

## Predominant Aggressor Determination

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## U.S. DOJ Office on Violence Against Women

Thank you to the U.S. DOJ Office on Violence Against Women.

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## Predominant Aggressor Defined

- Predominant Aggressor:
  - The person who poses the most serious ongoing threat.
  - Note: An injury resulting from a person acting in self-defense is neither abuse nor a crime.
  - IACP Model Policy on DV

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## Predominant Aggressor Determination

Major stumbling blocks facing officers:

- Conflicting stories
- Damning evidence (on its face) i.e., physical injuries, person calm, person out of control
- Black and white theoreticals vs. murky shades of gray real world
- Prompting confusion, indecision, & incorrect decisions

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## Predominant Aggressor Determination

- Self defense determination
- Analysis of injuries
- Course of conduct vs. incident based
- Thorough investigation that puts everything into context
- Investigate for Power and Control

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## Context is Everything

- Offender's INTENT or motivation in his/her use of violence
- HISTORY of violence
- MEANING of the violence to the victim
- EFFECT of the act on the victim
- LETHALITY and RISK of further violence, abuse, or intimidation of the victim

Loretta Frederick (2006)

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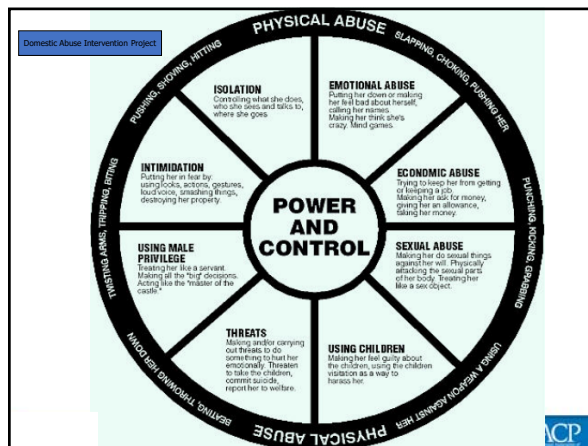
## Victim Reluctance

A victim may....

- Believe the violence won't happen again
- Feel responsible
- Have religious reasons
- Believe the threats

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## Power and Control = Criminal Behavior

- Emotional Abuse..... Simple Assault
- Economic Abuse..... Theft, Fraud, Forgery
- Using Children ..... Kidnapping, Neglect, Abuse
- Threats ..... Stalking, Harassment, Assault, Strangulation
- Using Male Privilege ..... Sexual Assault
- Intimidation ..... Vandalism, Animal Abuse, Destroying Property
- Isolation ..... False Imprisonment, Kidnapping, Custodial Interference
- Minimizing, Denying, Blaming ..... False Reports, Protection Order Violations

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## Investigate Power and Control

- Presence of fear of one party
- Presence of other normal responses of trauma, e.g. crying, hysteria, anger, etc.
- Presence of calm and/or controlling behavior in one party
- NEED FOR PROTECTION

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## Injuries on Attacker

- Bite marks on inside of arms (indicates possible strangulation from behind)
- Bite marks to chest, neck, or back
- Groin or "kicking" injuries
- Injuries caused by hard object or weapon
- Scratches to face, neck, hands
- Eye injuries (gouging)

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## Defensive Injuries on Defender

- Strangulation marks/petechial hemorrhage
- Injuries located predominantly on back, buttocks & back of legs (fetal position)
- Injuries hidden beneath clothing line
- Injury to top or back of head
- Marks on hands, wrists or arm
- Cuts/abrasions on knuckles, foot injuries

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## Case Study

- Boyfriend and girlfriend returned home from a night out on the town.
- He confesses to her that he has had sex with another woman.
- She slapped him.
- He drags her across the floor and out onto the deck. He kicks her and hits her.
- He strangles her until his cousin pulls him off her.

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## Case Study

- Take a moment to write down a few things you want to know before you arrive on scene.

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## Case Study

- A deputy arrives and does not see any marks on either party.
- He does not admit to any wrongdoing during this incident.
- She admits to the deputy that she had slapped him.

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## Case Study

- What are you looking for on scene? Evidence?
- Who are you talking to?
- What are you photographing?
- What questions are you asking?
- Who, if anyone are you arresting, and why?

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## Case Study

- She is arrested based on her confession.
- The following pictures were taken at the jail ten hours after the arrest.

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### Case Study

- Her parents took her from the jail to the hospital for treatment of her injuries.
- She was diagnosed with a broken rib and hyoid bone.
- Charges against her were dismissed.
- He was charged with aggravated assault.

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### Domestic Violence: What We Know

- Domestic violence victims who use force may also do so for a purpose, but that purpose is not related to obtaining and maintaining power and control.

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### Negative Consequences of Arresting DV Victims

- Alienate victim
- Revictimize victim
- Endanger victim
- Criminal record for victim
- Victim will not seek assistance
- Empower perpetrator

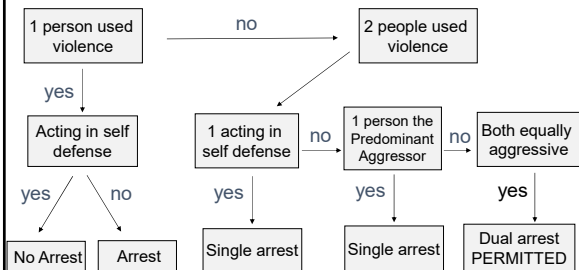
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### Motivations for Utilizing Force

- Fighting back may = defending oneself.
- Would this be mutual combat? Or would it better be categorized as a fear induced reaction from being attacked.
- To be mutually combative, by definition should it also have been a "fair fight"?
- Wouldn't you consider fair fights both unusual and distinct from typical abusive homes?

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### Arrest Decision Flow Chart



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### Injuries

- Because one person is injured does that automatically mean that the other person is the predominant aggressor?
- Have you ever injured a suspect that has not injured you either prior to or during an arrest?
- Were you justified in your use of force? Do you see similar parallels in DV cases?

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## Determining Self-Defense

- An absolute defense to assault or when force used to protect one from being injured
- Must subjectively fear imminent danger of bodily harm
- Fear must be “objectively reasonable” under circumstances
- May use no more force than is “reasonably necessary”

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## Use of Force Continuum

- When we fill out a use of force report we have a “cheat sheet” available to us.
- What criteria are utilized to determine whether that use of force was justified?
- Do you consider any of the same criteria to determine whether use of force was justified when attempting to determine self-defense in domestic violence crimes?
- Is there a difference?

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## Use of Force: Weapons

- A person who is being assaulted, or is about to be assaulted, may realize that they are no match for the violence against them and will often use a weapon or object as an “equalizer.”
- Law: The amount of force used to defend against an assailant may not be unreasonable or excessive.

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## Was it Necessary?

- Question is not:
  - Do I (the investigator, fact finder) believe force was necessary?
- Question is:
  - From the perspective of a reasonably prudent person standing in the shoes of the defendant, knowing all the defendant knows and seeing all the defendant sees, was the decision to use force reasonably necessary?

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## Self Defense Determination

Ask questions:

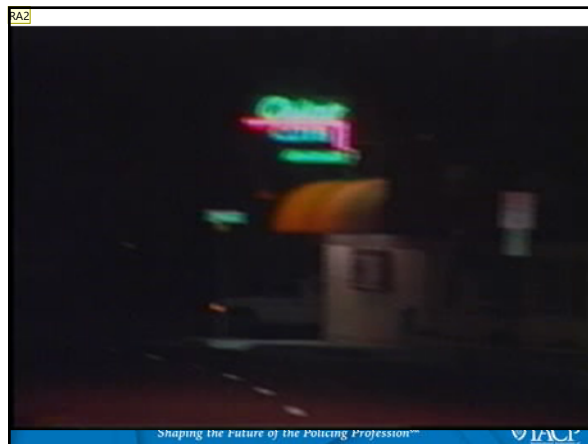
- What did you think was going to happen?
- What were you thinking when you picked up the knife?
- What made you think that?
- Why weren't you going to let him come near you? <sup>RA1</sup>
- What did you think would happen?

Remember: always make a self-defense determination before doing a predominant aggressor determination. Predominant aggressor only applies to when the officer had determined that both parties acted illegally and neither acted in self-defense.

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## Slide 35

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**RA1**      Change from why  
Rachel Apfelbaum, 11/19/2020

## Slide 36

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**RA2**      Rachel Apfelbaum, 11/19/2020

## Analysis of Injuries

- Analyze the injuries in the context of the totality of the circumstances

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## Investigate Power and Control

- History of committing violent crimes
- History of service calls to the home
- History of domestic violence between the parties, or with other victims
- Comparative height and weight
- History of protection orders
- Who is more capable of being assaultive?

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## Investigate Power and Control

- Has one party threatened the other?
- Has the threatening party carried out their threats?
- Severity and analysis of injuries
- Evidence that one party acted in self-defense
- The potential for future injury

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## Evidence

- Police Investigation: foundation of prosecution
- Prosecutor relies heavily on police to determine predominant aggressor
- If predominant aggressor is not determined at all or incorrectly determined (e.g. victim used self-defense), this can have devastating consequences to the prosecution
- Implications of defendant considered "victim" and victim considered "defendant"

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## What is Dual / Mutual Arrest?

- "Arrest them both and let the prosecutor and judge figure it out"
  - Ignores the intent of the law
  - A violation of the U.S. Constitution (Arrest without Probable Cause)
  - Possible violation of state law
  - Possible violation of agency policy

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## If Unable to Determine Predominant Aggressor

- Assess the safety of the parties and any children present; try to convince the parties to separate for the evening
- Petition for an emergency protection order if appropriate
- Someone does not always have to go to jail; don't arrest both parties if you are unable to determine the Predominant Aggressor
- Document your decision

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## What Happens After Dual Arrest?

- You take both parties to jail, meaning you decided both parties committed an assault, so you need to write two narratives or two reports justifying the probable cause for each arrest.
- You cripple the prosecution
- You probably took the victim to jail... you gave away trust in the system
- You subject yourself and your department to litigation
- The suspect thinks he won and will use it again in the future

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## New York 140.10

- 4) Notwithstanding any other provisions of this section, a police officer **shall arrest** a person, and shall not attempt to reconcile the parties or mediate, where such officer has reasonable cause to believe that:
- (a) a felony...has been committed by such person against a member of the same family or household

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## New York 140.10

4c) a misdemeanor constituting a family offense...has been committed by such person against such family or household member, unless the victim requests otherwise. The officer **shall neither inquire as to whether the victim seeks an arrest of such person nor threaten the arrest of any person for the purpose of discouraging requests for police intervention.** Notwithstanding the foregoing, when an officer has reasonable cause to believe that more than one family or household member has committed such a misdemeanor, the officer is not required to arrest each such person.

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## New York 140.10

- 4c) In such circumstances, the officer **shall attempt to identify and arrest the primary physical aggressor** after considering:
- the comparative extent of any injuries inflicted by and between the parties;
  - whether any such person is threatening or has threatened future harm against another party or another family or household member;
  - whether any such person has a prior history of domestic violence that the officer can reasonably ascertain; and
  - whether any such person acted defensively to protect himself or herself from injury.

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## New York 140.10

4c) The officer **shall evaluate each complaint separately** to determine who is the primary physical aggressor and **shall not base the decision to arrest or not to arrest on the willingness of a person to testify** or otherwise participate in a judicial proceeding.

The protected party in whose favor the order of protection or temporary order of protection is issued **may not be held to violate an order issued in his or her favor** nor may such protected party be arrested for violating such order.

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## New York 140.10

- 5) Upon investigating a report of a crime or offense between members of the same family or...a law enforcement officer shall prepare, file, and translate...a written report of the incident...
- 6a) A police officer who responds to a report of a family offense ... may take temporary custody of any firearm...that is in plain sight or is discovered pursuant to a consensual or other lawful search, and **shall take temporary custody of any such weapon that is in the possession of any person arrested for the commission of such family offense or suspected of its commission.**

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## Questions

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