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"It shall be the primary duty of all prosecuting attorneys … not to convict, but to see that justice is done."
Art. 2.01, Texas Code of Criminal Procedure

A closer look at strangulation cases

The prosecution might have more evidence than you realize, even if the victim is uncooperative or there aren't any visible injuries. Here is advice on how to look for this evidence, present it to the jury, and seek justice for domestic violence victims.

By Kelsey McKay
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Many years ago I prosecuted an aggravated assault case where Tony Brewer strangled, hit, and threatened his girlfriend (I'll call her Samantha) with a knife. Samantha recalled that the defendant came home, took the battery out of her phone, strangled her off and on for 15 minutes, releasing his grip only when it appeared she was about to pass out, and then re-engaging once she regained clear consciousness. She recalled feeling dizzy and having to use the restroom immediately after her release.

Too scared to report the incident after the defendant threatened to kill her if she reached out to the police, Samantha stayed at a friend's house that night and returned home the next day. After Brewer attempted to assault her yet again, she escaped and called 911 from a store down the road.

During the trial, Brewer made threats against most of the people in the courtroom, including the prosecutors, and he acted violently in the holding cell just outside the courtroom. Samantha remained relatively cooperative during the prosecution of the case, and we knew we had to send Tony Brewer to prison for a long time.

Because this incident took place before the statute that made strangulation a felony, we indicted it as an aggravated assault. To prove a felony, we needed to show that the defendant had either used or exhibited a deadly weapon (his hands and/or a knife). Absent the deadly weapon element, this case would be a misdemeanor. We had an added incentive to convict him of a felony, as he was habitual and another felony conviction would send him to the penitentiary for a minimum of 25 years. With our only physical evidence and visible injury corroborating a misdemeanor, we looked for ways to strengthen our deadly weapon allegations. The knife had never been collected, so we did what we could to have Samantha identify something that well represented the weapon. When it came to the strangulation, we knew we needed something to connect the dots for the jury. I had been to a domestic violence conference and heard speakers discuss using a strangulation expert in this type of setting. In trial, we called a deputy medical examiner from our county to help explain strangulation to the jury—specifically, how symptoms Samantha had experienced were consistent with a person who was strangled.

The jury deliberated for just under five hours, and I became con-

Continued on page 20

Continued from the front cover

A closer look at strangulation cases (cont'd)

cerned that my idea to call a "strangulation expert" wasn't enough to overcome the lack of visible injury that they may expect from a 15-minute-long strangulation. Luckily, the jury returned a guilty verdict on both counts, and the judge sentenced Brewer to 35 years in the penitentiary.

Having never called a strangulation expert before, I was eager to hear jurors' feedback, and I was surprised to find out that they had reached a guilty verdict on his hands as a deadly weapon within a few minutes. (It was the knife that held their deliberations up.) They also shared with me that had the expert not testified, they wouldn't have so quickly recognized his hands as a deadly weapon. With this feedback, I was encouraged that we could be successful in prosecuting a strangulation case without visible injury.

I've learned in the years since how to try cases that involve strangulation. They are tough cases, and I'm hoping this article will offer guidance on where to start.

Now a felony

In 2009, §22.01 of the Penal Code was modified to recognize family violence by strangulation or suffocation as a third-degree felony. In cases where a defendant has a prior family violence conviction, the offense is enhanced to a second-degree felony. Under the new law, the offense is committed by intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood by applying pressure to the throat or neck (strangulation) or by blocking the nose or mouth (suffocation).[1]

This change in the law gives prosecutors a powerful new tool against abusers who strangle their victims. In the past, law enforcement often treated strangulation like a slap in the face, where only redness was present. With this change, law enforcement can now treat strangulation more in line with its serious nature. While the law was warranted, it has left most prosecutors with the difficulty of figuring out how to prove a felony-level assault beyond a reasonable doubt, without much evidence.

My background

I've been a prosecutor in Travis County for close to a decade and have been involved with family violence cases for much of this time. In late 2010, our office received a grant for a prosecutorial position dedicated to strangulation. I was assigned to this position, which allows me to give trainings in our community as well as prosecute cases and work with law enforcement. In a given year, I will typically be involved in over 400 felony strangulation cases. I am also responsible for staffing strangulation cases for law enforcement as well as reviewing files and presenting them to the grand jury.

Since 2011, I have reviewed more than 1,000 strangulation cases in Travis County and tried a variety of them (from misdemeanor assault to sexual assault and capital murder) to juries. I have spoken to dozens of victims, and three things have been constant—and a fourth often makes prosecution difficult or impossible. One, when asked what she thought was going to happen during the strangulation, the victim almost always responds, "I thought I was going to die." Two, the majority of the cases have no visible injury, or if officers documented anything, it was "slight redness" to a victim's neck not visible in a photograph. Three, offense reports often provide very little evidence or follow-up investigation of strangulation beyond the victim reporting to the officer, "I couldn't breathe." And fourth, the victim who was in such fear the night of the offense has often shifted into a much different witness by the time the case gets to the courtroom.

These observations reveal that prosecutors are handling cases involving a very serious crime with almost no evidence—or, at least, what *seems* like no evidence. As this article shows (I hope!), we in Travis County have had success with certain methods to strengthen our investigation and prosecution of strangulation cases, and here we share them with others to make these cases easier to present to a jury.

The danger of strangulation

I find people are often surprised by the statistic that 10 percent of violent deaths in the United States are attributable to strangulation, and in the majority of these cases victims were women.[2] Non-fatal strangula-

tion is an important risk factor for homicide in a domestic violence relationship. Victims of non-fatal strangulation are 700 percent more likely to become a victim of domestic homicide.[3] In Louisville, a study showed that in 2009, strangulation was the cause of death in three out of four intimate partner homicides. An abuser's willingness to strangle his partner correlates to other dangers as well. In a study of 133 homicides secondary to asphyxia in the Bexar County Medical Examiner's Office from 1985–1998, sexual assault was the motive in 66 percent of female victims of ligature strangulation and in 52 percent of those due to manual strangulation.[4] Although anecdotal, research looking at defendants who shoot law enforcement officers showed that one-third have also strangled an intimate partner. These kinds of statistics are unfortunately not all that shocking to the domestic violence community, which for years has used a history of strangulation as a predictor of lethality.

And although the (very welcome) change in the law has allowed us to charge the crime as a felony in a more consistent way, it did not give us guidance on how to prove the crime. The challenge has been how to successfully prosecute and proportionately punish such a dangerous crime with little to no obvious evidence and an oftentimes uncooperative or recanting victim.

In my experience, success in prosecuting strangulation has been three-fold. First, prosecutors must understand injuries and develop non-traditional evidence to show the jury. Second, we must train officers to gather that evidence at the scene—before a victim becomes uncooperative. Finally, we must call an expert to the stand to explain strangulation and interpret this non-traditional evidence for a jury.

Step 1: Understanding injuries

The biggest challenge in a strangulation case is often the lack of obvious injury and thus evidence. For years, the majority of my offense reports read simply, "The victim stated she could not breathe," with a short description of the defendant placing his hand or arm around the victim's neck. In some cases officers noted the victim had redness on her neck, which was usually photographed in a dark room or with the shadow of her chin covering her neck, making it difficult to show to a jury.

This observation is consistent across jurisdictions. In San Diego, California, a study of 300 cases revealed that most cases lacked physical evidence of strangulation and only 15 percent included a photograph of sufficient quality to be used in court as physical evidence of strangulation.[5] In half the cases, there was no visible injury and in another 35 percent, the injury was not sufficient to photograph. The lack of physical evidence caused both law enforcement and prosecutors to treat strangulation cases as minor incidents, like a slap to the face where only redness might appear. Relying on external visible injury as a gauge for how serious we should treat an assault is misguided. Even in fatal strangulation cases, there is often no evident external injury.[6] Unlike many other crimes where the aggravating factor is usually corroborated with physical evidence, we can't always *see* strangulation. There are no pictures of a bloody stab wound to show the jury or a gun to display during closing arguments. Strangulation is not so straightforward. In seeking a reduction or a dismissal, a defense attorney relies on this challenge and depends on a prosecutor's or the jury's lack of understanding about the crime.

Visible evidence

Some of the best evidence of strangulation comes in the form of post-mortem examinations (autopsies) where the tissues of the neck and the brain can be evaluated. Obviously in a non-fatal case we do not have the ability to gather such evidence to present to the jury. Instead we often depend on a superficial evaluation of the victim's skin that is done shortly after the strangulation. Though the majority of cases will not have any external visible injuries, it is important that a trained professional perform a thorough exam because many of these injuries can be small and easily overlooked.

For instance, a half-moon-shaped abrasion may exist on the back of the victim's neck, hidden under her hair if her hair is long. Though the mark may only be a few centimeters in size, it could corroborate a victim's account that the defendant's hands wrapped around her neck and could indicate the point where the defendant's finger dug into her skin. Vertical fingernail marks or scratches on the victim are more often associated with self-inflicted defensive wounds than a result of the defendant's hands

Continued on page 22

Continued from page 21

around the victim's neck, but again, the existence of such marks can still corroborate the strangulation and aid a prosecutor in describing to the jury how brutal the attack was. Such markings may be present on the victim's neck or chest as she fought to pull a defendant's hands or fingers or a ligature from her neck. They may also appear on the defendant's face, chest, or arm as she claws at him out of panic.

Likewise, I often notice bite marks to the defendant. The victim may not even remember doing so, but victims often bite their assailants in an attempt to get them to release their grip. I find that if I have a good account of how he strangled her and I understand the positions of the defendant and the victim, the bite mark is usually consistent with how her head would contact his body. A bite mark can be on a defendant's forearm or bicep, usually when the strangulation is committed with an arm or his hands, and I've seen bites to the defendant's upper chest and shoulder, most often when the defendant is strangling her from behind with his arm. It is important to have a good description of how the strangulation played out so that the jury can see and understand why that bite mark is consistent with the victim's account. Rather than considering these injuries on the defendant as a weakness to the State's case, consider arguing to the jury the fear and panic the victim felt during the assault that made her react in such a primal way.

Bumps or injuries to the head are often overlooked because officers may not see them under a victim's hair, and victims may not know they exist. Head injuries happen when a suspect bangs the victim against the floor or a wall during strangulation. They can also corroborate a loss of consciousness if they occurred as a result of the victim falling to the ground. Other unexplained injuries, such as a twisted ankle, might also help to prove that she lost consciousness.

Other visible injuries to look for are swelling of the neck (edema), lips, or tongue. Again, such injuries may not photograph well, so it is important that they are well-described and documented by law enforcement or medical personnel. Bruising, usually caused from the pressure of the defendant's fingers or from a ligature, is sometimes present. The thumb generates more pressure than the other fingers, so singular thumb impression bruises are found more often than contusions showing a whole-hand grasp.[7] Often bruising does not develop immediately and is an important reason for follow-up pictures to be taken. At the scene, these injuries will be documented as redness to the neck.

Petechiae, which is the rupturing of capillaries (small blood vessels near the surface of the skin) is present in a very few cases. When petechiae is lacking, defense attorneys seem to want to hang their hat on its absence as evidence that no strangulation occurred. Petechiae occurs in moments where the jugular vein (which is closest to the surface of our skin and is thus obstructed with less pressure) is blocked and prevented from sending blood down to the heart but the carotid artery (which is deeper than the jugular vein and sends blood to the head) is open. This blockage of blood causes the capillaries to burst. This is significant because for petechiae to occur, some pressure was placed on a certain part of the victim's neck that occluded the jugular vein. In other words, petechiae is caused when only the most superficial part of the anatomy is blocked. This is not to say that the presence of petechiae isn't important—it certainly helps to prove strangulation in that it is evidence of impeding the blood flow of the jugular vein—but it can also support the argument that a struggle took place or that the suspect released and/or varied the pressure he used during the assault. At the same time, the absence of petechiae shouldn't be a concern for a prosecutor. Even in cases where petechiae might be present, it is easily missed as it sometimes presents itself as a single pin-point dot on the earlobe, in the eye, on the eyelid, or behind the ear. Like many other visible injuries consistent with strangulation, it is such a small injury that it is often overlooked and can be easily covered by freckles, dark skin, make-up, or lighting.

Tiffani Dusang, a forensic nurse examiner in Houston who has testified as a strangulation expert, explains that in her experience, strangulation is missed and misunderstood. It is missed because if we do not ask if the defendant strangled her, the victim most likely will not offer that information. This is primarily because strangulation is often part of a broader violent event such as domestic violence and sexual assault. The victims, who themselves do not understand the potential lethal outcomes of strangulation,

will not mention that strangulation occurred and even downplay serious symptoms such as difficulty breathing. This should be expected as the victims are focused on the here and now, such as the sexual assault, where their abuser is, or what is causing them the most pain at that moment.

Though it may sound strange, on more than one occasion I have heard a victim minimize and downplay strangulation and even refer to it as not being abuse, or that the abuser told her he wasn't abusing her because he was not hitting her. That attitude, combined with the likelihood that there are no serious markings as a result of a strangulation assault, all contribute to the victim minimizing the severity of a strangulation.

Non-visible evidence

Because so many of the visible injuries in a non-fatal strangulation case can be missed or misinterpreted, I have found that documenting other signs and symptoms is key to a successful prosecution, and to document them, we must be familiar with them. While this list is not exhaustive, these are some of the more common observations of what victims experience during and after strangulation.

Ask the victim about her breathing and if it was affected or if it changed both during and after the strangulation. For instance, did she experience rapid, shallow, or painful breathing? How would she describe how her breathing felt during and after the strangulation?

Other sensations can corroborate that her blood flow or airflow was impeded, so it is important to ask whether she experienced any other feelings during or after the strangulation: dizziness, nausea, headaches, or feeling disoriented or faint. Because some victims might experience symptoms during the actual strangulation and others once it is over, we need to ask about those time periods separately.

Did she have any physical response to the strangulation, such as coughing, urination, defecation, vomiting, or dry-heaving? I find that it is particularly important to not just ask about urination, but also to inquire about the urge to urinate or the loss of bladder control during, soon after, or in the days and weeks that followed the strangulation. I met with a victim a few months ago in preparation for trial. In this particular case officers had documented almost no signs of strangulation—not because they didn't exist, but because the officers didn't know what questions to ask. During my conversation with the victim, I asked about urination. She paused and told me that over the last several months, she had urinated on herself repeatedly. She told me she thought she had a urinary tract infection or a sexually transmitted disease and had even been tested for both at the doctor. She had no idea, nor did the doctor know to ask, that this was a result of the strangulation. The same victim remembered being nauseated for days after the strangulation but at the time assumed it was because of some medication she had taken. However, when I asked about it, she admitted that she had taken the same medication for 10 years and it had never before made her nauseated. Similarly, I met with another victim who, in response to my asking about nausea or vomiting, told me that she remembered being nauseated after the incident. She was able to recollect that feeling because she remembered being annoyed about it, thinking that the defendant must have gotten her pregnant. Never did it occur to her that it could be a result of the strangulation.

When we ask whether she blacked out or loss consciousness, a victim will often respond that she doesn't know or that she doesn't think so. In strangulation cases, experts have told me that if she isn't sure whether she blacked out, she probably did. I find that when the answer is anything other than a confident, "No, I did not lose consciousness," it is worth exploring. For instance, in follow-up interviews, law enforcement can ask her about any unexplained injuries (perhaps to the head, which would explain if she fell as a result of losing consciousness) or about any periods of time that she has forgotten.

Just as compelling are changes in the victim's voice or ability to swallow. Victims will sometimes report that it is painful or difficult to speak and may display a raspy or hoarse voice. A victim may be unable to speak or have to whisper as a result of the strangulation. She may experience neck tenderness or pain or it may be difficult to turn her head in the hours or days following the assault. Victims describe their throats as feeling scratchy and swollen and will often say that it felt like they had a sore throat. Sometimes they describe that it was painful to swallow or that it hurt to eat or drink. These symptoms are significant as they corroborate a strangulation that was so deep that it

Continued on page 24

Continued from page 23

affected the victim's trachea (windpipe). To give you an idea of how deep the strangulation went, it takes only 4.4 pounds per square inch (psi) of pressure to occlude (block) the jugular vein and 11 psi to occlude the carotid artery. Compression of the trachea requires 33 pounds of pressure.[8] Therefore, any sign or symptom that relates to the airway supports the argument that the amount of pressure was even more significant and acts as corroborating evidence.

Additionally, I like to ask victims open-ended questions that they can answer in their own words. Doing so builds credibility, provides unique descriptions that are hard to make up, and allows a jury to better visualize the experience. I ask three main questions, and following those are some examples of answers that I've heard:

- "Did you experience any change or loss of hearing during or after the strangulation or suffocation?" (Often the victim couldn't hear anything or will describe her hearing as "muffled," "ringing," "gurgling," or "it went silent.")
- "Did you experience any change or loss of vision during or after the strangulation or suffocation?" (Frequent responses are that "it went black or white," that she "saw stars," her vision got blurry, "the room closed in," or she experienced "tunneling" of her vision.)
- "How did your body or head feel during and after the strangulation or suffocation?" (Common phenomena include feeling "no strength"; "like a noodle"; wooziness; limpness; throbbing; "wavy"; "like my eyes were popping out"; that "my head felt big and red"; a tingling sensation in lips, arms, and legs; and that "my head felt hot."

Finally, I find that answers to the following questions provide both insight and inherent credibility to the case:

- What did the suspect say during the strangulation?
- Describe the suspect's demeanor during the strangulation.
- Describe how the suspect's face looked during the strangulation.
- What made the suspect stop?
- What did you think was going to happen during the strangulation?

Answers to these questions are usually incorporated into my closing argument and provide an element of credibility to the severity of the assault and how the victim felt that night. Later, when she recants or claims that he was just restraining her or he claims self-defense, answers to these questions support our argument that what she said the night of the offense, when she was scared enough to call the police, is a more accurate account of the truth.

Ideally, law enforcement would have asked these questions and the victim's answers are included in the offense report upon prosecutors' receipt of the case. However, this is rarely the case, especially in a community without strangulation-specific training for patrol officers.

Almost two years ago, I tried Vondrick Ware for strangulation. After reading the offense report, I had no evidence of strangulation other than the victim telling law enforcement that Ware put his hands around her neck and she couldn't breathe. Officers observed no visible injury to corroborate the strangulation and spent about 15 minutes at the scene. The detective did little to no follow-up on the case, and I did not call them to testify to the jury. Throughout the years, the defendant had been arrested on many family violence charges in numerous states against a variety of victims. In each case charges had been dismissed at the victim's request or because she was uncooperative. Luckily, by the time the case went to trial, our victim, Sandra Smith (a pseudonym), was cooperative and it was finally time for Ware to face justice.

During trial preparation, Sandra and I talked about the assault and specifically about signs and symptoms she recalled experiencing during and after the strangulation. By the time we ended our conversation, she had described two other strangulation incidents in the two weeks preceding our charged offense. After discussing all three incidents, she was able to describe at least 20 signs and symptoms consistent with strangulation and that corroborated the assault (i.e., she couldn't swallow, her vision went blurry, she felt weak, sound was muffled, she felt woozy, etc.). None of this evidence had been detailed in the offense report, as the victim had not been asked.

I quickly re-indicted the case, adding a second count of continuous family violence alleging the other three assaults (two strangulations and one misdemeanor assault) she had described to me during our conversation. (It is often a good strategy, when appropriate, to include a second count to a strangulation indictment that alleges continuous family violence because it allows the jury to gain some context into an otherwise very limited, complex dating or family relationship full of dynamics and influences reaching beyond just one

alleged incident.) In this case, although she had never reported additional incidents and they took place out of county, she had taken pictures on her phone and still had text messages he had sent her between the assaults (in many of which he apologized and acknowledged his behavior and included promises never to hurt her again). In this case, we called a local paramedic (whom we had trained on strangulation) to testify as a strangulation expert. The jury convicted Vondrick Ware, and he was sentenced to 6½ years in the penitentiary.

Step 2: Training officers to gather evidence

Under the statute, there must be a family, household, or dating relationship between the victim and defendant to charge third-degree strangulation. The assault typically occurs in the privacy of a home where there is no third-party witness. Often it also occurs within the context of a domestic violence relationship, carrying along with it all the complicated dynamics of power, control, fear, and recantation. Because of this complexity, it is vital that responding officers are trained to ask the right questions regarding the signs and symptoms of strangulation and documenting any physical evidence at the scene.

In some cases, the victim is cooperative and we can follow-up with questions. However, prosecutors aren't always that lucky, and it is paramount that visible injury, signs and symptoms of non-visible injuries, and details about the strangulation are investigated at the scene when law enforcement is initially called to respond.

For that reason, I worked with the Austin Police Department to add a strangulation supplement to the assault victim statement (AVS). (A copy of that form is at www.tdcaa.com in the journal archive. Just look for this story.) The AVS is a form that responding officers fill out on family violence calls and has been used on the street for many years. When the department revamped the AVS, we added a strangulation supplement that includes the questions I've mentioned in this article, plus checkboxes for signs, symptoms, and injuries, and a diagram of the victim's neck at different angles. It enables officers, who may not have advanced knowledge about strangulation, to ask the questions that will give prosecutors the answers we need to prove our case. While officers may or may not know the significance of every question, they have gathered the evidence we need. This supplement was introduced a few months ago and has significantly added to the quality and quantity of evidence that is gathered on a strangulation call. The advantage of the supplement for patrol officers is that they don't have to memorize the training; they have the supplement on hand to jog their memory.

I regularly teach strangulation at our cadet academy, and in October, for the first time I was able to walk cadets though the actual strangulation supplement they would be using and explain why it was so important to ask and document things they observe in detail. In the training I discuss the unique reactions of trauma victims and how strangulation, despite its lack of external injury, is still a traumatic experience. I point to a victim's common answer ("I thought I was going to die") to questions on the strangulation supplement ("What did you think was going to happen?") as a consideration in evaluating the level of trauma she had experienced, and then I talk about how she might react to trauma. I discuss the phases that a victim goes through during strangulation: disbelief (similar to shock, where it doesn't immediately register what is occurring and the danger she might be in), belief (where she quickly accepts the intense danger she is experiencing), primal (where she starts fighting out of instinct to save her life), resignation (she realizes that she is about to die), and finally thoughts of family and children. I describe how memories are recorded by a person under normal conditions (in the front cortex, which controls abstract reasoning and complex thinking) and compare it to a person experiencing trauma (where the frontal cortex slows down and the limbic system takes over and responds from a survival standpoint). Extracting traumatic memories is different from normal memories; with traumatic situations, it is better to ask sensory questions rather than about the who, what, where, when, why. I then point to various questions throughout the strangulation supplement which use this method to question a victim on a strangulation case (i.e., asking the victim to describe how things felt, sounded, etc.).

"As a power and control tactic, strangulation is tremendously effective for abusers. Victims may believe

Continued on page 26

Continued from page 25

they are being killed and, as a result, feel deeply and justifiably terrified both during the incident and for a long time afterwards."[9] Strangulation epitomizes the power dynamic that exists in domestic violence cases because the physical (and criminal) act sends a clear message to the victim that the abuser has the power to take the victim's life "with little effort, in a short period of time, and in a manner that may leave little evidence of an altercation."[10]

During my training, I also point out the usefulness of obtaining an explanation of how the strangulation occurred and what was used to strangle the victim: Did he use one hand? Two hands? His forearm? His foot? How long was she strangled, and how many times did he strangle her? I find it helpful to ask, on a scale of 1 to 10, how much pressure he used. All of the questions related to signs and symptoms should be asked at this time. Ideally, this type of questioning would take place again a few days later after the victim has had some time to rest and calm down. However, given the nature of domestic violence, I have found that once the officer leaves, it is likely that the victim's cooperation will end, so it is critically important for the officer to gather whatever evidence is available before leaving.

Despite the importance of evidence gathered at the scene, for those cases where victims are cooperative, it is important to have a follow-up investigation. Many of the symptoms that I have listed do not develop immediately, and many of the physical signs may not manifest for some time. I do not intend that the supplement replace a follow-up investigation. I've also found that working with people in the community, from the paramedics who respond to the scene and evaluate the victim, to the emergency room doctors and nurses who may treat her, strengthens the evidence. Anyone whom the victim may encounter should be educated about strangulation.

Step 3: Calling an expert

One of the first strangulation cases I tried before a jury had one of the best visible injuries I have ever seen in a strangulation case, a hand mark. Despite that bruising, the jury convicted the defendant of a lesser misdemeanor assault, not the third-degree felony of strangulation. While there were some other complications with the case, including a previous mistrial, a very uncooperative victim, and missing witnesses, we learned a valuable lesson. When we spoke to the jury about the strangulation, they told us that they didn't know what evidence specifically supported "impeding blood flow or airflow." They were right; there was almost none.

So how do we pass this knowledge of strangulation on to the jury, and how do we show them evidence that's hard to see? Three things have proven to be quite effective, and I will never try another strangulation case to a jury without efforts to include all three. First, start the education in voir dire. Second, use charts and diagrams. Third, end with a strangulation expert testimony.

Voir dire

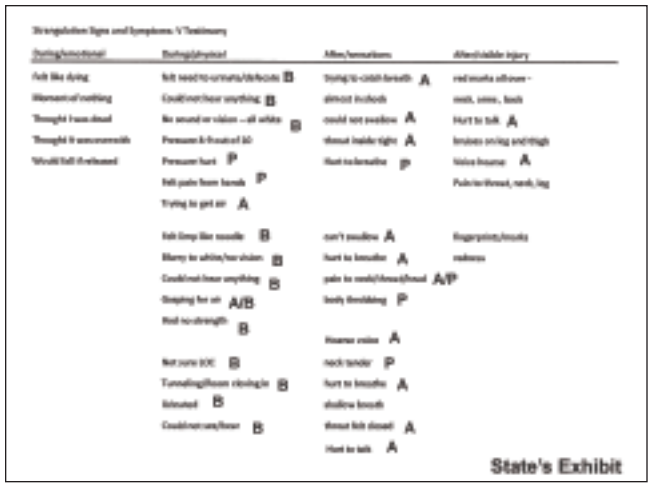
In voir dire, I always do two things. First, I try to get the jury to understand pressure and the neck's sensitivity to it. I will talk about how even a gentle touch on the neck can be uncomfortable, and I usually press my neck, which in turn makes potential jurors press on their own necks. If I can, I talk about the amount of pressure in an adult male handshake (80–160 psi) as a comparison to the amount of pressure it takes to occlude a vein or artery, which is significantly less. Starting this way makes jurors comfortable with the idea of there not being any visible injury.

I'll usually ask them questions about the change in the law and why strangulation is more serious than a slap in the face, for instance. At this point, I will ask if there is a juror who has been in the military or law enforcement or has been involved in mixed martial arts. On every panel I've had, there is someone who fits this category who can talk about being strangled. (I prefer this approach, rather than asking for someone who might have been a victim of strangulation in a personal way.) I have them describe the feelings of helplessness and talk about the sensations (visual, auditory, in the head, in the body) they felt during and after the strangulation. I usually end by asking them whether they had any visible injury as a result of that strangulation. The answer is usually no or "slight redness." What is nice is that the person offering all this good information (which will likely match up to your victim's documented signs and symptoms) is usually a big, tough guy.

Use charts and diagrams

Then I start the trial. Any witness who can describe a sign or symptom in any way, I call to the stand and jot

down the sign or symptom in a chart. (See an example of one such chart below.) Perhaps the 911 call can corroborate the victim's raspy voice or coughing. The EMS records and medical records, which are usually admissible even if the victim is uncooperative, often contain a few signs and symptoms. The observations of the responding officer or the testimony of the victim herself all assist in this chart. Even if the victim is describing the same injury, if she uses different words or describes it in various ways, I add it to the list. I offer the chart into evidence. After all the witnesses have testified, I print this chart out and save it for expert testimony.



Calling an expert

Then I call a strangulation expert. A strangulation expert is essentially a medical professional who can tie all the signs and symptoms up into a tidy package of evidence for the jury. If a doctor, nurse, or paramedic treated the victim, I usually start with them because they are already a fact witness. If I don't have one of these people, I reach out to someone in our community with whom I have worked and who has been willing to read articles relevant to the topic. I've been lucky to have a paramedic, who was initially a fact witness on a case, be willing to come in and testify as an expert in cases in which he wasn't directly involved. I've also called a deputy medical examiner and reached out to our SANE nurses who perform the sexual assault exams and had them testify. Most important is to find people in the community who are willing to work with you and to educate them. I've recently connected with the medical director at one of our hospitals who agreed to let me use her as a sounding board and give me access to the hospital's monthly meeting where I spoke on the topic of strangulation to the emergency-room staff. I was able to connect with the doctors and nurses and better educate the medical community who handle such patients about things they could do in their evaluations that would be helpful to a prosecution. The bonus in educating the medical community is twofold. First, because this evaluation often takes place within hours of the assault, the victim is likely still cooperative. Second, the victim will probably be more cooperative in discussing signs and symptoms for the purposes of medical help as opposed to criminal prosecution. And most of these records are admissible hearsay.

At the most recent cadet training, I had a cadet approach me and say that he was also a paramedic and was ashamed that he had been so cursory in his examinations of strangulation victims. I explained that it was understandable given the misunderstanding of strangulation even in the medical community. We agreed he could help in the future by being willing to testify as an expert for me in court.

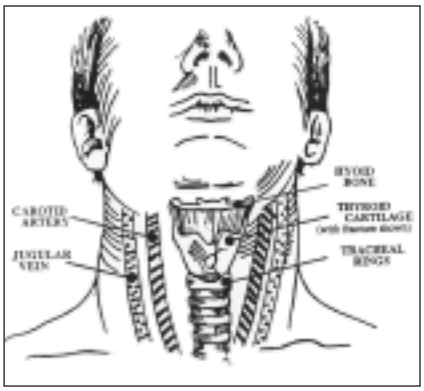
After qualifying the expert, I first have them talk about the difference between strangulation and choking. "Choking" is the internal blockage of the windpipe with a foreign object, such as food, whereas "strangulation" is the external obstruction of another's breathing or blood circulation either manually or with the assistance of a ligature or other device. Second, I have them discuss the different kinds of asphyxiation, both strangulation (manual, ligature, and hanging) and suffocation. Both are covered by the Texas Penal Code but are differentiated by the manner and means element of "applying pressure to the person's throat or neck" (strangulation) compared to "blocking the person's nose or mouth" (suffocation).[11] Ligature strangulation is strangulation with a cord-like object (such as an electrical cord or a shoelace). Manual strangulation is usually done with the hands, though I often see abusers who use their forearms, knee, or foot.

Third, I have them give a description of the anatomy of the neck and brain and often introduce a diagram so the expert can document blood flow movement and the location of different anatomy (veins, arteries, trachea, hyoid bone, etc.) from the most superficial exterior

Continued on page 28

Continued from page 27

structures to the most interior. (See the illustration below.) At this point they usually discuss how little soft tissue exists around the neck and



how vulnerable those structures are to external pressure. Fourth, as a point of contrast, I have them discuss blunt force trauma and the types of visible injuries that arise from acts like hitting someone with a bat and how bruises are created. I then have the expert describe how strangulation is different in that it takes very little pressure to occlude the structures around the neck. Ideally, the expert can quote the numbers referring to the amount of pressure it takes to occlude blood flow and air flow (because it is in a medical journal, they are likely to do so if they are adequately prepped). This line of questioning allows the expert to discuss that there usually isn't visible injury in a strangulation case, and it gets the jury comfortable with the fact that this is not out of the ordinary. Often, the expert then discusses soft tissue and bruising and how there isn't much soft neck tissue to be bruised.

Fifth, I have them talk about death from strangulation and discuss the physiology of a fatal strangulation. I make this point for a variety of reasons that have proven to be effective for a jury. It highlights the danger and lethality of what has occurred (i.e., that she could have very easily died as a result of this particular assault) and that what separates life from death is a very thin line. It also creates a pathway to discuss how even in homicide cases where the cause of death is strangulation, there is often no external visible injury.

Sixth, I have them give an example of pain that is non-visible, such as when you hit your funny bone and it burns—but there is no bruise or visible injury. Seventh, we talk about symptoms and signs of strangulation. I usually go through petechiae (whether it exists in this case or not, I have the expert describe what it is, when it occurs, and how often it occurs) and other visible injuries first. Then I discuss the signs and symptoms that aren't considered "visible injuries," such as the change in a victim's vision or urination, and how the act of strangulation can cause that symptom. I usually have them identify whether a particular symptom is a result of lack of blood flow or lack of air flow. I go through every single symptom that I have charted during the trial and have him describe and connect it to strangulation. Finally, I pull the chart out and ask him, symptom by symptom and sign by sign, whether it is evidence of 1) lack of airflow, 2) lack of blood flow, or 3) pain. If it is evidence of impeding airflow, I have the expert mark an "A" next to the symptom; for blood flow, I have the expert put a "B" next to the sign; for pain, I have him put a "B/I" for "bodily injury." (A transcript of one such direct examination is on www.tdcaa.com for readers to check out.)

Jury feedback

After conviction on a lesser-included in the case with finger-mark bruising on the victim's neck, we listened to the jury's feedback on needing evidence of impeded blood and breath flow, and in the next trial, we employed the method above and it was effective. The chart listing the symptoms and the expert's identification of which symptoms correlate as evidence of the different elements, combined with the expert witness testimony, spells it out for a jury. Just like in child sex-assault cases where experts can testify to how common delayed outcry is, calling an expert to explain the absence of visible injuries in a strangulation case makes the jury feel comfortable with convicting a defendant without much visible evidence. The chart and the signs and symptoms become the evidence, and the expert gives it credibility and provides understanding.

I often hand out my email address to jurors and ask them for their feedback on the case and our use of experts. I like to know what helped them with a conviction on the case. Here are a few comments that I've received since we have used the formula described above.

- "[The paramedic] was an awesome witness for you. … His ability to explain the anatomy of the neck and what makes up strangulation was incredibly helpful in understanding the components of the case

that you had to prove. When you were able to match [the paramedic's] comments to what the victim described experiencing, you buttoned up the State's case."

- "Both the paramedic and the social services expert played key roles in our decision. The paramedic provided an invaluable link between the testimony of the witness and the nature of the assault illustrated by connecting the symptoms with the causes. The social services expert drew a clear connection between the profile of an abuser in an abusive relationship and the actions that occurred in the case. The connections established by both of these people were instrumental in validating what we already knew at that point. It really served to shore up any reservations."
- "I found the testimonies of the two expert witnesses to be very helpful. The young man from EMS was very enlightening on the human anatomy. His descriptions of how strangulation affects the human body and what are the common symptoms the victim may experience was very helpful. That witness cemented your case in the jurors' minds from what I observed."

Conclusion

Ultimately, the key to successfully prosecuting strangulation cases is to reach out to the many members of our community who may interact with victims of this crime to educate and train them to overcome common misconceptions. We hope to minimize the dependence we have on victims testifying against their abusers and in turn reduce the pressure, burden, and danger on the victim as a result of the legal process. At a recent conference, I heard great advice: "Don't make a domestic violence victim be the witness to her own crime." Obviously, there are certain impositions we have to make, but ideally, we can learn to prosecute these cases in a less victim-dependent way. Because the reality is that in domestic abuse cases, today's victim is very likely to be a character witness for the defense tomorrow. ❇

Editor's note: The website www.strangulationtraininginstitute.com has an online training for officers as well as many resources for prosecutors. And, the author will be presenting at the Crimes Against Women conference in Dallas March 31–April 2nd. Online registration is now available at www .conferencecaw.org.

Endnotes

1 Texas Pen. Code §22.01(b)(2)(B). For easier reference, "strangulation" will be used as the general term in this article unless otherwise noted.

2 Gael B. Strack, J.D., George E. McClane, M.D., Dean Hawley, M.D., "A Review of 300 Attempted Strangulation Cases, Part I: Criminal Legal Issues", *The Journal of Emergency Medicine*, Vol. 21, No. 3, pp. 303-309 (2001).

3 *The Journal of Emergency Medicine*, 2009, 35.4. Non-Fatal Strangulation Is an Important Risk Factor for Homicide of Women.

4 Di Maio VJ: Homicidal asphyxia. *Amer. J. Forens. Med. Pathol.* 21(1):1-4, March 2000.

5 "A Review of 300 Attempted Strangulation Cases Part I: Criminal Legal Issues," Gael B. Strack, JD, George E. McClane, MD and Dean Hawley, MD, *The Journal of Emergency Medicine*, Vol. 21, No 3, 2001.

6 Dean A. Hawley, M.D., Forensic Medical Findings in Fatal and Non-Fatal Intimate Partner Strangulation Assaults.

7 *Id.*

8 DiMaio VJ, DiMaio D. Asphyxia. In: DiMaio VJ, DiMaio D, eds. *Forensic Pathology*. 2nd Ed. Boca Raton, FL: CRC Press; 2001: 229-277.

9 Strangulation and Domestic Violence: Important Changes in New York Criminal and Domestic Violence Law. November 19, 2010. Published online by the Empire Justice Center by Amy Schwartz.

10 New York's 2010 strangulation bill, A.10161-a (Lentol); S.6987-a (Schneiderman).

11 Texas Pen. Code §22.01(b)(2)(B).