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MOM CHANGES STORY IN SHOOTING OF BABY NOW SHE SAYS HUSBAND FIRED ACCIDENTALLY

MICHELLE R. DAVIS, Staff Writer

Just a few hours after Tammy Smith's 6-week-old daughter was shot to death last year, Smith told Richland County investigators that her husband intentionally pulled the gun's trigger during an argument.

But last week, during a meeting with the deputy solicitor who begins prosecuting her husband today for murder and assault and battery with intent to kill, Smith denied giving a statement to investigators. Smith, 24, now says the shooting, in which she was wounded, was an accident. That's the same thing her husband, Derrick, 29, said about what happened the night of Oct. 14, 1996.

Fifth Circuit Deputy Solicitor Johnny Gasser said last week Tammy Smith will be one of the first witnesses called today in the trial, which isn't unusual. What is unusual is that Gasser plans to attack Smith's credibility on the stand to try and prove his case.

"We plan on treating her as an adversarial witness," said Gasser, who filed a motion on Thursday notifying the court of his intent. He plans to question her under oath about the inconsistencies in her statements.

It's a move that would have been impossible more than two years ago. New rules of evidence, many based on existing federal rules, adopted by the state in 1995 allow attorneys to attack the credibility of witnesses they call to the stand.

The impact on serious domestic violence cases similar to the Smith case is important. It allows prosecutors to go forward even when the victim changes the story or wants to drop charges. And sometimes it's the only way to ensure a conviction.

In the past, South Carolina's rules of evidence required that attorneys vouch for the credibility of witnesses they called to the stand. That meant attorneys could not question the testimony of their own witnesses, said Pat Hubbard, a University of South Carolina law professor.

The only way for attorneys to attack their own witnesses was to declare them "hostile," Columbia attorney **Jack Swerling** said. But that could happen only if witnesses surprised the attorneys with new or different testimony on the stand that harmed the case, **Swerling** said.

The new rules of evidence apply to both prosecution and the defense.

"This is probably one of the major changes in South Carolina evidence law," **Swerling** said. "It can be a powerful tool."

In the Smith case, Tammy Smith was the primary witness and a victim in the shooting that killed her baby. Without the change in rules of evidence, it would have been difficult to go forward with the case against her husband, Gasser said.

Derrick and Tammy Smith are not strangers to violence. Police in two counties answered assault and domestic violence calls at their homes more than 25 times in the three years before arguments turned deadly at their Colonial Heights apartment off Farrow Road.

Derrick Smith was convicted at least four times of beating his wife. In other incidents, he was accused of punching her, kicking her when she was pregnant, and putting her in a headlock.

In the early morning hours on the day Fucshia Aude Smith died, Tammy and Derrick Smith got into an argument. According to a Richland County Sheriff's report taken the next day from Tammy Smith, Derrick Smith was drinking and fired a shot from his .38-caliber revolver inside the house. The report says Tammy Smith grabbed the baby and headed for a neighbor's house to call police.

"I said, 'Derrick please don't shoot me, you know I got this baby,'" the report quotes Tammy Smith as telling investigators. "That's when he fired."

The report also details Tammy Smith's response when an investigator asked her if Derrick Smith said he would shoot her.

"He said, 'If I ever catch you with anybody I'll blow both of your brains out because I love you,'" the report quotes her as saying.

But Derrick Smith told a different story, which his wife later backed up. He said the gun went off accidentally as he tried to put it away.

A bullet tore through the baby's chest as Tammy Smith held her. The bullet passed through the baby to her mother's left chest area.

Tammy Smith told investigators she was holding the baby on her shoulder, with the baby's back facing out. But the coroner found that the bullet entered the baby's chest first and exited through her back, an indication the baby was held facing the shooter.

The change in Smith's story isn't surprising. Battered women often change their stories to back up their husband's versions of events, said Nancy Barton director of Sistercare, a Columbia group that works to help the victims of domestic violence. Abuse can leave a woman terrified and feeling controlled, she said.

"She may very well still love him," Barton said of a domestic violence victim. "That's very influential in her thinking."

In less serious domestic violence cases, such as assault and battery, battered women's groups lobby to keep victims of abuse off the stand.

"We want enough evidence to be gathered without her because she is going to be prone to defend him or to look maybe culpable in some way . . . that may look illogical to a jury or judge," Barton said.

But in more serious cases, questioning the victim's credibility might be the only option, as it could be in the Smith case.

"I don't know that that's not the right thing to do in this case," Barton said. "If you really need more evidence than you have to ensure a conviction, then how far do you go?"

Attorney I.S. Leevy Johnson, representing Derrick Smith in the case, said he's not concerned about Tammy Smith's testimony and the changes in her statement.

"I think that she is going to be a fair witness," he said. "I am confident that the truth will come out."

Swerling said the new rules of evidence for some domestic violence cases might help battered women by heading off more serious crimes.

Swerling has defended eight battered women charged with murder. In those cases, the women repeatedly brought domestic actions against their abusers only to drop the charges when things seemed better.

"In the end, it's going to help women, I think, who are put in the position of not wanting to have to testify against an abusive spouse but being forced to," he said. "It sort of protects them."

Michelle R. Davis covers the state judicial system. She can be reached at 771-8484.



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