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Misidentified Victim-Survivors as Domestic and Family Violence Perpetrators: Plea Negotiations as a Tool for Justice?

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The misidentification of primary perpetrators in domestic and family violence (DFV) incidents has received increased attention in academic, practitioner and policy contexts. Yet limited research has explored the implications of misidentification for women in criminal proceedings, specifically how misidentification and subsequent criminalisation of women are linked to both erroneous or forced guilty pleas, and a reliance on plea negotiations to correct misidentification errors. Drawing on interviews with 21 legal defence practitioners, we document the strategies practitioners use in the plea negotiation process to advocate for women defendants who have been misidentified in DFV contexts. We also explore the barriers that women defendants face in accessing justice in a discretionary and managerialist criminal justice system.

KEY WORDS: plea negotiations, guilty plea, domestic and family violence, misidentification

INTRODUCTION

The misidentification of women as predominant aggressors in domestic and family violence (DFV) incidents has become a growing focus in academic, practitioner and policy contexts (Miller 2005; Hester 2012; Dichter 2013; Mansour 2014; Royal Commission into Family Violence 2016; Tolmie *et al.* 2018; Ulbrick and Jago 2018; Nancarrow *et al.* 2020; Reeves 2020, 2021, 2023; Larance *et al.* 2022). Misidentification refers to:

> Situations where police officers respond to an FV [family violence] incident, are unsure which party is the predominant victim–survivor and which is the predominant aggressor, and criminally charge or apply for a family violence intervention order … against the 'wrong' party (Reeves 2021: 2).

The concept of the 'wrong' party can be complex and there are conflicting explanations for the prevalence of women criminalised and prosecuted for DFV offences. As Reeves (2023: 4) argues, while women can indeed be predominant aggressors of DFV, and men can be victim-survivors, the circumstances surrounding women's arrests or their designation as respondents on civil protection orders often reveals 'a complex pattern of victimisation, trauma, and gendered structural disadvantage'. Women's use of force in self-defence or retaliation in DFV incidents is frequently misunderstood by the legal system, which struggles to account for the broader context of abuse and distinguishing between different forms of violence (Larance *et al.* 2022). In some cases, women's defensive actions, such as fighting back or using a weapon to protect themselves, are misinterpreted as aggressive behaviour, leading to their identification as the predominant aggressor (Dicter 2013; Fraehlich and Ursel 2014; Larance *et al.* 2022). Furthermore, women who do not conform to the stereotypical image of a victim-survivor, for example, being agitated towards and uncooperative with police, can confuse the police, courts and other legal actors (Mansour 2014; Iliadis *et al.* 2021). Misidentification therefore provides a critical lens through which to explore how the criminal justice system understands and responds to the criminalisation of DFV victim-survivors.

Australia's legal responses to DFV are somewhat unique in that the civil and criminal legal systems intersect in ways that blur the lines between civil and criminal law (Reeves 2023). This is primarily due to civil protection orders being an outcome of civil proceedings, but a breach of a protection order is deemed a criminal offence. Despite this, there has been limited research that explores the legal implications of misidentification for women in criminal justice proceedings. In particular, it is unclear how the misidentification and subsequent criminalisation of women can foster erroneous or forced guilty pleas, increasing women's reliance on plea negotiations to correct misidentification errors.

Plea negotiations involve discussions between the defendant or their practitioner and the prosecutor to potentially negotiate the charge(s), case facts and/or the prosecution's sentencing submission in exchange for a guilty plea (Flynn 2011; Flynn and Freiberg 2018). In Victoria (Australia)—the focus jurisdiction of this paper—it is estimated that between 80 per cent and 100 per cent of guilty pleas are entered after plea negotiations (Flynn and Freiberg 2018; Freiberg and Flynn 2021). As is the case more broadly, there is no data available on when a guilty plea in a DFV incident results from plea negotiations, or how often misidentified persons may plead guilty due to the pressures that arise from plea negotiations, particularly where there may be a more favourable outcome such as the withdrawal of more serious charges.

In this paper, we document some of the diverse strategies used by legal practitioners to advocate for women defendants who have been misidentified in DFV contexts, including through the plea negotiation process. Drawing on interviews with 21 legal practitioners, we also identify some of the perceived barriers women defendants face when moving through the legal system, particularly due to the discretionary nature of police and prosecution charging practices (Flynn and Freiberg 2018). We suggest that these barriers may result in misidentified women, who are already facing a range of complexities and vulnerabilities, admitting guilt simply to have the case resolved, regardless of the validity of the charges. This finding challenges previous assumptions that the criminal courts act as a safety net to rectify misidentification (see, for example, Reeves 2022). Specifically, this article aims to improve understanding of the misidentification of women as the primary aggressor in DFV contexts by exploring how misidentification charges proceed through the criminal justice system. Furthermore, we aim to highlight the ways in which the hidden, and often criticised plea negotiation process, can be used in misidentification contexts as a tool to improve justice outcomes for women defendants and address errors in discretionary charging decisions.

The paper begins by providing an overview of relevant background literature and the study methodology. We then present our findings, detailing the harms and potential benefits of plea negotiations in resolving misidentification. We further explore concerns relating to police and prosecutorial discretionary charging decisions in influencing how women experience justice, and the vulnerabilities of women defendants facing criminal charges. We conclude by discussing the implications of the findings, limitations and directions for future research.

BACKGROUND

Criticisms of criminal justice system responses to DFV, particularly in cases of misidentification, largely stem from incident-based policing and a lack of understanding of DFV dynamics (Ulbrick and Jago 2018; Nancarrow *et al.* 2020). According to Ulbrick and Jago (2018: 4), misidentification by police is 'pervasive' and results from inadequate understandings of women's use of violence in response to abuse, failure to follow existing guidelines on DFV investigations, poor policing, or systems abuse by male perpetrators (see also Dichter 2013; Douglas 2018; Nancarrow *et al.* 2020; Reeves 2020, 2022). An incident-focussed model of policing prioritises easily provable physical evidence and immediate action, leading police to disregard the cumulative context of abuse and non-physical forms of violence, such as coercive control (Myhill and Johnson 2016; Robinson *et al.* 2018). A focus on individual incidents, rather than patterns of behaviour, can lead to a misinterpretation of reactive acts or self-defence as primary aggression, resulting in women being arrested for more serious offences, for example, if they have used a weapon (Hester 2012; Davies and Barlow 2024). As a result, research has called for a more holistic consideration of the victim-survivor's circumstances (that is, not just a single incident in question), which may better contextualise women's use of violence (Hester 2012). Recent research has also considered how newly classified forms of DFV, such as coercive control, may be used to better contextualise women's violence in response to prolonged abuse (see, for example, Bettinson 2019). As we discuss in more detail in the following sections, while some forms of incident-based policing can be addressed or rectified at the plea negotiation stage, this is often too late in the process and fails to address broader systemic failings.

In Australia, research suggests that marginalised women, including First Nations women, women from migrant and refugee backgrounds, and women with disabilities are at a heightened risk of being misidentified as the primary aggressor (Royal Commission into Family Violence 2016; Nancarrow *et al.* 2020; Djirra 2021). Women with a history of criminalisation have also been found to be at higher risk of misidentification (Royal Commission into Family Violence 2016). There are a myriad of consequences stemming from criminalisation through misidentification, including women's separation from their children, loss of access to services (such as employment, housing, crisis accommodation), impacts on immigration rights and visa status, socio-economic costs, increased vulnerability to further violence, a loss of trust in police and the judicial system, reputational damage, and of course, criminalisation (Dichter 2013; Royal Commission into Family Violence 2016; Jago and Ulbrick 2018; Nancarrow *et al.* 2020; Reeves 2021, 2023). There is a paucity of research that has considered women's criminalisation experiences of misidentification in the criminal justice system. One exception is Dichter's (2013: 87) study, which explored the arrest experiences of misidentified women in the United States, many of whom described the ordeal as 'traumatising, degrading, and shocking'. Dichter (2013) identified three key themes arising from misidentification arrests: (1) the shock of being arrested, where DFV victim-survivors did not anticipate it and saw themselves as victim-survivors, not primary aggressors; (2) the consequences of arrest, including loss of finances, impact on employment, trauma for women's children, poor mental health experiences, and a loss of faith

in police and (3) arrest as a painful catalyst for change, where despite the lack of support from the legal system, some victim-survivors reported the experience as the step that finally assisted them in escaping family violence.

Emerging research in Australia has sought to examine the experiences of misidentified victim-survivors and practitioner responses in Australian civil legal systems where civil protection order matters are heard (Ulbrick and Jago 2018; Reeves 2020, 2021, 2023). Reeves' extensive work in this area has identified that victim-survivors are retraumatized by their highly stressful engagement with the civil legal system and like those defendants in Dichter's (2013) study, report a loss of faith in the system (Reeves 2023). According to legal practitioners in Reeve's (2023: 380) research, most clients who have been misidentified prefer to consent to the civil protection order because 'they just want to get out of there'. Further considerations that deter misidentified victim-survivors from contesting the order are avoiding delays and the retraumatizing nature of the court process (Reeves 2023). Legal practitioners in Reeves' (2023) study further discussed the challenge in determining what is in the best interests of their client—to consent to a civil protection order or to challenge it—where consenting means getting out of the court system quickly, but presents consequences in later contexts, such as charges associated with any breaches of the order. Such findings highlight the importance of addressing DFV across both civil and criminal justice systems more holistically.

Plea negotiations in DFV cases is an underexplored area within criminology and legal scholarship. There are some exceptions that have reflected on challenges in plea negotiations and DFV cases drawing on research with legal practitioners and defendants. For example, legal practitioners in Flynn and Freiberg's (2018) study in Victoria reported some hesitancy in prosecutors' readiness to engage in plea negotiations in DFV cases. This was due to concerns around community and media backlash if they were perceived as making a poor decision, such as negotiating a guilty plea, and the defendant then engaging in further DFV offences, including homicide. Jones (2011) explored the pleading pressures women defendants who are victim-survivors of DFV can face in England, finding that some women will plead guilty to crimes they had not committed due to coercion by their male partner. Margulies' (2001) research similarly identified pressure from male partners on women defendants as a key factor in women's decision-making in plea negotiations, particularly where the partner was abusive and responsible for the victim-survivor's involvement in the crime. Margulies (2001) further found that women defendants' inability to disclose mitigating circumstances (for example, their experience of DFV) may lead to worse court outcomes.

There is little research on plea negotiations specifically in DFV contexts, aside from work focussed on women who kill their intimate partners in response to prolonged abuse (Stubbs and Tolmie 2005; Sheehy *et al.* 2012a, 2012b; Kirkwood *et al.* 2013; Tyson *et al.* 2017; Nash and Dioso-Villa 2024). In these circumstances, women are often initially charged with murder, with the majority eventually negotiating guilty pleas to manslaughter, raising questions as to the appropriateness of the initial charge and whether there is any pressure to accept a guilty plea to manslaughter, rather than test self-defence at trial (Moffa *et al.* 2024). To the best of our knowledge, no research has yet explored plea negotiations as a solution or challenge in cases involving DFV and misidentification of women defendants as primary aggressors. This paper responds to this gap.

METHODOLOGY

This paper draws upon a subset of data from a larger study exploring the experiences of women defendants in plea negotiations in Victoria (Australia). The project comprised a two-staged approach which involved conducting semi-structured interviews with 21 legal practitioners and

then conducting in-depth interviews with 17 women with lived experience of plea negotiations as a defendant. The lived experience participants represented a diverse range of charge types, and while some had experienced family violence or DFV charges, none expressly discussed experiences of misidentification. In contrast, across the legal practitioner interviews, misidentification was a key issue consistently identified. This paper therefore focuses on the perspectives of the legal practitioners who offered their professional experience of patterns, challenges and issues relevant to misidentified women and plea negotiations.

Ethics approval was received from the Monash University Human Research Ethics Committee (Project No. 32053) and approval to recruit staff was also received from Victoria Legal Aid. Recruitment involved contacting individual practitioners through publicly available email addresses and sending organisations (including both private firms and community legal centres (CLCs)) an open invitation, encouraging any staff interested in participating to contact the first author. After interviews commenced, snowball sampling was also used with participants recommending other prospective interviewees. Participants were required to be over 18 years and to have experience representing women defendants in plea negotiations in Victoria.

Between August and November 2022, 21 semi-structured interviews were conducted across three groups: (a) private practice ($n = 9$); (b) CLCs ($n = 4$)–independent community organisations that provide free advice, casework and legal education, including First Nations Legal Services and (c) Legal Aid (LA) ($n = 8$)—a government-funded agency for people who cannot afford a private lawyer. These three groups enabled a diversity of perspectives and experiences of different clientele and organisational demands to emerge. Of the participants, 16 identified as women and five as men. Most were employed in urban/city locations ($n = 14$). The remaining worked in regional settings ($n = 7$). All participants were practising defence lawyers with experience spanning from 6 months to 17 years, with an average of 6.7 years in criminal law.

The interviews were designed to investigate plea negotiations, including the process itself, perspectives on women defendants' knowledge and capacity to engage in negotiations, and structural factors impacting plea negotiations. We also sought to understand the role of procedural justice in plea negotiations (e.g. client voice, transparency, sense of respect and dignity). Protections were put in place to ensure no identifying client information was disclosed, and participants were aware of the legal and ethical obligations of non-disclosure regarding sensitive client information.

All interviews were conducted remotely (Zoom, Microsoft Teams, phone) with an average duration of 55 minutes. The interviews were audio-recorded and transcribed verbatim. The transcriptions were de-identified and then thematically coded and analysed using NVIVO. A coding schema was developed, based on the interview schedule, key emerging themes and existing literature. For example, DFV, navigating plea negotiations, and procedural justice. Pseudonyms are used throughout the article, which reflects a randomly assigned number between 1 and 21, workplace type (e.g. Private, CLC, or LA) and gender (F/M). An (R) is assigned for those working in a regional location. For example, a female lawyer from a CLC may be assigned the pseudonym 16FCLC. A male private lawyer working in regional Victoria may be assigned 03MPrivateR.

FINDINGS

Our findings are presented over four sections. The first section discusses the prevalence and types of charges commonly brought against women in misidentification cases, and the range of negotiation strategies available to defence practitioners. The second examines the receptiveness of prosecutors to engage in plea negotiations, focussing on the conditions under which they are more likely to engage. The third section considers the impact of perceived workload pressures on prosecutors, highlighting how limited resources may thwart early negotiation efforts. The

fourth section then presents legal practitioners' views on whether misidentified women contest charges, exploring the factors that may influence their decisions. Combined, these four sections reveal plea negotiations to be a tool that can rectify misidentification errors and achieve more just outcomes for women, but also create pressures to finalise cases, regardless of the accuracy or validity of the charges laid.

(1) Plea negotiations in misidentification contexts

Across the interviews, participants reflected on the pervasiveness of misidentification, describing that women were misidentified as predominant aggressors in DFV incidents 'quite often' (12FPrivateR), or 'extremely frequently' (19MLAR). For one practitioner working for LA, they perceived misidentification as occurring so frequently that it became their 'starting point' when receiving a brief for a woman charged with DFV offences:

> When I see a police brief where a woman is identified as the respondent in a family violence intervention order, or … criminal offending to do with family violence … I think it's most likely that this person has been misidentified. … I think that it's actually like, the sensible place to start really, because it's so common (16FLA).

Misidentification can become criminalisation in several ways. One of the most common examples is through a breach of a civil protection order, such as a family violence intervention order (FVIVO),[1] which constitutes a criminal offence (Personal Safety Intervention Orders Act 2010 (Vic), s100). Breaches can occur in various contexts, such as reconnecting and/or continuing a relationship when an order stipulates that the person is not to approach or contact the protected person, or committing a further act of violence against the protected person (Easteal *et al.* 2018; Reeves 2023). In Victoria, breaches are considered 'technical' offences to which there is no defence, even if the breach occurs in the context of responding to an incident of DFV or acting in self-defence (Victoria Police 2022). This places significant power in the discretionary charging decisions of police, who choose whether or not to record an intervention order breach when it is reported. This effectively means the person considered the primary aggressor in breach of an FVIVO will face criminalisation without the prospect of a defence (Diemer *et al.* 2017).

Participants in our study identified numerous concerns with these powers and the absence of an available defence option, noting that they regularly deal with misidentified clients who have been charged in circumstances where the breach was minor. One practitioner observed, 'our system is really difficult. … There's no provocation defence or anything like that, so a breach is interpreted quite strictly' (05FPrivateR). Another private practitioner similarly commented, 'once you've breached it you've breached it. That's it' (12FPrivateR).

Given the absence of available defences to a breach charge, participants explained that often their approach in these situations is to ask the prosecution to withdraw the charge based on the public interest test; a legal standard used to determine whether proceeding with a criminal charge is in society's best interests (Hodgson *et al.* 2020). As one practitioner reflected:

> If there's been a misID[entification] and they've put an intervention order in place and then she – the accused – has breached it, for example, by going to the house or whatever, there's no defence to that charge. You're asking them to withdraw it on the basis it's not in the public interest to prosecute. … That's just something you've gotta try and convince prosecutors to do, and if they won't do it, your client doesn't have a defence (02FCLC).

1 Similar civil protection orders in other jurisdictions may include the Domestic Violence Protection Order (UK) or the Apprehended Domestic Violence Order (USA).

Other participants identified strategies such as pointing to patterns of abuse or history between the defendant and police to help get breach charges withdrawn:

> Nine times out of ten, the police probably have a history with the other person and they know a little bit about them because of previous call outs, previous relationships, or they've come before the court before, … particularly in situations where the woman is misidentified as the aggressor (10FLA).

In terms of its relevance to plea negotiations, another participant suggested that such reviews of the history of defendants and police may mean that 'even where [the prosecution] are not prepared to withdraw [that] charge, they may withdraw some charges on that basis' (03FCLCR). While reviewing previous histories involving misidentified women is effective in some contexts, it reveals a key limitation in the criminal justice system's approach to breaches of civil protection orders (Hamilton *et al.* 2023). It can also make plea negotiations or charge withdrawals more difficult for women who have not reported DFV previously. In circumstances where charges cannot be negotiated or withdrawn, another strategy reported by legal practitioners is to negotiate the agreed facts of the case, for example, requesting that some elements from the summary of facts be omitted (e.g. failing to mention that property was damaged during an assault, see Flynn, 2009; Flynn & Freiberg, 2018). One practitioner reflected on the careful consideration required in this form of negotiating:

> It's quite a skill, to put it quite delicately, to try to fix the summary as best as possible in those situations. … You've just gotta make it as pretty as possible for that, and … it's more of a balancing act (10FLA).

In addition to breaches of FVIVOs resulting in criminalisation, participants identified unlawful assault and recklessly causing serious injury as other common charges in cases involving misidentified women. This is consistent with findings in previous research (Mansour 2014; Reeves 2021). As discussed earlier, the circumstances in which victim-survivors would be charged with violence charges vary, such as in retaliation, self-defence, or in responding to prolonged coercive or physical abuse. The following participant provides one example:

> He pushed her into a pole and she slapped him and she got charged with assault, because he called police and she got charged. Then an intervention order got put out. So, we had an IVO [intervention order] and we had the crim[inal] charges. And I case conferenced[2] that and said look, we say she was misidentified, he's three times the size of her, she tells police quite frankly that he pushed her first and she slapped him back, blah, blah, and they don't withdraw at that stage. It had to go to contest mention[3] and then at contest mention hopefully they'll withdraw it, but technically she made admissions to a slap, so that's an assault. But is it, in context? (Int14LA).

2 The summary case conference refers to out of court discussions between the prosecutor and defendant (or their representative) aimed at identifying and resolving disputed issues and managing case progression. These discussions can occur via email, telephone, or face-to-face, and typically take place after a preliminary or full brief of evidence has been served, before the case is listed for contest mention. It also provides an opportunity for the defendant to understand the evidence held by the prosecution (Flynn and Freiberg 2018: 22–23).

3 A contest mention is a required but informal hearing involving a magistrate, defence practitioner and prosecutor to identify and refine case issues. It is also an opportunity to estimate the length of a contested case proceeding to court (Flynn and Freiberg 2018: 24).

Other participants pointed to a common outcome in misidentification cases being a combination of charges:

> The police seem to have this policy of charging with recklessly cause injury and unlawful assault and breach of FVIVO. They always go hand in hand. And I've even heard other police say to each other they would just charge them hamburger with the lot (06MPrivateR).

'Hamburger with the lot' is a colloquial expression describing a practice of charge stacking or overcharging, that is, where the prosecuting agency charges a defendant with a more severe offence or multiple offences (Flynn and Fitz-Gibbon 2011). For most summary offences in Victoria (which includes the majority of DFV offences and breaches), charges cannot be amended after 12 months, therefore multiple charges may be laid to ensure all possible offences and intentions are captured, for example, intentionally causing injury and recklessly causing injury (Flynn and Freiberg, 2018). However, there are criticisms of charge stacking, due to the possibility that multiple charges are laid to provide a 'bargaining' basis to encourage a guilty plea to a lesser number of charges down the track (Flynn and Freiberg 2018: 112). In the context of DFV, criticisms of overcharging have tended to focus on victim-survivors who have killed their abusive partners after long periods of abuse, who are charged with murder where a clear alternative of manslaughter may have been more appropriate (see Sheehy *et al.* 2012a; Flynn and Freiberg 2018; Bettinson 2019; Moffa *et al.* 2024). These criticisms are levied at both the police who initially charge the defendant, but also the prosecutors who then make charging decisions at trial. Our findings suggest that overcharging may be impacting DFV victim-survivors not only in higher-level cases, such as murder, but also at the lower end of the offending spectrum such as breaching FVIVOs. These insights highlight the importance of improving training for police and prosecutors to improve understandings of misidentification and subsequent criminalisation impacts in a diversity of DFV contexts. This would be particularly significant in relation to the laying of charges initially, given the potential pressures this may place on a defendant to plead guilty both within and beyond DFV contexts (see, for example, Flynn and Freiberg 2018). While in later sections, we explore how plea negotiations can serve as a remedy for misidentification, these findings suggest that this benefit depends on the nature of the charges brought against women defendants and the strategic options available for the defence to negotiate.

(2) Negotiating with prosecutors

Participants reported mixed success in negotiating better outcomes (such as reduced charges, improved summaries of case facts, withdrawal of charges) for misidentified women clients. A common view represented by the following quote was that 'eventually it [the truth] does come out' (10FLA). However, this outcome was often described only after the practitioner had engaged in persistent legal advocacy. Rather than the recognition of misidentification being the primary reason for charges being withdrawn or amended, participants indicated that prosecutor offers in plea negotiations often stem from concerns about the reliability of the state's case. For instance, one LA participant noted:

> It's not so much that they will accept that there's misidentification, it's more so that they will accept there are weaknesses in their case and that you're raising issues of doubt (19MLAR).

Similarly, a private practitioner recounted a case where 'a significant history of family violence [and] … an issue of self-defence' led to the withdrawal of charges, rather than explicit acknowledgement of misidentification (05FPrivateR).

Some recent research focussing on police and prosecutorial discretionary charging decisions in DFV cases has highlighted a concern around the under-prosecuting of DFV incidents (see, for example, Douglas 2018; Grant & Rowe 2011; Taylor-Dunn 2016). Other research suggests that there can be an inflexible approach to DFV by prosecutors, whereby charges are pursued regardless of the preference or impacts on the parties involved, particularly where the victim-survivor may not want matters to proceed (Flynn and Freiberg 2018). This hesitancy has been identified as stemming from a desire by police and prosecutors alike to appear tough on DFV offences (Flynn and Freiberg 2018). In our study, the latter view was supported both in terms of a hard-line approach to charging breaches of FVIVOs, even where they may be minor, and an unwillingness of prosecutors to negotiate in circumstances of misidentification. Indeed, several participants recognised this tension, acknowledging that while prosecutors do not wish to seem lenient on DFV, they are also aware of the complexities surrounding women's criminalisation of DFV offences and of misidentification:

> It's weird 'cause I think they've [the prosecution] got a really weird role to play. On the one hand, they're like family violence, we don't want to seem weak, we don't want to be withdrawing charges, we don't want to be giving lenient outcomes. But on the other hand, they get where we're coming from about being misidentified and women being the accused. So I don't think they know how to navigate that yet. I feel like they're stuck between these two competing ideals of like, we're so zero tolerance on family violence, but then on the other hand, they get the reality (14FLA).

Within this cautious approach, participants highlighted the variability of negotiation outcomes, attributing this to factors such as professional relationships and individual personalities. For example, two private practitioners from a regional area attributed their success in having misidentified cases withdrawn primarily due to their existing relationship with the prosecutor, emphasising the importance of credibility and trust:

> Our professional relationships mean that more often than not if we're saying, hey, would you mind just having a look at this, it's because we have genuine concerns and they'll tend to do it (11FPrivateR).

Another participant reflected on prosecutor personalities, alongside what other cases the prosecutor had that day as impacting on negotiations:

> It just depends whether you get them on a good day. You know which prosecutor you get, how many withdrawals they've had that day, how many diversions they've had that day. If they feel like they're being too lenient, they might just say no (14FLA).

Attitudes towards gender were also identified as impacting how an individual prosecutor will approach misidentification cases. As this participant noted:

> There are also prosecutors who will hear you out more if your client is a woman who you say has been misidentified. It kind of depends on the prosecutor. … Sometimes it has a bit of a, kind of like, paternalistic vibe to it or something … I don't know like, knight in shining armour police guy, I don't know, which is kind of annoying, but it's also good for the client [laughs] (16FLA).

Another LA practitioner suggested that 'it sometimes can be easier to get the charge withdrawn because of the way they see [a] female accused as being less, I guess, dangerous' (14FLA).

While some misidentified defendants may benefit from this paternalistic approach adopted by some prosecutors, women defendants who appear or behave outside of accepted gendered norms and expectations, for example, not acting as the damsel in distress, may be subsequently disadvantaged and not afforded the same sympathy and discretion (Ask 2010; Hester 2010). In the Australian context, First Nations women may be particularly vulnerable to assumptions surrounding victim-survivor behaviour 'due to the ongoing societal and systemic racism faced … including in the conceptualisations of the use of violence and stereotypes of the "ideal victim"' (Nancarrow *et al.* 2020: 11).

Participants in our study suggested that outcomes improved for misidentified women when both the prosecutor and defence practitioner had a strong understanding of the context and dynamics of DFV. As one participant observed: '[negotiations are] very reliant on the prosecutor and how on board they are with misID[entification] and their understanding of the dynamics of family violence' (02FCLC). Negotiating DFV related charges in misidentification cases under the existing legal framework relies significantly on the legal practitioners' understandings of DFV (from both the perspective of the defence and the prosecution), and on their willingness to act upon it. This element, combined with individual personalities and gendered assumptions leaves a significant margin for error or negative consequences such as misidentified woman erroneously pleading guilty to the charge(s).

(3) Overworked prosecutors

Another key factor influencing negotiations identified by participants was prosecutor workloads. Previous research has commonly identified concerns around the tension between efficiency in criminal justice systems and its impacts on procedural justice (Baldwin and McConville 1977; Feely 1979; Flynn 2016; Tyler 2000; O'Hear 2008). Heavy prosecutor workloads are evident across all court levels in Victoria (like most jurisdictions), but the workloads of prosecutors in the lower courts are particularly high (Ellis and Camilleri 2023). The Magistrates' (lower) Court mostly hears summary matters such as assault offences, driving offences and wilful damage to property, as well as the majority of DFV offences and breaches (Flynn and Freiberg 2018). In the 2022–2023 financial year, 106,074 cases were finalised in the Victorian Magistrates Court, compared to 2365 cases in the two higher Victorian courts combined (Australian Bureau of Statistics 2024). A significant portion of cases are therefore overseen by prosecutors in the Magistrates' courts leaving less time and opportunity for a focus on each individual case, particularly at early stages of the criminal justice process. Concerns have also been raised in this context around the legal knowledge and training of prosecutors in the Magistrates' court, given they are legally trained police (a course taken over a number of weeks), as opposed to prosecutors in the higher courts who have obtained a university legal qualification, training and placement (Flynn 2016).

Successful plea negotiations in cases involving misidentified women defendants requires a significant investment of time by the defence and prosecution. As this participant explained:

> The prosecution can be fairly OK with trying to look at the case holistically and determine, well, hang on a minute, the police officer that charged these people actually got it around the wrong way. It does take a lot of grunt work in terms of case conferencing and the negotiation to try and change that view, but it can happen and I have seen it happen successfully (06MPrivateR).

Similarly, 14FLA observed that when raising the issue of misidentification with prosecutors, 'they'll often listen, but it'll take probably a contest mention before they'll drop it'. She went on to explain:

> Very rarely will they withdraw on a mention stage, cause they're like, oh we want to chat to the informant. We want to get more disclosure material. Oh, we're just not ready yet. We need to chat to the complainant. We need to ascertain more things. And then you get to contest mention and they'll withdraw. So you just have to push it to that stage.

Reflecting on their perceptions of the high workload of the prosecution, another participant suggested that while 'some are open to seeing it [misidentification], some just simply don't have much time to delve into it' (18FLA). She continued:

> In the lower courts, the prosecutors often don't have the time to be able to devote to looking into it until they actually have a day put aside for a contested hearing. [It's] bloody frustrating.

These observations of workloads and how they impact on prosecutorial capacity to thoroughly investigate issues of misidentification in the lower courts raises numerous concerns. Ideally, thorough investigations should be completed prior to the laying of charges, rather than relying on the plea negotiation process to identify any issues within the case (Nobles and Schiff 2019). While this issue is not exclusive to situations of misidentification—and is relevant to all criminal prosecutions—it increases the potential for injustice when combined with particularly vulnerable defendants. Relying on plea negotiations to rectify errors or to identify the most appropriate charge also assumes that the misidentified defendant has legal representation, which is not confirmed for all those who come before the courts due to the nature of the offence, their income/assets and whether they intend to contest the matter (Flynn *et al.* 2016; Flynn and Hodgson 2017; Victoria Legal Aid 2023). For example, Victoria Legal Aid and CLCs traditionally do not represent accused people who contest matters (Laster and Kornhauser 2017; Noone 2017), and duty lawyers have limited time to meet with an accused person and review case material before a case is heard (Reeves 2020; Nickson and Neikirk 2024). Depending on plea negotiations to rectify errors also relies on the defendant having legal representation capable of identifying and understanding misidentification and advocating about the misidentification in an appropriate way. Research suggests the high workloads of prosecutors are similarly reflected in the workloads of defence practitioners, particularly those working at LA and CLCs (Flynn *et al.* 2016; Flynn and Freiberg 2018). This procedural gap highlights the importance of thorough preliminary investigations to ensure that charges are appropriately and accurately applied from the outset. It also aligns with broader criticisms of a criminal justice system that heavily relies on plea negotiations, in that it can be seen as abdicating its responsibility to the public, the defendant and the victim-survivor, to prove a case beyond reasonable doubt (Nobles and Schiff 2019).

(4) Misidentified women's capacity to contest

The paper has thus far focussed on the obstacles that legal practitioners frequently encounter when advocating for misidentified women clients. However, the most crucial element in these cases is the defendant's decision whether to plead not guilty or guilty, and to which charge(s).

The progression of a criminal case can be daunting and is often an unfamiliar process (Feely 1979; Cheng 2013). For women misidentified as primary aggressors, the punishment of the process itself may be heightened. As Reeves (2023: 380) notes, the gendered operation of the law, which frequently questions women's allegations of violence 'renders the court process for victim-survivors of family violence highly stressful, sometimes dangerous, and often retraumatising'. This is particularly true for victim-survivors engaging with the criminal justice system as primary aggressors, given this may make it difficult for women to overcome the label and escape criminalisation, leading to a loss of faith in the criminal justice system, including a reluctance to seek police assistance in the future (Reeves 2021).

Participants offered varied perspectives on whether misidentified women would challenge charges on the basis that they were misidentified. These ranged from observations that 'they fight the case … as opposed to just rolling over and pleading' (09FPrivate), to suggestions that misidentified clients 'are really vulnerable to folding [entering a guilty plea]' (16FLA). Other participants reflected on the range of trajectories of misidentified clients, for example, 06MPrivateR stated:

> I've had female clients where they're happy to put up the fight and they'll carry it the whole way through and they'll contest it every inch of the way. And I've had other female clients saying no, I can't go through this. I don't want to keep going to court. I don't want to, you know, drag it on. I'd just rather resolve it early or try to plead guilty. Just have it finalised.

Women from already marginalised and minoritized communities were also identified by participants as having vulnerabilities and navigating additional challenges, including language barriers, social isolation and familial and community pressures, which are further complicated by misidentification. For example, one CLC practitioner reflected:

> They are women who are highly likely to agree to plead [guilty] when they shouldn't. … They are very concerned about their social and community connection and family connection and it can be very difficult to get their instructions. … It can be very difficult to convince them not to plead (03FCLCR).

Factors such as whether the relationship (involving the DFV) was ongoing, and other complexities such as childcare responsibilities, socio-economic disadvantage and unstable housing, also factored strongly into women's decision-making, according to participants. One participant from a First Nations legal service suggested that whether the relationship had 'repaired' is a significant factor in whether the misidentified woman will contest charges, noting that 'the reality is if you go to a contested hearing, your partner would need to come and give evidence as to what occurred, and they don't want to do that to their partners' (10FLA). Another participant observed, 'it really depends on their living and financial circumstances and whether they can hold on to contest something' (12FPrivateR). Similar reflections were offered by a CLC participant:

> Particularly if it's a summary offence [relating to misidentification], the client can't afford to run it to a contest. There's no VLA [Victoria Legal Aid] funding, … we don't always have capacity, and we don't run contested hearings, so often for women, particularly if women are separated from employment, they may choose to plead to something because they cannot afford to contest it. … [Likewise] for women with children, where they have childcare responsibilities, they cannot afford those multiple attendances at court.... They don't have somebody else to look after the kids, you know, they've got to pick the kids up. … So often, I think, more frequently with women than men, our instructions are to plead [guilty] to something they shouldn't be pleading to, and so it's quite a bit of work to get people to separate from that, but you can see from their perspective they're wanting to do that because the sheer pressure with their life in that moment, in that instant, is more compelling than the damage to their future (03FCLCR).

These comments reflect not only the multiple pressures at play, but perceptions of how women experience these vulnerabilities and situations in different ways to men, and the potential gendered implications of misidentification and plea negotiations.

Some participants also suggested that the incarceration status of their client influenced their pleading decision. Misidentified women who were on bail were more likely to contest charges

as opposed to women on remand who were susceptible to 'cop a plea and just have it finalised early' (06MPrivateR) to get out of custody. These observations are not isolated to misidentification, and have been identified in relation to other recent criticisms of Victorian bail policy and its impact on increasing criminalisation of women. For example, Russell *et al.* (2020) found that high bail thresholds can create pressure for women to finalise or plead guilty to their matters in the bail and remand court, often leading to a time served sentence for an offence that likely would not have attracted a term of imprisonment.

Another factor seen by legal practitioners as impacting on women's experiences was the exhaustion felt in having their story discredited or ignored. Reeves (2021) similarly suggests this is of particular relevance in misidentification cases, where women have been though the civil justice system as a respondent to an FVIVO and have likely not had the opportunity to express their side of the story. In our study, one participant framed the issue as, 'they can arrive at that criminal matter with a profound sense of injustice, and they've already had an experience of not being heard' (03FCLCR). Cognisant of this reality, another participant outlined their strategy to ensure they listen to the client and the client can feel heard:

> My experience has been once women have identified that we are listening to them, … we tend to be given the benefit of that time where they will allow us to do that, and then that's broached really gently by trying, in my opinion, not to retraumatise them by having them say everything that's been happening when they might have repeated that already to ten people, but use the information we can get to then approach police and ask them to look at … the victim's prior history. And we've been pretty successful having matters withdrawn going on kind of gently-gently basis (11FPrivateR).

The approach identified here both prioritises the misidentified woman's well-being, while striving to achieve the best legal outcome. However, this highlights the significant investment required of defence practitioners in misidentification cases.

Overall, the capacity of misidentified women defendants to contest charges or to plead guilty is influenced by a multitude of factors (Flynn and Freiberg 2018; Freiberg and Flynn 2021). As the participants' observations demonstrate, and in line with prior research, misidentified women are already navigating complex life circumstances and are often lacking in financial, social, emotional and other resources required to contest criminal charges (Ulbrick and Jago 2018). When faced with the possibility of contesting criminal charges—a process that may take years, and substantial emotional, time and financial investment—the result can be pleading guilty to charges that perhaps should never have been laid in the first place. As 18FLA reflected, 'They're just bloody frustrated and burnt out and spent by it all, because it's a long process … you know, it's often two years until you get to a contested hearing'.

The insights from legal practitioners reveal the complex decision-making process faced by women, often balancing the desire for justice, with the practicalities of their lived realities. This nuanced understanding is crucial for developing supportive legal strategies that respect women defendant experiences and provide them with genuine opportunities for a fair resolution. Given that early detection of misidentification and resolution will likely result in fewer false guilty pleas and related collateral consequences, this further highlights the importance of prosecutors' awareness of DFV dynamics and the existence of misidentification.

IMPLICATIONS AND CONCLUSION

The misidentification of women as the primary aggressors in DFV cases often commences when they are designated as respondents on an intervention order (Reeves 2023). This typically

occurs when the male partner initiates contact with the police and is thus perceived as the primary victim-survivor, or in instances where cross-applications are filed and both parties are viewed as equal aggressors (Reeves 2023). Misidentification becomes criminalisation if the DFV victim-survivor breaches the civil protection order, or if other criminal charges are simultaneously or later laid (Ulbrick and Jago 2018; Reeves 2023). Given that 'police are the central pillar of Australia's domestic violence response' (Buxton-Namisnyk 2021: 1326), it is crucial to prevent the misidentification of primary aggressors at the earliest stages by enhancing police comprehension of DFV dynamics, coercive control and the circumstances that contribute to women's victimisation and criminalisation (Ulbrick and Jago 2018).

It is often assumed that criminal courts will correct errors when a woman is misidentified as the primary aggressor in a DFV case (Reeves 2021, 2022), however, the findings in our study suggest that this safety net is not always reliable. For some cases, plea negotiations play a critical role in addressing these errors by providing a mechanism for legal practitioners to seek redress. This generally involves urging the prosecution to reassess the evidence showing the abusive male partner is the primary perpetrator, and requesting them to withdraw charges based on this evidence, or the public interest test. However, the success of these negotiations is highly reliant on prosecutors' understanding of DFV, their existing relationship with the defence practitioner and individual personalities. Furthermore, in light of the high workload of prosecutors (and defence practitioners), such outcomes often require defence practitioners to push plea negotiations or threaten to contest the matter before the evidence in the police brief is reviewed and its strength and validity assessed. This variability poses challenges for defence practitioners in advising a client on the probable course or likely outcome of her case. For errors to be identified, it is equally important that defence practitioners have a strong understanding of misidentification, recognise it promptly and advocate for their clients in a sensitive and informed manner. This leaves substantial room for error in the process, suggesting further training for both police and legal practitioners is required to identify and avoid misidentification in DFV incidents.

These insights underscore the complexity of plea negotiations in cases of misidentification and the need for a nuanced understanding of DFV dynamics among prosecutors and defence practitioners alike. While plea negotiations can potentially be used as a strategy to achieve a more just outcome or withdrawal of charges, it is not without challenges. Relying on plea negotiations to correct the charging error depends on numerous other resources that may be unavailable to some women, such as the legal, financial and emotional support necessary to navigate the legal system. Structural barriers, such as limited funding for LA and CLCs means most recipients of LA cannot have their case run to a contested hearing. In cases where women are unable to afford private representation, a guilty plea may be the only option, despite any concerns around the accuracy of the charges.

While this study has provided insight into an under-researched area, there are some limitations, including that the voices of misidentified women defendants are not represented. Additionally, this article reports on a small sample size of defence legal practitioners in one Australian jurisdiction, and while it identifies concerns that are likely applicable in other contexts, it cannot be considered representative of the situation in Victoria, Australia or international jurisdictions more broadly. It does, however, highlight some of the dangers of a discretionary charging system, where errors in misidentification are reliant on individuals to rectify, as opposed to a whole system approach that addresses the potential for error.

Future research should seek to qualitatively explore the experiences of misidentified women through the criminal justice system, incorporating an intersectional lens to understand the diverse impacts of criminalisation and the justice system's failures (Hester 2012). For example, exploring how First Nations women and women from refugee and migrant backgrounds experience misidentification in DFV. Future studies should also seek prosecutor and police

perspectives on charging practices and the role of plea negotiations in cases involving misidentification. Further quantitative and qualitative research could also be undertaken to map the legal outcomes in perceived misidentification cases, alongside factors such as access to legal representation, time from charge to resolution and background factors of the defendant. This could be in the form of observation research, and accessing case files from both prosecutors and defence counsel (building on Flynn and Freiberg 2018). This would help provide further insight into these cases to help inform policy and practice responses, as well as improved training for police and judicial officers relating to misidentification and DFV.

The criminalisation of women in DFV cases has significant implications for their access to justice, safety and well-being. Misidentification can induce a sense of powerlessness, worthlessness and self-doubt, all of which are exacerbated by systemic gaslighting (Epstein and Goodman 2019). Depending on the legal outcome of the case, a criminal record can be an insurmountable barrier for victim-survivors who are trying to establish independence from an abusive relationship (Reeves 2020, 2021). When the justice system mirrors the patterns of abuse, it impedes rather than facilitates justice (Epstein and Goodman 2019). Addressing the misidentification of women as primary perpetrators within an incident-focussed system and reforming criminal justice policies and practices are crucial steps towards ensuring justice and support for all victim-survivors of DFV.

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