violence cases, and that victims recant or refuse to appear at trial because of a perpetrator's threats of retaliation. The U.S. Supreme Court recognized that domestic violence is a crime "notoriously susceptible to intimidation or coercion of the victim to ensure she does not testify at trial."[4] As many as 80 percent of domestic violence victims recant initial accounts of abuse and do not participate in prosecution after a batterer's interjection and influence.[5]

After batterers dissuade their victims' appearance, prosecutors must often proceed to trial without the victim's participation.[6] Nevada Revised Statue 200.485(9) requires prosecutors move forward with a case even without victim testimony unless the prosecutor knows the case cannot be proven or that the arrest was not supported by probable cause. Victims cannot "drop the charge" in Nevada. Thus, many cases move forward without victim participation. Photos, nontestimonial statements and medical records are often powerful evidence regardless of the victim's ability to participate in the case. Nonetheless, juries want to hear from the victim.[7]

The victim's problematic absence is compounded by the Confrontation Clause. Face-to-face confrontation is the cornerstone of Sixth Amendment Confrontation Clause jurisprudence.[8] Without the victim's presence, her prior statements to law enforcement and investigators are most often barred from evidence by the Confrontation Clause. Thus, the jailhouse slang saying "no face, no case" holds true for the majority of cases. Defendants have every incentive to preclude their victim's testimony at trial.

Beyond Violence: The Soft-Touch Approach

Perhaps surprisingly, batterers rarely use direct threats to influence and dissuade victims. Batterers tamper with victims often via phone calls, letters and text

messages from jail.[9] In a recent study of 25 heterosexual couples, in which the male perpetrator was detained for felony domestic violence, only one perpetrator directly threatened the victim. Instead, batterers regularly use sophisticated, psychological strategies to persuade their victim not to testify.[10] For example, batterers instruct victims on what should be said in court or done before prosecution. Batterer's instruction is a "minimization" technique used to downplay the abuse, evoke sympathy and encourage the victim's recantation. The soft touch is used more often and is more effective than a direct threat. A perpetrator's repetitious minimization influences the victims into re-defining the abuse narrative, recanting prior statements and refusing to appear at trial.

Attempted Murder and Witness Tampering in Anderson[11]

The Nevada Supreme Court considered the forfeiture doctrine in *State v. Anderson*. The state represented that the defendant procured a witness's absence via a call from a jail telephone by telling her to disappear and to leave her phone to avoid authorities tracking her. The state then moved to introduce the witness's out-of-court statements to the investigator. The defendant, proceeding pro per, objected. The district court concluded that the jail call was sufficient evidence to prove the defendant intended to procure the witness's absence, and the defendant forfeited his Confrontation Clause rights. The Nevada Supreme Court heard the case on appeal.

Nevada Supreme Court Adopted the Modern, Majority View of Burden of Proof in Forfeiture Doctrine

To prove forfeiture, the state must show that the defendant intended to prevent a witness from testifying. Federal and state courts split concerning the applicable burden of proof, which the state must satisfy to show the defendant's intent. Specifically, the courts have split on whether the appropriate standard of proof is the higher burden of clear and convincing evidence or the lower burden of a preponderance of evidence. Last year, in *Anderson*, the Nevada Supreme Court specifically addressed this issue as a matter of first impression. Writing for the majority, Justice Lidia Stiglich unequivocally sets forth, "the preponderance standard provides the appropriate burden of proof for purposes of the forfeiture-by-wrongdoing exception to the Confrontation Clause."[12] The forfeiture doctrine is born of equity because "no one shall be permitted to take advantage of his own wrong."[13]

Importantly, Justice Stiglich recognized that violence and threats are a rare form of witness tampering. Her opinion does not reference any such specific conduct. Instead, the court maintains fidelity to the law and discusses only the accused's "wrongdoings."

A New Opportunity for Domestic Violence Prosecutors

Although *Anderson* was not a domestic violence case, the decision is important precedent for domestic violence prosecution. Batterers will no longer benefit from their threats, instructions and soft-touch persuasion. The Nevada Supreme Court has signaled to prosecutors that the forfeiture doctrine is a viable tool. Batterers who not only threaten, but also use soft-touch dissuasion to preclude victim testimony, can foresee courts admitting victim statements into evidence notwithstanding the victim's absence at trial. "No face, no case" is not a maxim batterers can rely upon after forfeiting Confrontation Clause rights.

1. *Reynolds v. United States*, 98 U.S. 145, 159, 25 L.Ed. 244 (1879)).
2. Prior testimony subject to cross examination would not violate the Confrontation Clause under modern jurisprudence. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).
3. *Anderson v. State*, 135 Nev. Adv. Op. 37, 447 P.3d 1072, 1075 (2019) (quoting *Davis v. Washington*, 547 U.S. 813, 833, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

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4. *Davis v. Washington*, 126 S.Ct. 2266, 165 L Ed.2d 224, 2006).
5. "Domestic Abusers: Expert Triangulators, New Victim Advocacy Models to Buffer Against It" by Amy E. Bonomi & David Martin," Springer Science+Business Media, LLC, part of Springer Nature 2020
6. A victim cannot choose to "drop" domestic violence charges. Nevada Revised Statute 200.485(10) requires the state to prosecute domestic violence unless the prosecutor knows the allegation is not supported by probable cause or the case cannot be proven.
7. All defendants charged with domestic violence are entitled to trial by jury. *Andersen v. Eighth Judicial District Court*, 135 Nev. Adv. Op. 42 (Sept. 12, 2019) (granting defendants charged with misdemeanor domestic violence the right to trial by six jurors).
8. *Chavez v. State*, 125 Nev. 328, 337, 213 P.3d 476, 483 (2009)
9. "Domestic Abusers: Expert Triangulators, New Victim Advocacy Models to Buffer Against It" by Amy E. Bonomi & David Martin," Springer Science+Business Media, LLC, part of Springer Nature 2020
10. Meet me at the place we used to park." A.E. Bonomi et al. / Social Science & Medicine 73 (2011) 1054-1061
11. Not to be confused with *Anderson v. Eighth Judicial District Court*, 135 Nev. Ad Op 42) (granting domestic violence defendants the right to misdemeanor jury trials)
12. *Anderson v. State,* 135 Nev. Adv. Op. 37, 447 P.3d 1072, 1076 (2019)
13. *Anderson v. State,* 135 Nev. Adv. Op. 37, 447 P.3d 1072, 1076 (2019) (quoting *Reynolds v. United States*, 98 U.S. 145, 158-59, 25 L.Ed. 244 (1879))

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