

INTEROFFICE MEMORANDUM

To: Jeffrey F. Rosen, District Attorney

From: Cindy Seeley Hendrickson, Supervising Deputy District Attorney; Lindsay Walsh, Deputy District Attorney

Cc: James Gibbons-Shapiro, Assistant District Attorney

Date: November 10, 2014

Re: Whether or not to file charges against Ray McDonald based on the August 31, 2014 incident

It is our recommendation that the District Attorney's Office decline to file charges against Ray McDonald based on an incident that occurred on August 31, 2014. Both of the parties involved state that Jane Doe struck Ray McDonald first and the evidence shows injuries consistent with restraint and an ensuing scuffle rather than an attack. Extensive follow-up investigation has not shown otherwise. Because of conflicting accounts, the lack of verifiable eyewitnesses and the seemingly minor nature of Jane Doe's injuries, we cannot prove beyond a reasonable doubt that a crime occurred.

1. Office Issuing Policy

The Office's Policy and Procedure Manual section 5.02(b)(iii)(1) states, "The prosecutor owes a duty to the People of a state to prepare complaints in proper cases for factually sound and legal reason. The duty owed includes one to the accused – to prove the case charged against him/her beyond a reasonable doubt (Penal Code section 1096). The prosecutor must not overcharge a complaint by alleging unnecessary charges only to dismiss them at trial or in exchange for a plea."

Our office has long used a four-pronged test when evaluating cases:

1. Has a public offense been committed?
2. Is the identity of the perpetrator known?
3. Can the offense be proven beyond a reasonable doubt?
4. Should there be a prosecution under all the circumstances in the case?¹

¹ Perhaps this prong can be re-worded to read more clearly: "Given all of the circumstances of the case, is prosecution the right thing to do?"

If the first three charging hurdles are surmounted, this fourth prong should be used sparingly with great weight put on uniformity.

The Office By-Laws state, “Cases should be analyzed on evidence and triability, not personalities, friendships, or politics unrelated to the likelihood of prevailing before a jury.”

2. Facts

Jane Doe and Ray McDonald (“McDonald”) have been dating since July 2013. They became engaged in February 2014. As of late August 2014 they had lived together on and off for 11 months in McDonald’s home in San Jose. No one else was living with them at the time of the incident. Jane Doe was 10 weeks pregnant.

One documented prior incident involves both of these parties. On 5/24/14, McDonald called the police stating Jane Doe had a gun. At the time he denied that she ever pointed it at him or fired it. At the time McDonald said he just wanted her removed from the home. The 49ers Security Director called 911 around the same time. He reported that McDonald had just called him and told him that his (McDonald’s) girlfriend fired a gun. Our office declined to file charges. During the current investigation the 49ers Security Director was asked about the May 24th incident and he said he could not recall McDonald’s statement. During the current investigation McDonald was also asked about the May 24th incident and he changed his story and said Jane Doe did fire a gun into the ground as he drove away from his home that day. Initially Jane Doe denied firing the gun and has not provided any further information about what happened.²

On Saturday August 30, 2014, McDonald threw a birthday party for himself at his house. Guests began arriving as early as 3 p.m. Many claimed to have left before midnight but there were enough guests remaining at 1:58 a.m. to generate a noise complaint from a neighbor. Evidence exists to show that before and during the party McDonald became concerned about texts he was receiving from females he met the night before. He called the 49ers Security Director who connected him with Sgt. Sean Pritchard, a sworn peace officer employed by the San Jose Police Department. McDonald told Sgt. Pritchard he was afraid the women would show up at his home and cause problems. At one point he told Sgt. Pritchard he was afraid the women had actually shown up because one of them sent him a text describing what he was wearing. Sgt. Pritchard said he responded to McDonald’s residence two separate times to

² The 911 calls and interviews in that case support a very strong inference that a gun was actually fired. However, it was not determined forensically whether this was the case. This fact, coupled with witness inconsistencies renders impossible proof beyond a reasonable doubt of any charges relating to the firing of the weapon.

address this issue. Only McDonald and Sgt. Pritchard appear to have been privy to this issue.³ The guests who were identified and interviewed and who left prior to the altercation described the party as low key with nothing out of the ordinary occurring.

Sometime between 12:50 a.m. and 2:30 a.m. one of the female guests at the party, an acquaintance of McDonald, headed home. By this time Jane Doe was upstairs sleeping. The guest said she stopped by Jane Doe's room on her way out to warn her that some women were getting too friendly with McDonald. Jane Doe got dressed and came downstairs to confront the females. She saw a woman talking to McDonald and asked her to step outside, which they did. McDonald became upset that Jane Doe was embarrassing him. McDonald said he became concerned for Jane Doe's safety because of the aggressive manner in which she was speaking to the other woman and the fact that she was pregnant.

Jane Doe reentered the residence and headed back upstairs. McDonald followed, saying things that upset Jane Doe. Jane Doe said he called her names, indicated that she was an unfit mother, and threatened to take her baby. Both Jane Doe and McDonald agree that Jane Doe struck first. Jane Doe said it was a single push. McDonald said Jane Doe hit him multiple times with a closed fist. (McDonald had no visible injuries or complaints of pain.) McDonald grabbed Jane Doe's arms to restrain her, resulting in visible injury. At some point they ended up on the couch. Jane Doe said McDonald threw her on the couch. McDonald said they fell on the couch. McDonald tried to remove Jane Doe from the home forcibly. At one point he grabbed her neck, resulting in visible injury. Jane Doe said she was "fighting back," physically resisting McDonald's efforts to pull her out of the house. Jane Doe said she tried to push McDonald off of her. Jane Doe was able to free herself. McDonald said he let go. Then Jane Doe ran upstairs. McDonald called Sgt. Pritchard at 2:39 a.m. and said "I need to get this female out of my house." Jane Doe called 911 at 2:41 a.m. and said "Hello. I'd like to press for a domestic violence...my fiancé... he's trying to pull me out of the house ...he's drunk....I think he's calling the cops, he, he's trying to get me out."

Responding officers noted that McDonald was calm and cooperative and not too intoxicated to hold a conversation. Jane Doe was crying throughout her interview and seemed to be crying in the 911 call. Later Jane Doe told responding officers that she did not want McDonald arrested; she just wanted him to stop (trying to remove her from the home.) Jane Doe was offered and declined medical attention. Later that morning at 8:47 a.m. Jane Doe sent a text saying "Shit got way outta hand."

Responding officers arrested McDonald after determining that probable cause existed to believe that McDonald was the dominant aggressor and that his conduct had resulted in visible injury to Jane Doe. McDonald was arrested for felony domestic violence consistent with the Santa Clara County Domestic Violence protocol which has a pro-arrest policy and which requires an arrest whenever "an officer has probable cause to believe that a felony has occurred...irrespective of whether the officer believes the offense may ultimately be prosecuted as a misdemeanor."

³ A text from Jane Doe to McDonald at 12:27 p.m. that day indicates that she may have been aware of the issue as well.

A search warrant for Jane Doe's phone records revealed the phone numbers of individuals whom Jane Doe contacted shortly after the incident. Three turned out to be close friends with whom Jane Doe shared details of the incident later that same day (8/31/14). None of them actually witnessed the incident. All three were longtime close friends of Jane Doe. They gave similar accounts of the incident as told to them by Jane Doe eight to eleven hours after the actual event.

3. The Law

The above-referenced facts suggest two possible charges: California Penal Code sections 273.5 and 242-243(e).⁴

A. Penal Code section 273.5

To prove that McDonald is guilty of Penal Code section 273.5 we must prove that: 1) McDonald willfully and unlawfully inflicted a physical injury on a spouse/former spouse/cohabitant/former cohabitant/fiancé/former fiancé/mother or father of his/her child/person whom he/she dated; 2) the injury inflicted by McDonald resulted in a traumatic condition; and 3) McDonald did not act in self defense.

B. Penal Code section 242-243(e)

The elements of Penal Code section 242-243(e) are similar to those of PC 273.5. As a practical matter the only difference is that there need not be any visible injury. To prove a violation of PC 242-243(e) we must prove that: 1) McDonald willfully and unlawfully touched Jane Doe in a harmful or offensive manner; 2) Jane Doe has a qualifying relationship with McDonald⁵; and 3) McDonald did not act in self defense.

C. Self defense Instructions

Self defense instructions are given whenever there is some evidence to suggest that the physical altercation was mutual. As a practical matter, the only time they are not given in an assault case is when a defendant claims no physical altercation ever took place or that he/she was not present when it did.

⁴ We considered but quickly rejected the possible charges of false imprisonment (PC 236-237) and assault likely to cause great bodily injury (PC 245(a)(4)). There is insufficient evidence regarding the amount of force used by McDonald in grabbing Jane Doe's neck to prove a violation of PC 245. There is a similar lack of evidence concerning how, how long and with what force McDonald had Jane Doe on the couch (PC 236-237.)

⁵ Effective January 1, 2014 the qualifying relationships in PC 242-243(e) are identical to those required by PC 273.5.

A person must be found not guilty of using force against another if he acted in lawful self-defense. A person can use force to defend himself if he believes he is in imminent danger of being touched unlawfully (like being pushed or hit), if he reasonably believes force is necessary to defend himself, and if the force he uses to defend himself is reasonable. In determining whether a person's conduct was reasonable the jury can consider whether the person claiming self-defense was threatened in the past. (See CALCRIM No. 3470.) Here there is conflicting evidence concerning the events immediately preceding the physical contact, but both McDonald and Jane Doe agree that Jane Doe initiated the physical contact. Jane Doe described it as a single push followed by fighting back after being grabbed. McDonald said she punched him multiple times with a closed fist.

The right to use force in self defense continues only as long as the danger exists or reasonably appears to exist. When the attacker withdraws or no longer appears capable of inflicting any injury then the right to use force ends. (See CALCRIM No. 3474.) Here there is conflicting evidence regarding the threat, if any, Jane Doe continued to pose after McDonald grabbed her arms. McDonald said Jane Doe continued to swing at him. Jane Doe insists that she pushed McDonald one time and fought back only after McDonald grabbed her. There are no verifiable eyewitnesses to the physical altercation.

The fact that Jane Doe was pregnant does not render inapplicable the law of self defense; however her pregnancy is a factor to be considered in determining what force was reasonable. Here, Jane Doe told the 911 dispatcher that she was 10 weeks pregnant. The dispatcher offered her medical assistance including an ambulance which she declined saying "I'm fine." Jane Doe's decision not to cooperate further with the investigation precludes any follow-up on this issue.

The People must prove beyond a reasonable doubt the elements of the aforementioned crimes. That means that the People must prove beyond a reasonable doubt that McDonald did not act in self defense and that he used more force than was reasonable.

4. Collateral Issues

Side issues have arisen during the course of this investigation. They have not compromised our charging decision in this case.

The investigation has revealed that Sgt. Pritchard, while on duty and in uniform, responded to McDonald's house on two occasions during the party on August 30. He responded a third time just after the incident, in the early morning hours of August 31. At that time he was still in uniform but it is not clear whether he was still on duty. The relationship between Sgt. Pritchard and the 49ers, and possible relationships between other San Jose Police officers and the 49ers required a thorough investigation including extensive interviews and search warrants to make sure neither perceived nor actual bias compromised the investigation or in turn our charging decision.

Possible violations of agency policy and the fact that Sgt. Pritchard was working for the 49ers while being paid by the citizens of San Jose remain issues that can be handled administratively.

5. Analysis

The issue with respect to both possible charges is whether McDonald used unreasonable force against Jane Doe and whether this can be proven beyond a reasonable doubt.

Jane Doe's refusal to participate further in the investigation which would have included photographs taken 48 hours after the incident means we will never know the full extent of her injuries. The color and extent of bruising visible 48 hours later might have provided more evidence regarding the amount of force used by McDonald, which is crucial to determining whether the force McDonald used was reasonable. The absence of eyewitnesses renders even more critical the availability of physical evidence. In the initial phase of the investigation, everyone interviewed denied seeing any physical altercation between McDonald and Jane Doe.⁶

It is significant that the dominant act Jane Doe called to report was McDonald's act of "pulling" her out of the house. The dispatcher specifically asked "Was he hitting you?" Jane Doe replied: "He's trying to pull me out of the house." The 911 call is devoid of any allegations of choking or throwing or even grabbing. Only later under questioning from responding officers did details emerge regarding how McDonald tried to pull her out of the house. Omissions in the 911 call do not mean Jane Doe was untruthful in her statement to responding officers, but they show how she initially perceived the incident.⁷

⁶ In a follow-up interview, a teammate of McDonald claimed to have seen a portion of the incident. This player said he saw Jane Doe punch McDonald's face and then he (the player) walked away. This statement lacks credibility for several reasons. This player is likely the person heard yelling when officers first arrived. He is clearly heard protesting McDonald's arrest. His allegiance to McDonald is very strong, and he initially told officers he didn't see anything other than McDonald and Jane Doe talking calmly. This initial statement stands in stark contrast to the accounts given by both McDonald and Jane Doe immediately after the incident. His later account isn't any more convincing. It is simply not credible that the player would have seen Jane Doe strike McDonald and then turn and walk away without hearing or seeing what followed, as he recounted in that later interview.

⁷ Omissions in the 911 call would pose an additional challenge if the case were filed, proceeded to trial and Jane Doe refused to testify as she is entitled to do without fear of incarceration pursuant to California Code of Civil Procedure section 1219. If that were to occur, a trial would have to be conducted with only the 911 call, initial pictures and possibly Jane Doe's first statement to officers. The possibility that a victim might choose not to testify is not a dispositive factor in our issuing decision but it is a factor affecting the likelihood of prevailing before a jury.

When compared to Jane Doe's own account immediately after the incident, the stories relayed by Jane Doe's three close friends, who provide the strongest evidence of an unjustifiable assault, seem to embellish McDonald's physical actions. This does not mean the witnesses are intentionally exaggerating. These are people who have cared about Jane Doe for a long time and were most likely horrified to see marks on her and to hear what she had to say. It is common for dramatic experiences to become more dramatic upon re-telling.

Circumstances concerning Jane Doe's past conduct further complicate the issue of whether McDonald used unreasonable force. The May 2014 incident in which Jane Doe allegedly fired a gun could be part of what the jury would be instructed by the judge to consider in determining whether McDonald could use force to defend himself and whether that force was reasonable.

6. Conclusion

The appropriate charging decision in this case is clear based on the evidence known to us after a lengthy and exhaustive investigation. Because both parties state that Jane Doe struck first, and because her injuries are consistent with restraint of her arms and then a continuing struggle, the People will not be able to convince twelve jurors unanimously and with proof beyond a reasonable doubt that McDonald did not act in self defense. Therefore, we cannot prove a crime occurred.

The decision is clear because we have mutual fighting between two parties, each party blaming the other and there are no verifiable eyewitnesses, no one with significant injuries, and no allegation of prior domestic violence by McDonald. In fact, the only documented prior incident between these two parties involved Jane Doe possibly firing a gun. What complicated the review in this case was the number of potential witnesses, some of whom were not forthcoming with what they saw. Extensive investigation was required to determine whether relevant evidence even existed. A charging decision could not be made without that investigation.

The fact that the appropriate charging decision is clear does not make it simple or easy. Facts surrounding the incident remain unknown despite extensive investigation. Jane Doe's decision not to cooperate further with the investigation and the lack of eyewitnesses has left critical gaps in the evidence. Missing evidence precludes a feeling of certainty regarding how the events unfolded in this case. The charging decision is neither simple nor easy in part because of public expectations surrounding the case. These expectations were created by the Ray Rice domestic violence case which inspired a largely positive national discussion about domestic violence issues. The expectations were fanned by the fact that McDonald was arrested for domestic violence against his pregnant fiancé that resulted in visible injury.

It is our solemn duty to analyze this case based on the evidence and triability and not based on politics or public sentiment unrelated to the likelihood of prevailing before a jury, and that we have done.