

Defending Domestic Violence Cases  
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**I Most Common Charges in Domestic Violence Court**

1. Simple Assault
2. Assault on a Female
3. Communicating Threats
4. Violation of a Domestic Violence Protective Order (DVPO)

1. **Simple Assault:**

Elements:

An assault.

Definition of assault:

There is no statutory definition, case-law governs:

1. Unlawful application of force to the person of another. *State v. Thompson*, 27 N.C. App. 576 (1975), OR
2. Creating a reasonable apprehension of immediate bodily harm. Must allege and show: 1. A show of violence by defendant. 2. Reasonable apprehension of immediate injury or bodily harm . 3. Causing the alleged victim to engage in a course of conduct they otherwise would not have. *State v. McDaniel*, 111 N.C. App. 888, 891 433 S.E.2d 795, 797-8 (1993).

2. **Assault on a Female**

Elements

1. The defendant is male 18 years of age or older at the time.
2. An assault occurs
3. On a woman.

**Common Defenses to Charges of Simple Assault and Assault on a Female**

A. Self-defense:

1. A reasonable person must believe it is necessary to use force.
2. The defendant must actually believe the force used is required.

3. The minimal force must be used for the minimal time necessary to defend oneself.

\* A defendant who quits the fight may raise self defense upon renewal of the fight even if he started the original confrontation. *State v. Miller*, 221 N.C. 356 (1942).

B. Defense of Property:

A person has the right to use non-deadly force to defend against threatened loss, damage or other encroachment to personal property. *State v. Lee*, 258 N.C. (1962).

A person has the right to evict a trespasser using non-deadly force. A person must first ask the trespasser to leave, then may lay hands upon trespasser to remove them, and only then use more excessive force. *State v. McCombs*, 297 N.C. 151 (1979). Of course, you will need to establish the defendant's rights in the property and that the victim is a trespasser.

C. Necessity:

To assert the defense of necessity, the defendant must show

1. He was not responsible for bringing about the emergency,
2. That his actions were justified because the potential harm that would result from compliance with the law was greater than that which would result from its violation, and
3. That no reasonable legal alternative was available. *State v. Thomas*, 103 N.C.App 264 (1991); *State v. Gainey*, 84 N.C.App. 107 (1987).

\*\*\* Not a "defense", but the state must also put on evidence of your client's age in an AOF case. 135 N.C. App 400

\*\*\* In Domestic Violence cases where the Magistrate is not permitted to set bond, your client must be brought before a judge within 48hrs for bond to be set, or the Magistrate must then set bond. *State v. Thompson*, 349 NC 483 (1998). (Court held that failure to adhere to statutory scheme for consideration of pretrial detention unreasonably violated defendant's Procedural Due Process rights without serving any legitimate governmental interest. Dismissal is an appropriate remedy.)

3. Communicating Threats  
Elements

1. Without lawful authority

- a. Willfully threatens to injure another person or that person's child, sibling, spouse, or dependent,
- b. Willfully threatens to damage another's property, AND
2. Communicates that threat to the threatened person,
3. In a manner to make a reasonable person believe that it is likely to be carried out, And
4. The threat is believed by the threatened person.

### **Weaknesses in a Communicating Threats Case**

These are not defenses in the sense that they go towards attacking the case on the elements as opposed to the defenses discussed earlier.

1. The impossible threat --- if you were a guy I would punch you.
  2. The incredibly unlikely threat--- I am going to pick up that 2000lb tv and throw it on you.
  3. The never intended to be heard threat----Defendant tells *his* buddy at the bar that he is tired of his girlfriend's attitude and is going to "slap the crap out of her". Unknown to him, a friend of his girlfriend overhears it and calls her. They both head down to the magistrates office. \*\* Note--- would it be different if defendant said this to his girlfriend's friend, who then told the girlfriend, who then took out a warrant? Arguably, the Defendant meant for the threat to be communicated to her and in fact was. 157 NC App 638
  4. The conditional threat---Defendant and boyfriend broke up. He has no legal rights to the apartment. He leaves stating he will return in two weeks to get his things. She calls him the morning of the 15<sup>th</sup> day and states, "you have until 10:00 pm, after that, I am putting your crap on the curb". 37 NC App 714.
  5. What if the boyfriend in example number 4 was on the lease and had a legal right to the use of the premises. Could you still argue the threat is conditional (only going to happen if he does not collect his stuff by 10:00 pm) and therefore not a crime? A conditional threat satisfies the elements if the speaker had no right to impose the condition. 37 NC App 714
4. DVPO Violation:  
Elements
1. Knowingly
  2. Violates
  3. A valid protective order

## **Weaknesses in a Violation of a DVPO Cases**

1. Was your client served with the ex-parte Order? (If that is the Order allegedly violated)
2. Was he/she served with the complaint and notice for the hearing on the 1 year Order? This goes to both the element of knowingly and the issue of the validity of the DVPO. What if he/she was not served with notice and did not appear at the hearing, but learned of the entry of the Order?—Service of notice is a jurisdictional necessity.
3. Was the Order still in effect at the time of the alleged offense?
4. If the Order was renewed, was the request to renew made before the expiration of the former Order?
5. What are the limitations on your client pursuant to the Order? Ex. Is contact allowed for issues relating to child care?
6. Is your client only to refrain for assaulting harassing etc, but contact is not forbidden.
7. Were findings of fact made to support the issuance of the Order?

### **And keep in mind:**

\*\* Defendant's conviction for assault was vacated as barred by the Double Jeopardy Clause due to a previous contempt proceeding on a DVPO for the same conduct. *State v. Gilley*, 135 N.C. App. 519; 522 S.E.2d 111; 1999 N.C. App. LEXIS 1177, May 19, 1999

## **II TRIAL ISSUES**

### 1. General Considerations for all Domestic Violence cases:

What do you want to know:

History of parties: married, dating, ex-girlfriend/boyfriend, share a child.

Any other pending litigation (ie: Family Court) Look at those files.

Any other prior allegations? What happened to those charges?

Was anyone else there (witnesses)?

Did your Client make any statements to the police?

Did your Client make statements to any mutual friends?

Was your Client even present when the police responded? (Identity issues)

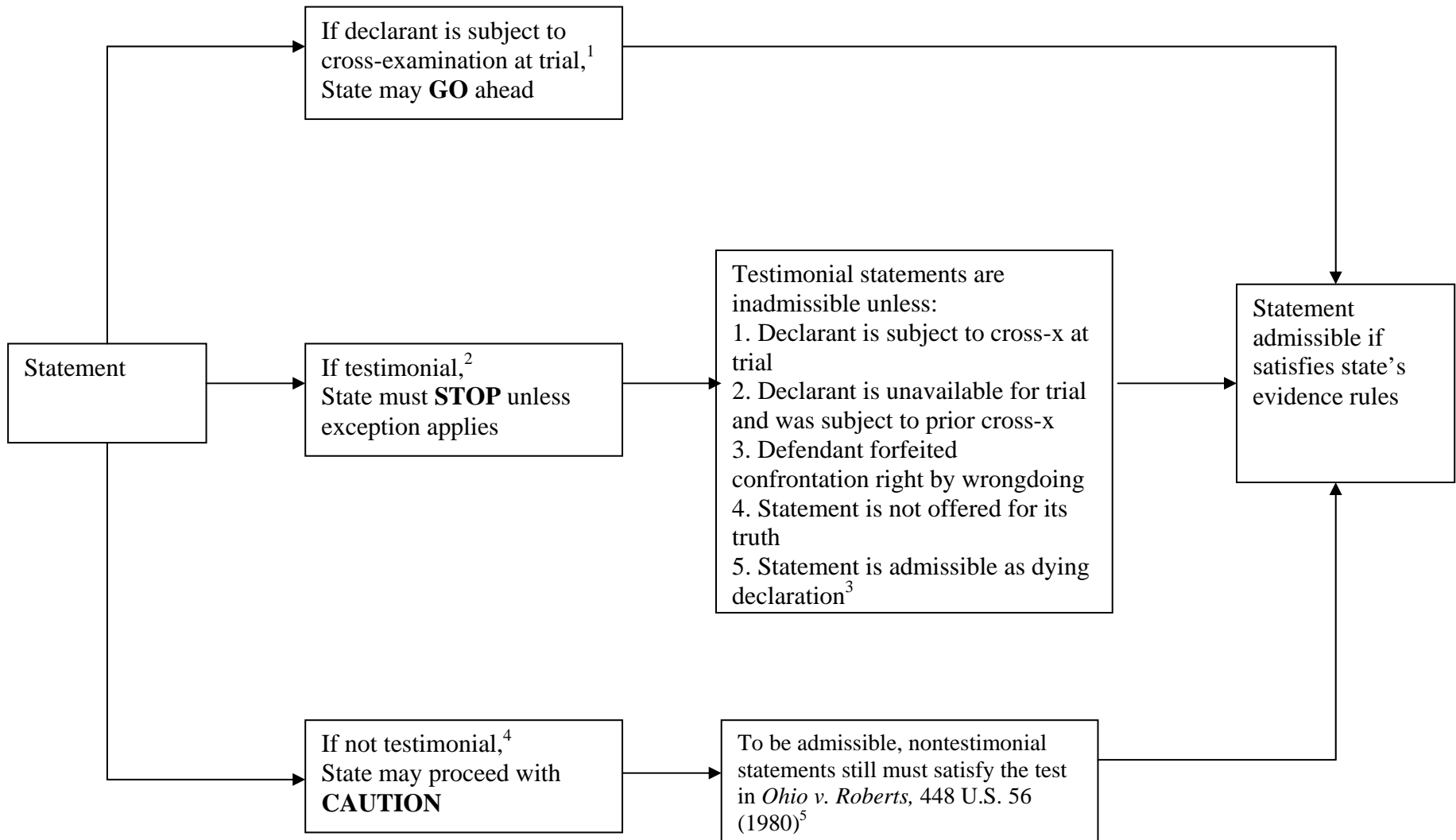
Are there any pleading defects?

Did the alleged victim file for a protective order as a result of the same event?

2. The Recanting Witness.  
The state is NOT permitted to put the witness on the stand for the sole purpose of getting in otherwise inadmissible evidence as impeachment evidence. This is not applicable where the State is “surprised”.
  
3. Prior Bad Acts If the state does bring up prior bad acts to show intent or the reasonableness of the fear of the alleged victim, be careful not to remind them.  
Ex: You didn’t report this alleged assault for two weeks? Answer: “Well, in the past he has said he would kill me if I told anyone about the things he does, but I finally decided I was tired of it.” I promise you on redirect the state will ask about prior behavior.
  
4. The Missing Witness  
Domestic Violence cases suffer from the “missing witness” issue more than any other. The State will often seek to introduce evidence through other means, most often, the testimony of the officer(s). This brings us to the confrontation clause and the analysis provided through *Crawford v. Washington*.

## CRAWFORD v. WASHINGTON FLOWCHART

Thanks to John Rubin



## Notes to *Crawford* Flow Chart (Thanks again to John Rubin)

1. If the declarant successfully invokes a privilege against testifying or the judge unduly interferes with cross-examination, then the declarant would not be subject to cross-examination and the Confrontation Clause would not be satisfied.

2. The *Crawford* court gave the following as possible definitions of testimonial statements: *ex parte* in-court testimony or its functional equivalent, extrajudicial materials contained in formalized testimonial materials, and statements made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. The Court gave the following examples of statements that are testimonial: prior testimony at a preliminary hearing, before a grand jury, or at a former trial; affidavits and depositions; police interrogations (used in a colloquial rather than technical, legal sense); and plea allocutions.

3. A testimonial statement no longer satisfies the Confrontation Clause merely because it falls within a firmly-rooted exception to the hearsay rule. If testimonial, a statement is admissible only if it satisfies one of the exceptions identified in *Crawford*. *See also State v. Pullen*, \_\_\_ N.C. App. \_\_\_, 594 S.E.2d 248 (2004) (recognizing impact of *Crawford*). The *Crawford* court stated (without deciding the issue) that testimonial dying declarations might be admissible but found that such statements are *sui generis* and did not adopt any other hearsay exceptions as grounds for admitting testimonial statements.

4. The Court gave the following as examples of non-testimonial statements: an off-hand, overhead remark; a casual remark to an acquaintance; business records; and statements in furtherance of a conspiracy. *Compare State v. Forrest*, \_\_\_ N.C. App. \_\_\_, 596 S.E.2d 22 (2004) (finding that victim's spontaneous statement immediately after rescue from kidnapping was not testimonial).

5. Under *Roberts*, the Confrontation Clause bars admission of an unavailable witness's statement if the statement does not bear "adequate indicia of reliability." To meet that test, the evidence must either fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness." The North Carolina Court of Appeals has recognized that *Roberts* continues to govern the admissibility of non-testimonial statements under the Confrontation Clause. *See State v. Blackstock*, \_\_\_ N.C. App. \_\_\_, 598 S.E.2d 412 (2004).

# Confrontation Clause

## When is it an issue?



You should immediately start considering your analysis the moment you discover the likelihood that a primary witness (alleged victim) is not going to be present. The following is a sample of the things you will want to know:

1. Where were the parties when the police arrived?
2. How many officers responded?
3. Is the officer who is in court the first officer to arrive at the scene?
4. Is there a scene? Or did the Victim come down to the magistrate later and the police were simply called to take her statement? (Durham does this).
5. Did the officer separate the parties and then take statements?
6. Did the alleged victim say "nothing happened" at first?
7. Is there any indication of any ongoing "emergency" at the time police arrived.
8. Is some of what the alleged victim said admissible, but not all?
9. Do the parties speak another language? Was an interpreter brought in to the mix? How long did it take him/her to get there. Is he even in court?
10. End game analysis: Was the responding officer trying to discover "what happened" as opposed to "what is happening".

**REMEMBER: EXCITED UTTERANCE IS A HEARSAY EXCEPTION, IT IS NOT AN EXCEPTION TO THE CONSTITUTIONAL RIGHT OF YOUR CLIENT TO CONFRONT HIS/HER ACCUSER**