

Prosecuting The Batterer Without The Victim's Approval

by {ga=ejgoodman}

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For years, Angela R. (as she is named in court records) had reported being beaten, attacked, dragged up and down staircases by her hair and even burnt by Victor Santiago, the man to whom she says she's married "by love," and with whom she has a child. She called 911 and visited hospital emergency rooms over and over. Police officers have heard him threaten to kill her after smashing all the furniture in their home. But like countless other victims of intimate violence, when the moment of truth had come -- testifying in open court -- Angela had declined to prosecute and the criminal cases against Santiago were dismissed.

Despite three decades' worth of changes in public awareness and policy since violence against women became a priority of the women's movement, victims still fear prosecuting their husband/boyfriend assailants. A daunting, ongoing problem for the criminal justice system and the women themselves is the victim's unwillingness or inability to participate as a complaining witness after she has called the police, and especially when she is needed to testify at trial.

But in the recent case of *People v. Santiago*, the Manhattan District Attorney and Acting Supreme Court Justice Jeffrey Atlas took a new approach -- the victims' prior statements about her beatings were allowed to be used as court testimony without her approval.

Angela had testified behind the closed doors of the grand jury, after an assistant district attorney assured her that the accused (Santiago) is never present at this stage. But when it came to the trial stage, when Santiago would be present, Angela refused to testify, and went so far as to threaten that, if forced to testify, she would declare that all the complaints had been fabricated by the police and prosecutor and even by herself. She enumerated her reasons -- she was ashamed to tell her story and be judged by other people; if Santiago were in jail, she could not afford to support their daughter; she loved him and no longer wished to press charges. Without Angela's testimony, Santiago could probably not be convicted.

The district attorney asked the judge for permission to read the grand jury minutes to the trial jury, an unusual criminal procedure, normally possible only if the complaining witness -- Angela R. -- has become "unavailable." Some domestic violence cases have been prosecuted through photos and medical records, but relying on the domestic victim's prior statements would be a new development.

At a pretrial hearing, where witnesses included an expert in battered women's syndrome,

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Angela R. told Justice Atlas that she and Victor Santiago had been together for "ten beautiful years." Santiago blew kisses to her in the courtroom and insisted that she is the one who hits him, but that he is a "forgiving kind of guy." The judge called much of the couple's testimony "patently incredible," and, in a decision that attorney Dorchen Leidholdt, director of Sanctuary for Families' Center for Battered Women's Legal Services, calls "extraordinary," Justice Atlas concluded that Santiago's violence, threats, chicanery or other acts of misconduct caused Angela R. to become "unavailable." The judge ruled that the prosecutor should be allowed to present to the trial jury her prior statements, including those she had made to the grand jury.

According to Leidholdt, "this decision moves (domestic violence) jurisprudence forward in a really important way," recognizing that domestic violence is of a completely different character than stranger-on-stranger crimes in which there can be a variety of reasons for recanting testimony or declining to proceed for reasons which are not based on fear, threats or witness tampering. "He's been abusing her for years, then calls her 100times from Riker's Island where he's being held. He cannot be allowed to benefit from his own outrageous behavior," she adds.

Brooklyn Law School Professor Elizabeth Schneider, author of *Battered Women And Feminist Lawmaking* (Yale) calls the decision very valuable in the specific facts of this case, but notes that "doing anything that is not what the victim wants is a problem." The issue, Professor Schneider says, is "whether you go with the woman's wishes or the evidence that she is recanting only out of fear or threats." Fear and threats are not the only problem. As Dr. Ann Wolbert Burgess, an expert on battered women's syndrome testified, the abusive male can also be seductive, romantic and exploit the victim's fantasies that everything will be fine.

Whatever the reasons for the recantation, Leidholdt applauds the decision for "not forcing Angela R. to face down the man who has repeatedly brutalized her." However, Carlin Meyer, professor of family law at New York Law School, while acknowledging that "hitters don't hit just one woman," and that therefore society -- not just Angela R. -- needs to be protected, adds, "but the state is never going to protect her."

Professor Meyer believes that "No one walks in the victim's shoes and she should be allowed to assess the potential danger to herself, the benefits and burdens, that flow from going forward with a complaint. The state (and the prosecutors who act for it) can't know if she's better off with her batterer working and not in jail. It's paternalistic for the state to force her to testify and act as if it knows better." She points to the possibility of a "slippery slope" where hearings might be skipped, experts disallowed and the rights of both parties might be jeopardized.

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Leidholdt disagrees: "This decision," she says "is truly empowering."

Emily Jane Goodman is a New York State Supreme Court Justice