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The Texas Prosecutor

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

Always Be Closing: Using voir dire to argue misdemeanor cases

"A, B, C. Always be closing. *Always be closing*!"

Alec Baldwin boomed those words as he tried to motivate a group of underperforming salesmen in a famous scene in the film *Glengarry Glen Ross*. While Baldwin's character encouraged salesmen to use any means necessary to separate customers from their money, prosecutors can put the mantra of "Always be closing!" to a more positive (and ethical) use in the execution of our singular objective: justice.

In a courtroom, an effective closing argument is simply the final extension of a message the prosecutor should have conveyed during every phase of trial. Done properly, voir dire is the leading edge of your closing argument.

By Ryan C. Calvert
Assistant District Attorney in Brazos County

Primacy

When prosecutors imagine ourselves in trial, we most commonly envision delivering a closing argument. That's where we experience our "Law & Order" moment. We get to bring together passion, emotion, and logic to overcome flawed defense arguments.

But psychology tells us that by the time a case gets to closing argument, jurors have already made up their minds. The "primacy effect" is a well-known and documented psychological phenomenon, which says that the earlier people receive information, the better they accept and recall it. For example, one study found that when people read a series of statements about a person, the amount of time they spend reading the items declines with each new piece of information.[1] Even more telling for prosecutors, participants in another study were shown two lists of character traits that contained identical traits, but in reverse order. Participants who read the list with positive traits shown first had more favorable impressions than those who read the list with negative traits first.[2]

Thus, jurors' impressions of our case and our positions are formed long before we stand to deliver a closing argument. By using voir dire to begin the message that will carry through to closing argument, prosecutors take advantage of the primacy effect and begin "closing" before the defense lawyer ever speaks. Consequently, voir dire is most effective when everything a prosecutor does, says, and asks during jury selection has a case-specific objective.

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Rest in peace, Jacqui Saburido

I was truly saddened last month when I learned that Jacqui Saburido had died of cancer. Ms. Saburdio became a symbol of the dangers of drunk driving after she suffered horrific burns to her face and body in a 1999 crash.

By Rob Kepple
TDCAF and TDCAA Executive Director in Austin

Jacqui, then a 20-year old Venezuelan student at the University of Texas, was headed home from a birthday party at the legendary Oasis on Lake Travis in Austin with friends when their car was struck head-on by a drunk driver who had drifted into their lane. Two other passengers in the car died instantly. Jacqui, sitting in the front passenger seat, suffered third-degree burns over 60 percent of her body after the car caught fire.

You will certainly agree that the anti-DWI ad campaign that came years later stuck with you. A good friend of mine was the photographer and producer for the TxDOT campaign and got to know Jacqui in the process, and he attests that her selflessness in the face of this unspeakable adversity was humbling to everyone involved in that project.

The reason I mention Jacqui in this TDCAF News column is that this Foundation exists to help prosecutors be ready to do their jobs. If we do our jobs right, we can truly impact the number of crime victims we see in our communities. There were no winners in tragedies like what happened to Jacqui and in the criminal trial afterward, but there can be winners in the future—people who are spared from such suffering because of the work prosecutors do. I truly believe that your work has saved lives.

I have linked to Jacqui's story here: www.facesofdrunkdriving.com/jacqui. The whole website is weighty with details of that night, including the drunk driver's 911 call. If you as a prosecutor ever do outreach on DWI to schools and your communities, sharing Jacqui's story could serve you well, and her memory and work will live on. ❇

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Recognizing the TDCAA staff

I want to take a moment to thank the TDCAA staff for all they do.

By Rob Kepple
TDCAA Executive Director in Austin

It is really amazing to see the training, books, and services this group of 16 dedicated people can consistently give you. For instance, TDCAA delivered 68,719 hours of continuing education in Fiscal Year 2018, putting TDCAA in the top five State Bar MCLE providers (out of more than 1,500). This group manages to produce one major seminar a month, plus countless regional, in-house, and online training offerings. On top of that, TDCAA publications lead the field in Texas criminal law with more than 33 high-quality books and manuals. Finally, we pride ourselves in getting you the legal answers and resources you need in a timely way. We may not know the answer here, but our profession has a lot of depth and we can find you the right expert.

Our secret? Experience and dedication to people we serve. Your TDCAA staff has a combined 153 years of service at TDCAA, for an average of almost 10 years per person. Simple fact is we like working for you! This is a positive, energetic and "can do" group, and I am proud to work with them.

Legislative Session in the rear-view mirror

Here at TDCAA we are putting the final touches on our Legislative Update conferences. Updated code books are being shipped, registrations are pouring in, and we've gassed up Frank the Tank (the official TDCAA vehicle). I won't spoil the show by telling you everything that happened during the 86th Regular Session, but I do want to hit a couple of highlights.

First, the legislature shored up assistant prosecutor longevity pay for the rest of Fiscal Year 2019 and for the 2020–'21 biennium. I can tell you that legislators were anxious to make sure this program was supported, and I'd like to thank Representatives John Zerwas (R-Richmond) and Oscar Longoria (D-Mission) and Senators Jane Nelson (R-Plano), Joan Huffman (R-Houston), Royce West (D-Dallas), and Chuy Hinojosa (D-McAllen). There was no shortage of members who kept an eye on this fix as it worked its way through the system.

Second, one of the most significant changes in law is buried deep in the 1,000-plus pages of the General Appropriations Act. Budget writers have invested in the DPS crime lab in Austin to the tune of hiring 120 new forensic analysts. That will allow the lab to "double-bench" with a second shift so they can really put a dent in the lab's backlog. In addition, the legislature passed a provision allowing forensic analysts to testify on a video feed, which could save a lot of travel time and keep the analysts on the bench working cases.

As usual, there are some fun bills that always pass. One of my personal favorites is how the city of Fredericksburg is trying to remake itself. Check out House Concurrent Resolution 37, by which the city sunsets its designation as the state's Polka Capital of Texas ... and remakes itself as the official Wine Capital of Texas!

Impact players

I want to take a moment to thank so many prosecutors who worked with the legislature this session. In our January–February 2019 edition of *The Texas Prosecutor*, I described the role TDCAA has historically played at the legislature, that is, as a resource. It is our members who do the heavy lifting.

It would be impossible to recognize everyone who weighed in, but it was great to have a number of experienced assistant prosecutors spend many a long night at various legislative committees and represent the profession well: **Pete Gallego** (ACDA in Bexar County), **Vincent Giardino** (ACDA in Tarrant County), **Tiana Sanford** (ADA

in Montgomery County), **Paige Williams** and **Alex Guio** (ACDAs in Dallas County), and **Amy Meredith** (ADA in Travis County).

Fun facts about Texas prosecution

Speaking of **Vincent Giardino**, legislative liaison extraordinaire: He recently completed a book on the 100-year history of the Tarrant County Criminal District Attorney's Office. I have watched him spend countless hours reviewing archived newspapers and legal documents to dig into the office's rich history, and he has told me about some of the more interesting things he has learned about our profession. For instance:

• **New lawyers starting their profession as prosecutors is nothing new.** As far back as 1861, one man boasted in a newspaper ad that he was more qualified than his opponents to be the district attorney because he had recently become "a full man" by getting married—while his two opponents were still bachelors. In 1881, Governor Oran M. Roberts, a former district attorney and judge, said that the state needed more experienced lawyers and called for prosecutors to be paid at least as well as district court judges. This need to attract and maintain experienced prosecutors is still imperative today.

• **Jurors had to be sequestered until the 1960s.** Some courthouses had a jury dormitory within the courthouse to accommodate jurors forced to stay the night. There would be enough space for 13 beds: room for 12 men and a bailiff. The law was changed for two reasons: One, women could finally sit on Texas juries in 1954 so counties suddenly needed separate accommodations; and two, it seemed silly that the defendant could go home at night if he were on bond but the jury had to be locked up.

• **Prosecutors' salaries used to be paid out of the fines they collected**, not general revenue, so if no fines were assessed or collected, that meant salaries could not be paid—which is unimaginable now. This practice was not changed statewide until 1951.

• **The Penal Code was re-codified in 1974.** Prior to that year, sentencing statutes were phrased as such: "life, or a term of years not less than two." This meant there was no cap on the number of years, and a couple of McLennan County juries gave defendants 5,000-year sentences. To combat this, the legislature put in our modern language of "99 years, or life."

How things change! ❇

Recent gifts to the Foundation*

Richard Alpert
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David Finney *in memory of Lowell Thompson*
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David Williams *in memory of Louis Crump*
Vic Wisner

* gifts received between February 2 and June 7, 2019

'You wanna be startin' something'

As public servants our first job is always to do justice. It's often the reason we went to law school, and it's usually the reason we became prosecutors.

By Jarvis Parsons
TDCAA President and District Attorney in Brazos County

We believe that one of the best ways to make our community a safer place is to make sure individuals who harm others are punished for that conduct.

However, in this day and age, I believe it's not enough to *do* justice. We as public servants who believe in the criminal justice system have to be ambassadors to our constituents. We should open the curtain and be transparent with the citizens in our community about The What and The Why of prosecution. Creating a Citizens Prosecutor Academy (CPA) is a great way to meet those goals. The Brazos County District Attorney's Office formed such an academy about two years ago, and it's been a great success.

Nuts and bolts

A Citizens Prosecutor Academy is an 8–12-week program that works much like a Citizens Police Academy. The public is invited to attend the sessions to get a better look at what happens in the District or County Attorney's Office. Topics can vary. For our office, we focused on things we think the public may be interested in. Our introductory session starts with the citizens introducing themselves to us and each other. We then ask them a couple of questions:

1) Why did you sign up for the class?
2) What is one question about the criminal justice system you would like answered?

We ask these questions so we can tailor our presentations to the specific needs of the citizens taking the class. After hearing all of the questions and concerns about the criminal justice system, I begin my session, which basically is an overview of the office, the divisions within it, the work we do, and why we do it. Working as a prosecutor for essentially my entire life, I forget how many people have no idea what the District Attorney's Office does or why people become prosecutors. It's clear when I start to speak about why I am a prosecutor and give attendees an inside look into what we do on a daily basis that average citizens who may not know much about the criminal justice system transform into engaged citizens.

Our sessions last from 6:00 to 8:30 p.m. one night a week. While that seems like a long time, it actually goes very fast. We usually find that attendees ask so many questions that we are struggling to finish within the allotted time. I view that as a good thing because it means they are engaged in the talks. While you can break down your sessions anyway you want to, here is how we have it broken down in Brazos County.

Week 1: Introduction and Overview of the Office
Week 2: The Role of the Grand Jury and Narcotics Presentation by Law Enforcement
Week 3: Domestic Violence
Week 4: Crimes Against Children
Week 5: Local Gangs and Juvenile Prosecution
Week 6: Punishment (we use this session to explain enhancement paragraphs, misdemeanors and felonies, punishment ranges, and the like)
Week 7: Prosecutor Ethics and the Death Penalty
Week 8: Mock Jury Selection
Week 9: Mock Trial and Graduation

What I like most about this model is you can input any topic you want, present it, and make it your own. You could make your office's Citizens Prosecutor Academy a six-week process if you wanted to. However you choose to do it, it's a great way for citizens to see you in your element and to appreciate the job we do as prosecutors in the community.

The secret sauce

While the content is important, the most important thing is getting some of your prosecutors and staff on board because it takes more than an elected DA to pull off a program of this magnitude. In my office I knew I needed to get three types of people on board with this vision to make it work. I needed a "cruise director" (someone who would be immediately excited about the program), an "executor" (a person who can not only dream big but also make it happen), and a "critic" (someone who would be wary at first, but once won over, could provide strategic vision to take the CPA to the next level). I could paraphrase their thoughts for you, but I feel it's better to let them tell their own stories.

The Cruise Director, Ryan Calvert (theme song: "Everything Is Awesome" from *The Lego Movie*)

"Like most prosecutors, I frequently complain that the public 'doesn't understand the criminal justice system.' I constantly see news stories about cases, and the public's response to those stories, and lament that people 'just don't get it.' But it occurred to me that no matter how much we complain about the public's ignorance, the public will remain ignorant unless *someone* teaches them. And if we, as prosecutors, don't educate people about what we really do, then who will?[1]

"So I was *thrilled* when my boss, Jarvis Parsons, came to me in early 2017 and asked me to be one of the cruise directors for his new Citizens Prosecutor Academy. Jarvis explained that he wanted the public to understand what we do and how we do it—in particular, Jarvis wanted to include people in the community who may not typically like law enforcement. 'If we can help them understand us,' Jarvis said, 'then they will share that understanding with their families, neighbors, and church groups.'

"For the first academy, we hand-picked attendees who could help the program grow. Elected officials (including our county judge and several commissioners), business leaders, educators, and members of the media were invited to participate. We decided that the group would meet one evening a week for nine weeks. Additionally, Melissa Carter, one of our victim assistance coordinators (VACs) and our executor (more from her in a minute), convinced local restaurants to donate food for each meeting so that we could provide dinner to our attendees.

"My role in most sessions is similar to that of a color-commentator on a sports broadcast. The speaker(s) for the session discuss their respective topics, and I periodically chime in with examples or further explanation. Additionally, I am responsible for the voir dire session. I select a case that requires me to cover topics that jurors will find engaging and challenging, such as Law of Parties and circumstantial evidence. During the first half of the session, I conduct a voir dire with the attendees as the panel. For the second half, I give attendees a glimpse "behind the curtain" of voir dire by explaining to them exactly what I was doing during jury selection and why I was doing it. We discuss challenges for cause, the use of peremptory strikes, and how voir dire is part of an overall trial strategy, even though we cannot directly discuss the facts of the case.

"Finally, my last role in the academy is to participate in the mock trial during the final session. Because we are always looking for ways to train our youngest prosecutors and get them 'reps,' I see the Citizens Prosecutor Academy mock trial as an opportunity for some of our less-experienced people. I choose two young attorneys to prosecute the mock trial case while I play the defense attorney, and I select a case that gives each side good material to work with. Finally, I reach out to police officers or other professionals involved in the case to play themselves as witnesses. Because time is short, we use only two to three witnesses during the trial. Jarvis plays the judge. The trial lets attendees see in action many of the topics we spent the previous nine weeks discussing. It also gives some growing prosecutors a chance to practice their skills, and it lets Jarvis and I see what those young prosecutors need to work on.

"After we completed the first academy in the fall of 2017, the response from attendees was overwhelming. They recommended numerous friends and colleagues to attend future academies. Additionally, Melissa and I went on a local news station to invite the public to attend. To date, four academy classes have completed the program, and our fifth will kick off in September.

"Something I especially love about the CPA is that it gives us an opportunity to show the public how seriously we take both our ethical responsibilities and attempts to rehabilitate offenders. Coming into the academy, most attendees have

I needed a "cruise director" (someone who would be immediately excited about the program), an "executor" (a person who can not only dream big but also make it happen), and a "critic" (someone who would be wary at first, but once won over, could provide strategic vision to take the CPA to the next level).

no idea that we turn all of our evidence over to the defense, while the defense has no obligation to provide any evidence to us. Attendees are fascinated to learn that if we ever encounter information that is, in any way, harmful or damaging to our case, we must disclose it immediately. Many attendees begin the program thinking that we are mere 'government workers' who simply punch a clock 40 hours a week and are primarily interested in conviction rates and obtaining maximum sentences. Those attendees are shocked when they see the number of hours we actually work, how each case is evaluated on its own merits, and how justice for both the victim and the offender drives everything we do.

"While I certainly don't expect to eliminate public misunderstanding of the justice system through the CPA, I have seen the impact the program is having within our community. We have had graduates of the program on juries and jury panels. We have heard from friends and family members of graduates about what they learned just from hearing about the program. Recently, I spoke to Dennis Maddox, a graduate of our Spring 2019 session. Dennis is a retired pastor who also happens to work in the courthouse as a supervisor of our custodial staff. Dennis mentioned to me that he "worked in these hallways every day and had no idea about the great things that y'all do right here." Comments like that convince me that the Citizens Prosecutor Academy is worthwhile. The more our community understands who we are as prosecutors, what we do, how we do it, and (most importantly) why we do it, the better we can do justice."

As we brainstormed topics, it was evident that attorneys like to talk. A lot. I had to remind them we were keeping this to nine weeks so we couldn't cover everything.

The Executor, Melissa Carter (theme song: "Taking Care of Business" by Bachmann-Turner Overdrive)

"I often joke that my journey with our Citizens Prosecutor Academy began because I was wandering the halls of the office as my boss, Jarvis Parsons, was looking for a 'volunteer' to hear his new idea. I remember sitting there as he talked through the plans, and as much as I love to give him a hard time about the extra work it would entail, I knew I wanted to be a part of it. For me this project meant so much more than just hosting a few people in our office and teaching them about our work. I was born and raised in Brazos County, I have lived most of my life here, and I'm raising my family here, so anything that helps the community understand the work of the District Attorney's Office is important to me. When Jarvis asked me to help him, I was hooked and ready.

"We started the planning process and to be truthful, we borrowed a lot of our initial ideas from other counties. Jarvis wanted to get started right away so I had to convince him to give us a few months to make the plans and set everything up. As we brainstormed topics, it was evident that attorneys like to talk. A lot. I had to remind them we were keeping this to nine weeks so we couldn't cover everything.

"After we chose our topics and speakers (most of whom were our ADAs, VACs and investigators), we started reaching out to our inaugural class attendees. Jarvis wanted to do an invite-only class first so that we could work out any problems and be ready for the public in the spring. We started a list of people in the community we thought might be willing to sacrifice their Tuesday evenings for our class. I was worried we wouldn't be able to fill the 25 spots so we came up with more than 50 names, and as we got their addresses, we sent out invitations. I even convinced my dad to be one of our attendees, just in case we didn't have enough people. Within days, though, the class was full and I had a waiting list for Spring!

"Our first session was interesting. We had planned to have a quick introduction time and then get started with the ins and outs of intake and grand jury. We asked each attendee to introduce him or herself and tell us one thing he or she didn't like or understand about the criminal justice system. Well, that one question opened up over an hour of discussion and before we knew it, our intake chief had only 30 minutes left to teach. These attendees were a cross-section of our community, and they definitely opened our eyes to the issues they had with crime, justice, punishments, trials, ethical issues, and so much more. Even though we taught very little that first night, we had so much new information to work with, and we knew we had so much to explain about the law, our office, and the criminal justice system.

"Throughout the next few weeks, we began the process of educating our community on all aspects of our office. We told them the good, the bad, and the ugly. We let them ask questions, we showed them the courthouse, and we even let them be jurors for a night. At the end of that first academy, we graduated 22 community members who included a judge, county commissioners, high-school principals, small-business owners, a

nurse, a reporter, a stay-at-home mom, a banker, a preacher, and others. They stuck with us until the end and as we took a group picture, we realized this class was more than just us teaching them about our office. They had taught us so much about why we serve the community, how to better serve citizens, and the importance of never losing sight of doing what is right through our work. We were pumped and ready to make this academy part of our normal course of business.

"Since that first academy, we have hosted three more and educated 60-plus community members about the DA's office. We have tweaked things along the way—we now have our "alumni" provide dinner, we have extended the session times, and we make sure there is always fresh coffee brewing. We have filled the academy each session, and there is usually a waiting list for the next one. This academy has given us a glimpse into the people who represent our community so that we can better represent them. They have asked tough questions of us, challenged our results at times, and have even said they don't like what we are doing; but through each class, we have been able to educate them, create relationships, and impart knowledge of so much within the system. I think each of our attendees would agree that it is through those hard questions that we have seen a way to work together and make this community a great place to call home."

The critic, Brian Baker (theme song: "Fight The Power" by Public Enemy)

"OK. Let me tell how it *really. Went. Down*. March 2017. Monday. 8:03 a.m. Jarvis' office. As I walk in and start to sit, I see it! Jarvis has that familiar look—a cross between a welcoming smile and an evil smirk. I immediately know that one of the following has happened: Jarvis has:

- heard something at a conference;
- talked to a DA in another county; or
- listened to a podcast; and

He has an idea ... aka a *project*.

"I settle into a chair, take a sip of coffee, and make sure my cup is full. Then when I have exhausted all reasons to stall, I ask: "What?" (I'm asking with equal parts curiosity and dread.)
He says he wants to host a Citizens Prosecutor Academy that fall.

"For the next few minutes everything is a jumble of Jarvis explaining that he sees such an academy as a great way to educate the community on what we do. At the exact same time, my brain starts conjuring all the reasons that it is not worth the time and energy it will require. I mean ... are we really going to ask prosecutors and staff who are burning the candle at both ends already to give up more of their nights and free time?

"An hour later, like so many times before, I walk out of Jarvis' office and start making calls. We are going to put on a Citizens Prosecutor Academy, and it is going to happen fast. I reach out to other counties already holding such programs and ask for all their advice. The TDCAA community comes to my rescue and with their materials as a starting point, we set off to make it happen.

"Over the next few months we come up with a curriculum and assign presentations. Ryan Calvert and Melissa Carter agree to be the academy concierges. They will walk with the attendees every step of the way. We then hand-select our first class, intentionally picking people who have a voice in the community and who can facilitate others to attend in the future.

"I will admit that I was still skeptical and secretly thinking that we would put on one class, maybe two and then realize that I was right: It was more work than it was worth.

"Oh, how wrong I was.

"The first class was an amazing success. I watched as 22 residents of Brazos County were exposed to what we do day in and day out and they were totally engrossed. They were seeing up close the things that make me love this job and this office. We all watched as the class truly got a small taste of the good and the bad, the frustrations and the joys. But most importantly, I proudly observed as these attendees got a chance to meet and hear from the people who work in our office. There was a real connection being made. I realized their experience here would have far-reaching implications for how each of them, as well as their friends and family, would view our office and the cases, as well as the news those cases generated.

"We have now graduated four classes and are about to start our fifth. We have expanded our applicant pool from people we know to strangers who have never stepped foot in a courthouse. I have seen this academy change the minds of those skeptical about the criminal justice system in Brazos County.

"I'm not sure if it was a conference, another elected DA, or a podcast that set us down this path. I continue to readily admit that indeed I

Continued in the pink box on page 11

I will admit that I was still skeptical and secretly thinking that we would put on one class, maybe two and then realize that I was right: It was more work than it was worth. Oh, how wrong I was.

Resolving disorderly conduct in a world of open carry

Disorderly conduct includes intentionally or knowingly displaying a firearm in public "in a manner calculated to alarm."[1]

By Andrea L .Westerfeld
Assistant County & District Attorney in Ellis County

This was once a fairly straightforward statute. But now that open carry is legal in Texas, a person can legally carry a firearm out in public where he could not before. How can we determine what behavior is calculated to alarm and what is reasonable open carry? In *State v. Ross*, the Court of Criminal Appeals had to delve into this question. And with a concurrence and three dissents, it was not an easy one to resolve.

The facts

Little is known regarding the facts of the offense itself because this was an appeal of a pretrial motion to quash. We only know that Dai'Vonte Ross was charged in Bexar County with displaying a firearm in a public place in a manner calculated to alarm.[2] He filed a motion to quash the indictment, arguing that the indictment did not provide sufficient notice because it was required to allege what about the way he displayed the gun was calculated to alarm. The State claimed that this was evidentiary and did not need to be pleaded. The trial court granted the motion, and the State appealed. The San Antonio Court of Appeals affirmed, finding that the term "alarm" is vague and a defendant is entitled to additional notice.[3]

Alarmingly vague

Usually tracking the statute will be sufficient in an indictment, but sometimes additional information is necessary to give a defendant enough notice.[4] Generally, a statute that uses an undefined and indefinite term will need additional information, such as when only one of multiple manners and means in a statute is chosen. So the CCA's analysis turns on whether the term "alarm" is vague or indefinite.

As usual with an undefined term, the CCA began its analysis by looking at the common usage. The CCA and the lower court of appeals both generally agreed on the common definition: "striking with fear, particularly in a sudden or exciting manner."[5] But the court of appeals still believed that the term was vague because "conduct that alarms some people does not alarm others." Thus, the court of appeals believed, a person could not know from the statute what behavior was forbidden because he could not know what would alarm all people.

The CCA rejected this explanation, finding that the statute does not require a person actually *be* alarmed. Rather, the focus is whether the firearm was displayed in a way *calculated to* alarm. Calculated, when used with an infinitive verb ("to walk" or "to run"), has always been interpreted as meaning "likely."[6] Thus, "calculated to alarm" means likely to alarm.[7] This gives it an objective reading, invoking the reasonable person standard.

Finally, the CCA considered the intent element. Because the underlying conduct—displaying a firearm—is not illegal, then the intent requirement applies to the surrounding circumstances that make it illegal.[8] In this instance, that would be the manner calculated to alarm.

Putting the complete analysis together, the State must prove that the defendant 1) intention-

ally or knowingly displayed a firearm *and* 2) he intended or knew it was in a manner objectively likely to frighten an ordinary, reasonable person.[9]

Musings on open carry

The CCA then decided to discuss specifically how the statute balances with open carry. It is important to remember that this portion of the opinion (Part III-B, for those following along at home) is only a plurality. Judge Yeary joined the majority opinion but did not join in Part III-B, filing a separate concurrence. So this is not controlling authority, only some considerations on the issue.

The open carry statute authorizes a licensed person to openly carry a handgun in a public place.[10] Part of the statute provides that it is an offense for a licensed person to intentionally display the handgun in public unless the gun was carried in a shoulder or belt holster.[11] Thus, a person who openly carries a gun in another way, such as in an ankle holster, would be violating this section. But importantly, the disorderly conduct statute requires the additional element of displaying in a manner calculated to alarm, not merely displaying in an unapproved manner.[12] Because of that additional element, disorderly conduct does not conflict with open carry.

Judge Yeary believed that the plurality went too far with this section because the Court was not called upon to interpret the open carry statute.[13] He did not believe that merely carrying a gun in a holster would amount to "displaying" it under the statute. Rather, displaying would require some overt act, such as withdrawing it from the holster or drawing conspicuous attention to it. A person may display by drawing attention to a gun in a shoulder holster without committing an offense, but if the gun is in a leg holster, it may violate the open carry statute.

In any event, neither the plurality opinion nor the concurrence has a majority, so the Court's musings on how the open carry statute might be applied individually is simply guidance for prosecutors. It is not controlling authority.

Notice and deciding after the fact

Ultimately, the CCA determined that the language of the statute alone provides sufficient notice for Ross to defend himself. He can begin preparing his defense that either his conduct was objectively not frightening or that he did not intend it to be.[14] Tracking the language of the statute is enough.

was wrong, so no need to bring it up again. Whatever inspired Jarvis, he was right to listen, and he was right to want to enlighten members of our community, class by class, on how our office ensures justice is done. Our community is stronger and better for it, and not allotting the extra time and resources would be a huge loss for our office and law enforcement in Brazos County."

Conclusion

My hope for you, readers of this article, is to spur you to take reach out to your communities in new and exciting ways. Citizens Prosecutor Academies are just one way to fulfill that goal. It is more work for you and your staff, but it is definitely worth the time and effort. Please don't hesitate to email or call my office—my email is jparsons@brazoscountytx.gov and my phone number is 979/361-4320. We would be happy to share with you like other prosecutors shared their ideas with us. ❇

Endnote

[1] I once heard a colleague say, "As prosecutors, we must define ourselves, lest we be defined by others."

If even judges disagree, how can the statute be clear enough to give notice to a layperson?

The dissents pointed out the simple fact that two courts and multiple judges and justices have disagreed on how this statute is meant to be interpreted. If even judges disagree, how can the statute be clear enough to give notice to a layperson?[15] Judge Walker explained that a person is entitled to adequate notice in the charging instrument to prepare his defense. But there are at least two ways of reading "calculated to alarm"—the majority's "likely to alarm" and the dissents' "deliberately planned to alarm." Because there are two reasonable readings, Judge Walker argues, the indictment must provide additional notice.

But it is the procedural posture of the case that gives the saving grace. This is a pretrial motion to quash. The defendant's concern over which definition would apply has now been resolved by the Court's opinion. Because the case had not yet gone to trial, the defendant is now facing only the question of preparing his defense and knows which interpretation the case is based on.[16] Does that mean that the decision would have been different if the issue had been raised later, such as in a sufficiency analysis? At any rate, now that the issue *has* been resolved, let's hope it will forestall any future challenges on that matter.

How inherently alarming in a gun?

The dissents raised a final issue: Is it possible to display a firearm in public *without* it being in a manner calculated to alarm? Judge Slaughter argued in her dissent that "many ordinary people, even in Texas, may become alarmed at the sight of a gun in person," despite open carry laws.[17] Thus, most gun owners are aware that people may be alarmed if they carry a gun openly in public. If the focus of the disorderly conduct statute is, as the majority argues, whether a person is "likely" to become alarmed, then Judge Slaughter believes any instance of open carry is enough to satisfy the requirement. This is why she advocated the "deliberately planned" definition of calculated to alarm rather than simply likely.

Judge Yeary took issue with Judge Slaughter's description of what is common knowledge.[18] He noted that she cited only to a law professor and two note-writers, not any empirical studies. His own belief is that "the alarm at the sight of a citizen merely carrying a holstered handgun is quite irrational, especially here in the Lone Star State." A person alarmed at the mere sight of a holstered gun would thus not fit the objective reasonable-person standard the court adopted.

This is an issue that all prosecutors will face when prosecuting a case of disorderly conduct by displaying a gun. When would an objective, reasonable person feel alarmed by the sight of a gun? Now that open carry is legal, would a reasonable person feel alarmed simply by the sight of a gun in a holster, as Judge Slaughter argued, or would it take some additional act? A prosecutor facing such a case should be prepared with facts showing why the display of the gun was particularly alarming—did the defendant put his hand on the butt of the gun? Did he say something suggesting he intended to use it? Did he start to draw it from the holster? Did he wave it in the air? All *State v. Ross* tells us for certain is that we do not have to plead such facts in the indictment. We will still need to prove them to our jury's satisfaction at trial. ❇

Endnotes

[1] Tex. Penal Code §42.01(a)(8).

[2] *State v. Ross*, No. PD-1066-17, 2019 Tex. Crim. App. LEXIS 512, slip op. at 2 (Tex. Crim. App. May 22, 2019).

[3] *State v. Ross*, 531 S.W.3d 878 (Tex. App.–San Antonio 2017).

[4] *State v. Zuniga*, 512 S.W.3d 902, 907 (Tex. Crim. App. 2017).

[5] *Ross*, No. PD-1066-17, slip op. at 6-7.

[6] See, e.g., Tex. Code Crim. Proc. Arts. 36.14 (calculated to arouse), 36.19 (calculated to injure), and 38.05 (calculated to convey).

[7] *Ross*, No. PD-1066-17, slip. op. at 11.

[8] *Id.*, slip op. at 12.

[9] Judge Newell, although dissenting, agreed with the majority's interpretation of the meaning of the phrase "calculated to alarm." *Ross*, slip op. at 2 (Newell, J., dissenting), but he believes that because there is such a "molecular-level distinction" between "displaying" and merely "carrying," the State should specify which facts it is relying on to prove the difference.

[10] Tex. Penal Code §46.035.

[11] Tex. Penal Code §46.035(a).

[12] *Ross*, No. PD-1066-17, slip op. at 15.

[13] *Ross*, slip op. at 1 (Yeary, J., concurring).

[14] *Ross*, slip op. at 19.

[15] *Ross*, slip op. at 1 (Walker, J., dissenting); *Ross*, slip op. at 4-5 (Slaughter, J., dissenting).

[16] *Ross*, slip op. at 20-22.

[17] *Ross*, slip op. at 7 (Slaughter, J., dissenting).

[18] *Ross*, slip op. at 4 n.5 (Yeary, J., concurring).

'Can you tell me more about Crime Victims' Compensation?'

Early in my career I really cherished the Crime Victims' Compensation (CVC) program.

By Jalayne Robinson, LMSW
TDCAA Victim Services Director

It's a fund administered by the Office of the Attorney General that reimburses crime victims and their immediate families for some of the financial costs of crime. Seeing how CVC can make a difference in a crime victim's life made me a true believer in the program.

Now, as I assist other victim assistance coordinators (VACs) across Texas, I enjoy teaching people about the program, especially that without VACs spreading the word about CVC to our crime victims, many would never apply.

In my position, I am often asked, "Can you tell me more about the Crime Victims' Compensation program? I really don't understand how it works." In this article, I hope to answer the most common questions I get about it.

The program was created by the Texas Legislature in 1979. It is funded by criminal court costs, fees, and fines paid by convicted offenders, and CVC then reimburses crime victims and their families for expenses of up to $50,000. Each of the awards are limited in the amount that can be reimbursed, and property crimes are not covered. CVC is a "payor of last resort," meaning it will pay for certain crime-related expenses not covered by insurance or other sources. These include funeral and burial, mental health care, loss of wages, loss of support, child care, medical care, rent and relocation, crime scene clean-up, travel expenses, and evidence replacement.

For example, a victim may have medical expenses because of a crime, and his health insurance covers some medical bills but not all. The crime victim can apply for CVC and once approved, the program could reimburse for any out-of-pocket medical expenses, such as co-pays or deductibles. Many crime victims have high medical insurance deductibles or incur numerous co-pays during their recovery, which can add up.

As I reviewed each criminal case and read offense reports to get ready to send out a victim services packet, in the back of my mind I was asking, "How could the CVC program help this crime victim?"

When I worked in a prosecutor's office (23 years in the Wood County Criminal DA's office), here's how I would introduce crime victims to CVC. After grand jury, I would request a list of the indictments, and from those, I would identify those cases that included a victim. As I reviewed each criminal case and read offense reports to get ready to send out a victim services packet, in the back of my mind I was asking, "How could the CVC program help this crime victim?" Look for crimes or attempted crimes that caused mental or physical injury or death, such as assault, child abuse, child sexual assault, DWI, elder abuse, family violence, failure to stop and render aid, homicide, human trafficking, kidnapping, robbery, sexual assault, and stalking. (Note that identity theft and property crimes are *not* covered by CVC.) My goal was to personally talk with each crime victim about the program. One by one I would call people on the telephone and introduce myself as their VAC from the DA's office. I would tell victims that in the next week or so, they would receive a packet from our office that contained information about filing for the CVC program, along with a Victim Impact Statement form and other pertinent information about their case.

At that point, I would begin a conversation about any out-of-pocket expenses they may have incurred because of the crime or that could possibly come up in the future. I kept a quick reference chart next to my phone so I could scan to see how the program might be suitable for each individual (here's the link to that reference chart, which you can download yourself: www.texasattorneygeneral.gov/sites/default/files/files/divisions/crime-victims/CVC_QuickReferenceGuide.pdf). I told them how the program works and what benefits might be helpful to them. Of course, I never promised any reimbursement or payment, noting that all reimbursement decisions are made by the Office of the Attorney General, but my job was to offer assistance in helping the crime victim apply.

CVC online portal

In other CVC news, in September 2018, the Office of the Attorney General (OAG) announced its new online portal. The process for crime victims' and VACs to submit applications online, upload crime related bills, and follow each step of the claim process is now even easier. Here is a link to the website: www.texasattorneygeneral.gov/crime-victims/crime-victims-compensation-program/apply-crime-victims-compensation.

Also in 2018, the CVC Program unveiled its new online CVMS Web Portal for access by advocates, law enforcement, medical professionals, and qualifying nonprofits. An application process through the OAG can establish your office with the online portal. Here is what the web portal could do for VACs and law enforcement:

- prepare applications on behalf of victims that can be completed by the victims when they register;
- submit a crime report while preparing an application;
- submit bills for hospitals, physicians, prescriptions, funerals, childcare, and mental health care while preparing an application;
- view the status of applications;
- view the status of bills; and
- easily track the status of one or more applications and associated bills.

If your office does not have already have account and you would like access to the CVMS web portal, have someone in your office complete a New Organization application at www.texasattorneygeneral.gov/crime-victims/information-victim-services-professionals/victim-services-professionals-crime-victims-compensation-portal-access/new-organization-application. Once your organization has been approved, individual users in an office can complete a new user application here: www.texasattorneygeneral.gov/crime-victims/information-victim-services-professionals/victim-services-professionals-crime-victims-compensation-portal-access/new-service-professional-access-request.

Crime Victim Services Annual Report

Every year, I enjoy reading the Office of the Attorney General's Crime Victim Services Annual Report. I learn something new every time. For instance, the 2018 report announces that CVC received 34,706 applications, and the program awarded $67.4 million to crime victims. Isn't that incredible? Also included in the annual report is a Crime Victims' Compensation Activity Summary by county, which includes information on how many CVC applications were received and approved, how many applications were denied, and total amounts paid out on behalf of victims, all listed by county. It is interesting to look up your county and see how many crime victims were assisted in the previous year. This information and other data are included in their report, which is here: www.texasattorneygeneral.gov/

sites/default/files/files/divisions/crime-victims/Crime%20Victim%20Services%20-%20Annual%20Report%202018.pdf.

As a VAC, personally talking with crime victims about what benefits are available and providing application assistance to help them apply could make a huge difference in their lives. We as VACs should continually ask ourselves "In my position, how can I best assist our crime victims?" One of the first and best places to start is with the Crime Victims' Compensation program.

Victim Impact Statement revision

This summer I will serve on the VIS Revision Committee, which will meet several times to review the format of the VIS form, VIS Quarterly Activity Report, *It's Your Voice* brochure, and VIS Recommended Processing Procedure. The committee is interested in making these documents user-friendly for victims as well as criminal justice professionals. So if you have wished for revisions to these documents and brochures, let me know and I will share those suggestions with our committee. Please email your thoughts, ideas, or suggestions to me at Jalayne.Robinson@tdcaa.com

Mark your calendars

In April, the TDCAA Key Personnel–Victim Services Board met to plan curricula for TDCAA's Annual Criminal & Civil Law Update (in Corpus Christi September 18–20) and the Key Personnel & Victim Assistance Coordinator Seminar (in San Marcos November 6–8). Many thanks to each of you for your time, effort, and dedicated service to the KP-VS Board. There were so many great ideas, and we are looking forward to some fabulous workshops!

To see what we have planned, please mark your calendars for TDCAA's upcoming seminars. For more information, visit our website at www.tdcaa.com/training.

In-office VAC visits

TDCAA's Victim Services project offers in-office support to prosecutors' victim services programs. We at TDCAA realize the majority of VACs are the only people in their offices responsible for developing victim services programs and compiling information to send to crime victims (as required by Chapter 56 of the Code of Criminal Procedure). We also recognize VACs may not have anyone locally to turn to for advice and at times could use assistance or moral support. This project is especially helpful to new VACs.

My recent travels have taken me to Tyler, Gregg, Jasper, and Nueces Counties—see some photos of my trips, below. If your office would like to schedule a victim services visit, please email me at Jalayne.Robinson@tdcaa.com. I am available for inquiries, support, in-office consultations, group presentations or to train brand new VACs in your office. ❇

TOP PHOTO: In the Tyler County CDA's Office (left to right): VAC Paula Gibbs, Misdemeanor Administrator Virgie Sullivan, Clerk Katrina Walston, CDA Lucas Babin, and TDCAA Victim Services Director Jalayne Robinson. SECOND FROM TOP: In the Gregg County CDA's Office (left to right): AFV Administrative Assistant Angie Herritage, Criminal District Attorney Tom Watson, VAC Mona Jimerson, TDCAA Victim Services Director Jalayne Robinson, and Victim Services Director Karen Bertoni. SECOND FROM BOTTOM: Folks in the Jasper County CDA's Office, plus TDCAA Victim Services Director Jalayne Robinson. BOTTOM: Folks in the Nueces County DA's office, plus Jalayne Robinson.

Photos from our Civil Law Seminar

Gerald Summerford Award winner

Barbara Armstrong, Assistant County Attorney in Harris County, was honored with the Gerald Summerford Civil Practitioner of the Year Award at the Civil Law Seminar. She is pictured with Brian Klas, TDCAA Training Director, who presented her with the award. Congratulations, Barbara!

Always be closing: Using voir dire to argue misdemeanor cases (cont'd)

What are the objectives of voir dire?

Successful prosecutors enter each voir dire seeking to achieve specific objectives:

1) Prepare jurors to overcome *that case's* potential weaknesses;

2) Identify and eliminate jurors who cannot (or may not) overcome those weaknesses;

3) Establish *that case's* themes and arguments;

4) Educate jurors on the law governing the case;

5) Protect strong jurors from defense challenges for cause; and

6) Establish credibility with jurors.

Achieving each objective requires prosecutors to spend time planning voir dire presentations, tailoring them to the facts, legal issues, and most especially, potential weaknesses *of the specific case being tried*.

Focus on your weaknesses

One of the biggest mistakes I often see young prosecutors make is to use a "stock" or generic voir dire for each type of case. I have seen inexperienced prosecutors, moments away from jury selection, calling down the hall to colleagues, "Does anyone have a [*fill in the blank*] voir dire I can use?" As a young misdemeanor prosecutor, I was often guilty of that same mistake. I tended to conduct every DWI voir dire the same way. After all, a DWI is a DWI, right? Likewise with assault family violence or theft cases.

It took a "not guilty" verdict on a DWI with a .24 BAC and a crash to teach me the flaws in the "one-size-fits-all" approach.

The defendant in that case was a doctor who, after the crash, was extremely apologetic, kind, and cooperative with police. So cooperative, in fact, that by the end of the video, he and the arresting officer were showing each other photographs of their respective children. When I spoke to the jury after the verdict, jurors said they felt that being arrested and going through a trial were punishment enough for the defendant, whom they all liked and for whom they felt sympathy. At the time, I complained bitterly that I lost because I had a "bad jury." In time, I realized that the jurors didn't fail. I did.

In that case, I spent the vast majority of my time in voir dire discussing intoxication, as I always did on DWI cases. But proving intoxication was the strongest part of my case. Unfortunately, I never discussed or asked any questions about my case's biggest weakness: sympathy for the defendant. Rather than covering topics that jurors might actually struggle with in that specific case, I wasted my limited voir dire time discussing an element that would be easily proven.

An essential question that prosecutors should ask prior to voir dire is, "How can I lose *this* case?" The answer to that question largely dictates where the prosecutor must spend the limited amount of time provided for voir dire. The prosecutor must thoughtfully consider what topics he *must* cover. For example, if the issue is intoxication in a DWI, then the bulk of voir dire should be spent on that topic. If, however, the main contested issue on a DWI is operation of a motor vehicle, then that case's voir dire should look very different.

Prosecutors are trained to identify factual issues that may prevent a case from being proven beyond a reasonable doubt. Jurors, though, often consider two distinct questions when deliberating:

1) Has the case been proven? and

2) Even if the case is proven, *should* I convict the defendant?

To succeed, the prosecutor must often address both questions in voir dire. During trial preparation, some potential issues to consider include:

- sympathy for the defendant;
- unlikable victim or witnesses;
- cooperating witnesses or co-defendants ("snitches");
- inconsistent testimony;
- inability of witnesses to recall details;
- absence of eyewitnesses;
- absence of physical or forensic evidence;
- the "who cares?" factor (for example, shoplifting from Walmart or possession of marijuana);
- circumstantial evidence
- poor police work;
- uncooperative victim;
- absence of harm to the victim or society; and

One of the biggest mistakes I often see young prosecutors make is to use a "stock" or generic voir dire for each type of case. I have seen inexperienced prosecutors, moments away from jury selection, calling down the hall to colleagues, "Does anyone have a [fill in the blank] voir dire I can use?"

- delay in reporting the crime (especially in child abuse and domestic violence cases).

Before conducting voir dire, ask yourself (and teammates) whether jurors may struggle with any of these issues in your case. If the case has a potential weakness unrelated to the facts of the crime itself, address the issue head-on in voir dire. If the evidence proves the defendant's guilt beyond a reasonable doubt, but for some other reason, jurors are unwilling to convict, then those jurors are subject to challenge for cause and must be struck from the jury. (More on challenging jurors for cause in a bit.)

Let's practice evaluating two very different assault family violence cases for their potential weaknesses.

Case One:

- Defendant and victim are married with two children
- Defendant becomes angry with victim over finances
- Defendant pushes victim into a wall
- Defendant punches victim in the face
- Victim calls 911 immediately and reports that her husband hit her
- Officers respond quickly and victim tells them what happened
- Defendant denies touching victim and says the two simply "had an argument"
- Officers note obvious swelling on the victim's eye and damage to the wall
- Victim later recants and tells prosecutors that defendant never struck her
- Victim does not work outside the home

Case Two:

- Defendant and victim are dating
- Defendant learns victim is cheating on him and confronts her
- Defendant slaps victim in the face two times
- Victim does not call 911 immediately but goes to the police department the following day to report the assault
- Officers note that victim has slight redness on her face but no obvious injury
- Victim is cooperative with prosecutors and wants defendant punished
- Victim has prior convictions for possession of a controlled substance and theft

What potential weaknesses or issues in each case might a prosecutor want to address in voir dire? In Case One, you'll definitely need to address recanting or uncooperative victims, witness credibility, and totality of the circumstances. In Case Two, minor or invisible injuries should be discussed, as should having an unlikeable victim and delay in reporting an assault.

Although Case One and Case Two involve the same crime, the prosecutors' voir dires should vary substantially from each other. To prepare jurors to overcome each case's potential weaknesses, the prosecutor must structure the discussion to address those case-specific concerns. A generic domestic violence voir dire fails to adequately address the unique weaknesses of *either* case, while potentially wasting valuable (and limited) time on areas that may not be relevant.

It is important to note that the examples in this article are not intended to be word-for-word scripts of voir dire, nor are they appropriate in every case. A critical component of trial preparation is determining which areas must be covered in voir dire and how the prosecutor plans to approach them. Additionally, prosecutors must conduct voir dire and every other phase of trial in their own unique styles. The purpose of these examples (and this article as a whole) is not to dictate what prosecutors must say or do, but rather to illustrate ways we might tailor voir dire to the circumstances of a specific case. The goal is for prosecutors to find ways to make voir dire an active component of the persuasive process in the eyes of jurors.

Let's get into some details about how to address the weaknesses in both cases.

Evaluating Case One

Here, the largest hurdle the prosecutor must overcome is that the victim will testify the defendant is innocent (a common occurrence in family violence cases). For jurors to see past that testimony and convict the defendant, they must first clearly understand the family violence dynamic. The reasons victims recant, the inequality of power in abusive relationships, and the enormous pressures placed on victims to protect their abusers must be forefront on jurors' minds from the very beginning of the trial, and the prosecutor is responsible for focusing jurors on these issues. Through the prosecutor's questions, jurors can educate each other on why victims of domestic violence recant. Consider the following example: *"Juror No. 1, why might a victim of domestic violence not want the abuser prosecuted?"*

"Fear."

"Fear of what?"

"That the person will do it again, or it will get worse because she told."

"Juror No. 2, your neighbor says fear of retaliation. Can you think of any other reasons?"

"Embarrassment."

"Embarrassment about what?"

"Having to talk about a family secret."

"Juror No. 3, how do people often feel about someone they're in a relationship with?"

"Love."

"Can love be a factor in why a victim may not want to prosecute?"

"Yes."

"Juror No. 4, does domestic violence affect only the victim?"

"No."

"Who else can be impacted by violence in a home?"

"Kids."

"Sure. If a victim has kids with an abuser, could that be a factor in why the victim may not want law enforcement involved?"

"Yes."

"Why?"

"Because they want to keep the family together."

"Juror No. 5, what is something that victims of domestic violence might need or depend on an abuser for?"

"Financial support."

"Financial support only for themselves?"

"No, also for their children."

"Absolutely. So can money be a factor in why many victims of domestic violence don't want law enforcement involved?"

"Definitely."

"Juror No. 6, because of all these reasons we've talked about, do you think victims of domestic violence sometimes actually try to protect their abusers from law enforcement?"

"Yes."

"Like what?"

"By not reporting it or lying about it."

"Juror No. 7, do you agree with your neighbor that sometimes victims of domestic violence lie about what happened to protect their abuser?"

"Yes."

"If we have evidence that proves abusers are guilty, do you think we should prosecute domestic violence cases even if victims are not cooperative or lying about what happened?"

"Yes."

"Why?"

"Because domestic violence is dangerous and you don't want it to get worse."

"Juror No. 8, when a victim is being assaulted and picks up a phone to call 911, what is she thinking about in that moment?"

"That she needs help."

"Right. And when does she need it?"

"Right now."

"Sure. What is she thinking about a year or two after that 911 call, when the case against her loved one finally goes to court?"

"All those reasons why she doesn't want him in trouble."

"So, if a victim of domestic violence does not want an abuser in trouble, should we prosecute those cases, Juror No. 9?"

"Yes."

"Why?" (And so on.)

By asking jurors why a case should be prosecuted despite an uncooperative or recanting victim, the prosecutor prompts the jurors themselves to argue the case for the prosecution. Jurors' responses in voir dire about why a law must be enforced later become a prosecutor's closing argument compelling those jurors to convict.

Another effective technique is to ask which members of the panel have experienced domestic violence in their homes. Sadly, every jury panel will include people whom domestic violence has touched in some way. The prosecutor can ask those jurors whether the victim ever notified police. Most often, jurors will say no. Even jurors who indicate that police were called typically concede that law enforcement was not notified the *first* time abuse occurred. The prosecutor can then ask those jurors why police were not called. Jurors will cite the same reasons for not involving law enforcement that the victim faces in the case now on trial: love, family, fear, financial dependence, etc. This discussion changes the family violence dynamic from a theoretical concept to a real-world occurrence. By bringing this issue to the forefront during voir dire, the prosecutor prepares jurors for the fact that the case's victim will recant and also equips jurors to see beyond the surface-level fact that the victim is uncooperative and instead look at whether an assault occurred.

Even when jurors understand why victims of domestic violence want to keep abusers out of

A critical component of trial preparation is determining which areas must be covered in voir dire and how the prosecutor plans to approach them. Additionally, prosecutors must conduct voir dire and every other phase of trial in their own unique styles.

trouble, some still feel that the matter is a family issue and should not be prosecuted without a cooperative victim. The following approach can be effective in addressing those jurors:

"Juror No. 13, I talk to many people who feel that if the victim of an assault does not want law enforcement involved, then we should stay out of it, especially when we're not talking about an assault with severe injuries. How do you feel about that?"

"I tend to agree."

"That's fair. Clearly, if someone was severely injured, that might be different, but if we're talking about minor injuries, you just don't think a person should be convicted of a crime if the victim doesn't want that to happen, right?"

"Right."

"So if you're honest with yourself, even if the evidence proves to you beyond a reasonable doubt that the defendant committed an assault, you would not convict if you also learned that the victim doesn't want him prosecuted, right?"[3]

"Yes."

"Thank you. I appreciate you letting me know that. I know that many people feel that way. Who else agrees with that?"

By welcoming opinions that are adverse to the prosecution, the prosecutor creates a safe place where jurors who are ill-suited to that particular case can readily identify themselves. Once the prosecutor knows who those jurors are, she can effectively use challenges for cause and peremptory strikes on those jurors.

Note that voir dire is rarely a place to try to change jurors' minds. One of my first voir dires as a misdemeanor prosecutor was on a DWI without a breath or blood test. I asked the jury panel whether anyone would require a scientific test in order to convict. Six jurors raised their hands. My first thought, frankly, was that these jurors were stupid. I proceeded to give them a hypothetical involving an *extremely* intoxicated driver who crashed his car and then told police how drunk he was. I then asked those six jurors whether they would actually need a breath or blood test to convict someone like that. All six said, "No, I guess if you had a case like that, I wouldn't need a test." I felt smug in knowing I had won the intellectual argument ... until I remembered the facts of my case were nowhere near as strong as the facts of my hypothetical. By losing sight of my ultimate objective of getting the best jury for *my* case, I created a situation in which I had six jurors to strike and only three strikes to use. As it turned out, I was the stupid one that day!

By welcoming opinions that are adverse to the prosecution, the prosecutor creates a safe place where jurors who are ill-suited to that particular case can readily identify themselves. Once the prosecutor knows who those jurors are, she can effectively use challenges for cause and peremptory strikes on those jurors.

Evaluating Case Two

A key potential weakness in Case Two is the absence of obvious injuries on the victim. The defense lawyer will undoubtedly argue during the trial that if photos show no injuries on the victim, then no injuries ever existed. During voir dire, a prosecutor must certainly explain how the definition of "bodily injury" does not require *visible* injury. Explaining the law, however, is frequently not enough to ensure that jurors actually *follow* the law. The *manner* in which a prosecutor explains the law is as important as the explanation itself.

Jurors can more easily apply a law if they understand and take ownership of *why* the law is what it is. Prosecutors can help jurors understand and embrace a law by questioning them about their feelings on an issue *prior* to explaining what the law is. Consider the example below:

"Juror No. 10, you have long hair. If I grabbed a handful of your hair and pulled it hard, how would that feel?"

"It would hurt."

"Sure. Have I caused you bodily injury?"

"I think so."

"Why?"

"Because it hurt."

"Juror No. 11, if I took a picture of her, am I going to be able to see any signs of injury like blood or bruising?"

"No."

"Juror No. 10, are you going to go down to the hospital and get a CT scan or any other test so we would have medical records showing you were injured?"

"No."

"Juror No. 13, I definitely caused Juror No. 10 pain, but it didn't last very long, it didn't cause any visible marks on her, and she didn't require medical treatment. Do you think I caused her bodily injury?"

"I think so."

"Why?"

"Because you hurt her."

"Juror No. 14, do you agree that you can hurt someone without causing visible injuries like bruises or bleeding?

"Yes."

"If I walked up to you on the street and punched you in the stomach, is that going to cause a lot of bleeding or bruises?"

"Probably not."

"So, is that still an assault?"

"Yes."

"Why?"

"Because you hit me."

"Juror No. 15, should the law wait until I rip the hair out of your neighbor's head or beat her badly enough that it results in bruises and blood before the law says it's a crime?"

"No."

"Why not?

"Because you don't have a right to hurt people at all."

"Juror No. 16, do you agree with that?"

"Yes, I do."

"Well, the Legislature agrees with you. Here is the legal definition of 'bodily injury'..."

Rather than simply giving the legal definition of "bodily injury" and asking jurors how they feel about it, the prosecutor uses the order and structure of questions to prompt the *jurors* to explain that the law should be precisely what it is. In the process, the prosecutor identifies jurors who are not naturally inclined to agree with that law. Following this discussion, the prosecutor is in a strong position to argue in closing that the jurors themselves rejected the defense's suggestion that without visible injuries, there is no assault. Through this conversation, the prosecutor is already closing.

The same principle applies in DWI cases on the issue of intoxication. Rather than simply providing the legal definition of "intoxication" and asking how jurors feel about it, consider the following discussion:

"Juror No. 1, what is something alcohol does to people?"

"It slows reaction time."

"Juror No. 2, what else?"

"It impairs judgment."

"Juror No. 3, does alcohol effect your vision?"

"Yes."

"Does it make it better or worse?"

"Worse."

"Juror No. 4, does alcohol effect your mind's ability to process information?"

"Yes."

"Does it make it better or worse?"

"Worse."

"Juror No. 5, does alcohol effect your ability to physically control your own body?"

"Yes."

"Does it make it better or worse?"

"Worse."

"How many of you have been driving when someone cut you off and you had to jump on your brakes in an instant to avoid a collision?"

Every juror raises a hand.

"When you're in that situation, if your ability to physically see the threat, or *your ability to mentally process what you're seeing as a threat,* or *your ability to physically react to the threat by turning the wheel or hitting the brakes, is impaired to* any *degree because of alcohol, what kind of difference can that make on the roadway?"*

"Life or death" is the most common response.

"So, Juror No. 6, should the law wait until a driver is extremely drunk before stepping in and saying that he cannot drive?"

"No."

"Why not? I mean, if he's a little bit intoxicated but he still seems to be walking and talking OK, why shouldn't he be allowed to drive?"

"Because intoxicated drivers are dangerous long before they're extremely drunk."

"Juror No. 7, your neighbor says intoxicated drivers are dangerous long before they're extremely drunk. How do you feel about that?"

"I agree."

"Juror No. 8, how do you feel about that?"

"I also agree."

"Well, the Legislature agrees with you too. Here is the legal definition of 'intoxication' in Texas ..."

Through their responses, jurors take ownership of the legal standard of intoxication, lowering their expectations of what "intoxicated" truly means, thereby addressing the potential weakness in the case of a defendant who is not obviously intoxicated on video. Additionally, this approach establishes a common theme in a DWI case: that a slightly impaired driver is both dangerous and guilty. That theme should carry through every phase of trial, from opening statement and questioning of witnesses, to closing argument. Thus, when the prosecutor argues that legal standard during closing, he merely reinforces what *jurors themselves* said during voir dire.[4]

Rather than simply giving the legal definition of "bodily injury" and asking jurors how they feel about it, the prosecutor uses the order and structure of questions to prompt the jurors *to explain that the law should be precisely what it is. In the process, the prosecutor identifies jurors who are not naturally inclined to agree with that law.*

Challenges for cause

Identifying potential weaknesses in a case is meaningless if the prosecutor fails to eliminate jurors who struggle with the issues at hand. Potential jurors who indicate that they disagree with a law, theory, or theme in the case need to be struck from the jury. The question is, by what mechanism will they be struck? Obviously, the more jurors are struck for cause, the more flexible the prosecutor can be with peremptory strikes. First, though, the prosecutor must understand the difference between questions that properly challenge jurors for cause and those which improperly seek to commit jurors to a particular result in the trial. Consider the two questions below:

By validating the positions of jurors who disagree with the prosecution, prosecutors can more easily identify other jurors who share those views, thus making them easier to strike.

"Could you ever convict a person based upon the testimony of one witness?"

vs.

"If you hear from only one witness, but that witness's testimony convinces you of every element of the crime beyond a reasonable doubt, would you convict the defendant?"

To the average juror, the two questions sound like they ask the same thing. Legally, however, the first question is improper while the second one is proper. Essentially, the first question asks a juror how much evidence he needs for a case to be proven beyond a reasonable doubt. Caselaw makes clear that such a question calls for an improper commitment from the juror.[5]

On the other hand, the second question asks whether the juror will follow the law. The law *requires* jurors to convict once every element is proven beyond a reasonable doubt. Thus, by framing challenge-for-cause questions on the premise that the juror believes each element beyond a reasonable doubt, the prosecutor can ask about any potential weakness in a case in order to strike jurors who might struggle with a particular issue.

In *Standefer v. State*,[6] the Court of Criminal Appeals noted that commitment questions containing certain facts of a case are appropriate, so long as they 1) go to a legitimate challenge for cause, and 2) do not contain unnecessary facts. The basic formula is, "If you believe each element of the crime beyond a reasonable doubt, but you also learn [*fill in the blank with a potential fact*], will you convict the defendant?" Consider the following example from a domestic violence voir dire:

"Juror No. 1, if the evidence convinces you beyond a reasonable doubt that the defendant intentionally caused bodily injury to a family member, but you also learn that the victim does not want to prosecute, can you promise the court that you will still convict the defendant?"

This question is proper under *Standefer*. Because the law requires jurors to convict once the elements of assault are proven beyond a reasonable doubt, the question goes to a legitimate challenge for cause. Additionally, the question contains only those facts necessary to establish the challenge for cause, namely, that the victim does not wish to prosecute.

Earlier, I discussed creating a safe place for panel members to express unpopular or controversial views. Fear of judgment or embarrassment may cause potential jurors to hesitate before openly expressing opinions, such as "drugs should be legal" or "stealing a small amount from a store like Walmart should not result in a criminal conviction." Moreover, virtually no jurors wish to be seen as "unwilling to follow the law." Indeed, when trying to strike a juror for cause, many prosecutors make the mistake of asking the juror, "So you can't follow the law?" The tone of that question automatically makes jurors defensive and inclined to say things like, "If it's the law, I'll follow it." As a result, the prosecutor has to burn peremptory strikes on those jurors.

Consider the difference in these two approaches:

"So, if the evidence proves to you that the defendant possessed marijuana, the law requires you to find that person guilty. Will you follow the law?"

vs.

"Marijuana is legal in several states, and many people feel it should be legal here. A lot of people tell me that even if I prove beyond a reasonable doubt that a defendant possessed marijuana, there is no way they could convict someone of a crime for something that they don't feel should be illegal in the first place. If you're honest with yourself, is that how you feel?"

Which tactic do you think is more likely to result in a juror being struck for cause? By validating the positions of jurors who disagree with the prosecution, prosecutors can more easily iden-

tify other jurors who share those views, thus making them easier to strike. Once a single juror expresses such views, welcome the juror's input and call for other, perhaps less-vocal panel members who agree. Again, the objective in voir dire is not to change jurors' minds. Rather, it is to identify those jurors who cannot guarantee that they will render a true verdict based on the law, as their oath requires.

Take ownership

The philosopher Ralph Waldo Emerson once said, "Shallow men believe in luck or in circumstance. Strong men believe in cause and effect." Too often, prosecutors blame a "bad jury" for an acquittal. In reality, a loss at trial is usually caused by a prosecutor failing to adequately prepare the case, failing to identify the case's issues, or failing to plan and execute a voir dire tailored to address the specific case's potential weaknesses and establish themes that will persuade jurors to do justice. By waiting until closing argument to articulate to jurors why we are right, we entrust our case to the luck of the draw with regard to who is in the jury room. Voir dire is our opportunity to lay the foundation for every argument we make in a case and to ensure that those jurors who make it into the "comfortable chairs" of the jury box are both aware of and ready to overcome any issues our case may have. We largely control who our jurors are and how well they are prepared *for our specific case*. For that reason, we must *always be closing*. ❇

Editor's note: This is the first of three articles on voir dire that this journal will publish. Keep an eye out for the next two issues to read about special issues in voir dire and jury selection in punishment cases.

Endnotes

[1] Susan Belmore & Michael Hubbard, "The Role of Advance Expectancies in Person Memory," *Journal of Personality & Social Psychology*, 53(1): 61-70 (1987).

[2] S. Asch, "Forming Impressions of Personality," *Journal of Abnormal and Social Psychology,* 43(3): 318-325 (1946).

[3] Note that under *Standefer v. State*, 59 S.W.3d 177 (Tex. Crim. App. 2001), this is a proper commitment of a juror because it goes to a legitimate challenge for cause and contains no unnecessary facts.

[4] It is important to note that the example is an abbreviated version of what should be a longer discussion with a jury panel where responses are extensively looped to others on the panel to foster an active exchange among jurors. "Looping" simply means asking jurors to respond to the statements of other jurors. Once a legal definition has been provided, it is critical that the prosecutor attempt to strike for cause any jurors who indicate that they may not be able to follow that law.

[5] See *Castillo v. State*, 913 S.W.2d 529 (Tex. Crim. App. 1985); *Medina v. State*, 2004 WL 764444.

[6] 59 S.W.3d 177 (Tex. Crim. App. 2001). Also see "Staying on the right side of *Standefer*" by Zack Wavrusa in the May–June 2019 issue of this journal.

A loss at trial is usually caused by a prosecutor failing to adequately prepare the case, failing to identify the case's issues, or failing to plan and execute a voir dire tailored to address the specific case's potential weaknesses and establish themes that will persuade jurors to do justice.

Prosecuting environmental crimes

Criminals come in all shapes and sizes, as do their crimes.

By Russell Murdock
Office of Regional Counsel, Environmental Protection Agency in Dallas

One type of crime that does not always receive the attention it deserves is environmental crime. What does an environmental crime look like? Some, like those deriving from the tragedies at Deepwater Horizon or the BP Texas City Refinery explosion, lead to death or immediate serious injury. Others, like those from a recent prosecution in federal court in Marshall, have to do with the criminal exposure of unprotected workers to dangerous asbestos. Still others involve the pollution of our state's waterways, land, and air. Each represents a danger to the environment of our state and its residents.

The detection, investigation, and prosecution of environmental crimes is a collaborative effort throughout texas. Federal and state agencies work together, as well as with their local counterparts, to enforce environmental laws. Since 2014, 114 defendants have been found guilty or pleaded guilty in environmental criminal cases in Texas. Twenty-two of those were sentenced in federal district court while 92 were sentenced in local district courts. Eighty-three of the defendants were individuals, and 31 were corporations.

Despite these resources and coordination, many environmental crimes are not prosecuted, in part because more prosecutors are needed to accept and prosecute environmental cases. Many line prosecutors may not know that environmental crimes fall under both federal and local jurisdiction; additionally, some may be hesitant to step into a new and complicated area of the law seemingly by themselves. But no Texas prosecutor need ever feel they are alone when prosecuting an environmental crime. Criminal agents, investigators, and attorneys from both the Environmental Protection Agency (EPA) and Texas Commission on Environmental Quality (TCEQ) are available and eager to assist prosecutors each step of the way.

One such example of federal and local prosecutions coinciding took place in Harris County. The Harris County District Attorney's Office successfully prosecuted a truck driver who was dumping hazardous wastes in and around Houston. This prosecution and investigation then directly led to a fraud investigation of EPA's renewable fuels program, which spanned multiple states and resulted in federal convictions of several individuals.

The EPA has a Criminal Investigation Division comprised of special agents who are fully authorized peace officers empowered to enforce the nation's environmental laws, as well as any other federal law, in accordance with guidelines established by the United States Attorney General. EPA's criminal agents are highly trained men and women dedicated to protecting the country's air, water, and land resources. In addition to the special agents themselves, EPA's Criminal Investigation Division can call upon the broader technical, legal, and scientific expertise of the EPA to aid investigating and prosecuting its cases. Attorneys from the EPA, called Regional Criminal Enforcement Counsels, specialize in environmental crimes and are available to answer any questions prosecutors may have. The majority of federal prosecutions based on criminal investigations completed by the EPA are brought by local U.S. Attorney Offices or the Environmental Crimes Section of the Department of Justice in Washington, D.C.

On the state side, the Texas Commission on Environmental Quality's (TCEQ) Environmental Crimes Unit provides technical support and criminal investigative expertise in multi-agency investigations. TCEQ's Environmental Crimes Unit is comprised of several criminal investigators positioned throughout the state. In addition to investigating crimes, this unit also serves as a resource for and provides training to local, state, and federal law enforcement officers on criminal environmental violations. Its goal is to increase

recognition of environmental crime as a threat to public safety and to encourage and support enforcement of environmental statutes at the state level. Several members of TCEQ's Environmental Crimes Unit volunteer with the Southern Environmental Enforcement Network (SEEN) to provide training not only to law enforcement, but also to local prosecutors.

The TCEQ hosts regular meetings of the Texas Environmental Enforcement Task Force to promote collaboration across all levels of federal, state, and local government. Every few months, representatives from EPA, U.S. Department of Justice, TCEQ, Office of the Attorney General of the State of Texas, Texas Parks & Wildlife Department, Texas Department of Public Safety, Travis County District Attorney's Office—which has extensive experience prosecuting environmental crime—and several other local and county offices, meet to collaborate and aid each other in their criminal investigations and prosecutions. Other regional taskforces exist throughout the state as well,

Across Texas, a few intrepid prosecutors from all levels of government are doing their part to protect the environment—but more are needed. If you are interested in helping to protect Texans' public health and natural resources from environmental criminals, reach out to your new partners using the contact information below.

Resources

To learn more about EPA's Criminal Investigation Division, visit www.epa.gov/enforcement/criminal-enforcement-overview or call 214-665-6600 to speak with the Dallas area office. To learn more about TCEQ's Environmental Crimes Unit, visit www.tceq.texas.gov/compliance/investigation/crime, and to learn more about the Southern Environmental Enforcement Network's training opportunities, visit www.seentraining.org. ❇

Now that a bail-jumping defendant is back in custody ...

"Counsel, I have a jury waiting. Where is your client?" Words that no defense attorney wants to hear—and words that indicate a great deal of time and preparation on the prosecution's part are about to go to waste.

By Benjamin I. Kaminar
Assistant County & District Attorney in Lamar County

Sometimes, there's a legitimate reason for the defendant's failure to appear, such as a car collision en route to court or a child who had to go to the emergency room ...

Wait—didn't we run this article four issues ago? Not quite. It sounds familiar because in a previous article, we covered how to forfeit a fugitive's bond a few issues back, but now it's time to follow up with how to prosecute the new offense.

Investigation and charging

Bail jumping is a relatively straightforward offense to investigate and charge. The elements are simply that the defendant was lawfully released from custody on condition that he appear in court, and he intentionally or knowingly failed to appear. As with our previous discussion about forfeitures, we start with the bond itself. A person hasn't committed an offense if he was never released from custody on bond, whether through an erroneous release or some other situation. This may be especially important if your jurisdiction sets cases for a docket where the defendant has not yet been arrested. Once you have verified that the person was released on bond and is not in court, the court should forfeit the bond (again, as we discussed during the forfeiture article). Often, the bailiff or officer taking the forfeiture will complete a certificate or affidavit for the court's file, which will be useful later on. If they don't, check the court's file for any other documentation, whether a docket entry, a judgment nisi, or something else showing that the court put in its records that the defendant failed to appear.

Once we've established that the defendant was on bond and failed to appear, the next investigative step is to confirm that the defendant had notice of the setting. How defendants are given notice will vary by jurisdiction. In some counties, the defendant may sign a reset sheet or pass slip containing the date and time of the new setting. In others, he will receive a notice mailed from the clerk's office with each setting. If this is the case, confirm that notice was mailed to the address listed on the bond, not an old address. Sometimes, defendants who have had cases in a county before will have historical address information that does not get updated with the new arrest; other times, the defendant will have had a change of address after arrest and will have updated that information with the clerk's office. Prosecutors should make sure notice went to the address the defendant gave.

Next, an inquiry to the defendant's bondsman may be in order. Some bondsmen actively track their defendants' court settings and stay in contact with them. These bondsmen can be invaluable in confirming whether they notified the defendant of court dates as well as alerting us to reasons the defendant may not have appeared, such as hospitalizations. Other bondsmen may not be quite as thorough in monitoring their defendants and are less helpful.

Finally, once a defendant is re-arrested, checking his jail calls may be worthwhile, espe-

cially if he is contacting bondsmen to post bail again. Bail bondsmen will often want to know why the defendant didn't show for court before writing a new bond, and the defendant might just offer an excuse—which can provide useful impeachment material for trial or alert prosecutors to a justification that changes our charging decision.

After you've run down all the information regarding the defendant's bond, failure to appear, and notice, it's time to draft the charging instrument. The degree of offense for bail jumping varies based on the degree of offense for which the defendant was required to appear. Bail jumping is generally a Class A misdemeanor; however, if the underlying offense was a Class C misdemeanor, the bail jumping offense is also a Class C.[1] If the underlying offense was a felony, the bail jumping offense is a third-degree felony. It is critical that an indictment specify the defendant was required to appear for a felony; if it does not, then the indictment defaults to the offense being a misdemeanor.[2] The felony/misdemeanor classification is based on the offense as filed in court, not as listed on the bond.[3] This means, for example, that if the defendant is arrested for the felony of DWI–3rd and posts bond for a DWI–3rd, but the charge is later filed as a misdemeanor DWI–2nd, the bail jumping charge will be a misdemeanor. On the other hand, if the defendant is arrested for a misdemeanor family violence charge and posts bond for that misdemeanor but is subsequently indicted for felony family violence because of a prior conviction, any bail jumping charge will be a felony.

Finally, bail jumping is not a continuing offense, so the statute of limitations begins to run the day the defendant fails to appear.[4] Bail jumping has the default felony limitation of three years, but limitations may be tolled by the defendant's absence from the state. Prosecutors relying on the defendant's absence from the state to avoid a limitations problem should ensure that the indictment alleges tolling.

Trial

While a bail jumping trial may be simple on its face, there are still some key issues to watch for and steps we can take while presenting evidence that will strengthen a case. Voir dire affords the opportunity to discuss potential defenses, such as reasonable excuses for failing to appear. Hypotheticals regarding various reasons and differing re-apprehension scenarios can be helpful in flushing out potential jurors' views on excuses.

The case-in-chief will often be relatively straightforward. Step one, as always, is proving the defendant's identity. If the bondsman is available, he can often identify the defendant as the person for whom he posted the bond. The bondsman can also discuss his office procedures for periodic check-ins, how he monitors defendants, and what he does to get defendants to court. A really good one will also discuss efforts to recover the defendant after he failed to appear.

Next, a deputy clerk can explain for the jury how defendants are notified of court appearances and the purpose of the various documents that the State is offering, such as notice letters, reset sheets, the bond, etc. Having someone to explain the meaning and provide context is far preferable to letting the jury try to sort through a pile of documents. A clerk can also testify about how her office updates addresses to ensure that any notices go to the most recent known address. The theme of the clerk's testimony should be that of professional and routine administration.

Third, call the bailiff from court the day of the failure to appear. While prosecutors could simply offer a certified copy of a certificate of call (assuming one was completed), live testimony from someone who was in the courtroom provides context. Explaining how long the court waits for the defendant to appear before forfeiting the bond, where the defendant's name is called, and so forth help to show the steps taken and leeway given to make sure it was not just a case of someone running late or getting lost in the courthouse.

If officers actively attempted to locate and re-arrest the defendant, their testimony about efforts to find him can be invaluable in showing the defendant's intent to avoid being brought to court. For example, if an officer tried to find the defendant at his home, elicit testimony about how many times the officer went to the house and when he did so. You can even top it off with a photograph of the defendant's mailbox or house numbers just to show that the officer was looking at the same place listed on the bond.

If a defendant has previous criminal history in your county, he likely has had bonds there before. This may be a chance to go through his previous bonds and appearances for the limited purpose of showing his knowledge of how ap-

If the bondsman isn't available to testify, utilize jail personnel and records to cover his release on bond. It may be one of the few times you can introduce a mugshot during guilt-innocence, as that will help establish identity.

pearances work. The best way to go about this will probably be to use his previous bondsmen—that way you can discuss the defendant's familiarity with the requirements of being on bond while not introducing evidence of prior offenses.

Finally, don't forget to introduce certified copies of all relevant documents (or have a custodian authenticate them). We've discussed the bond, any type of notice from the clerk's office, and a certificate of call or bailiff's certificate. Some others include the charging instrument, which will show whether the offense was a felony or misdemeanor, any judgment nisi because it is additional documentation of the defendant's absence, and any defensive pleadings (or a default judgment) from a companion civil case. Some judges may be unwilling to admit the judgment nisi because they think that can be construed as the court commenting on the evidence. If a judge raises that concern, be like Elsa and let it go.[5] There should be plenty of other evidence, and if the judge has voiced that concern, any halfway competent defense attorney will seize on it as an objection. The case should already be solid enough that you don't have to risk an unforced error.

On the bright side, because it can't be tried together with the underlying offense, any punishment for bail jumping will be eligible for stacking.

Defenses

Bail jumping has one special defense, that of a reasonable excuse for the defendant's failure to appear. What is reasonable is, as always, a question for the jury. However, regardless of what the excuse is, it must cover the entire time that the defendant was gone, from his failure to appear to his re-arrest or reappearance in court.[6] Even if an excuse is reasonable for the day of the failure to appear, it may not explain the rest of his absence. For example, a stomach virus the morning of court may be reasonable, but if it takes six months to re-apprehend the defendant, it probably won't qualify as a defense.

If the defendant produces some evidence of an excuse, be prepared to explore just when he came up with that excuse. If you forfeited his bond and served him with the forfeiture, check to see whether the defendant ever filed an answer. At least one court has held that the defendant's failure to answer a bond forfeiture suit is relevant evidence to rebut a defense.[7] This is also an opportunity to use the defendant's jail calls where he discussed some other excuse (or had none at all). You can also use the re-arresting officer to rebut a reasonable excuse. If the defendant was actively evading law enforcement or was caught during some other activity, it will undermine the reasonableness of the excuse, its duration, or both.

If some evidence of an excuse has been produced, the defendant will be able to request a defensive jury instruction, and the court refusing it will almost guarantee reversal (and not requesting it at all is begging for an ineffective assistance claim). If a defendant requests this instruction, prosecutors should request a further instruction that a reasonable excuse must cover the entire period of the defendant's absence. While it's a non-statutory instruction, at least one appellate court has applied a three-part test for such instructions and found it to be proper.[8]

Punishment

As a rule, you probably won't be trying a bail jumping case with other offenses. Due to the separation in time from the underlying offense, it probably won't qualify for consolidation as part of the same criminal episode.

On the bright side, because it can't be tried together with the underlying offense, any punishment for bail jumping will be eligible for stacking. Although there's no requirement of notice that the State intends to seek a cumulated sentence, it doesn't hurt to file a notice of intent—it ensures that the defendant and his attorney know you are planning to stack and will insulate the record from an ineffective assistance claim. The claim that the defendant would have pleaded guilty if only he had known the punishment would be stacked is almost always laughably false, but why expend effort on getting affidavits in a couple of years when we can foreclose that claim with a few minutes of effort before trial?

Conclusion

The vast majority of bail jumping cases will not see a jury, whether they are charge-bargained away or packaged with the underlying offense. However, when prosecutors are faced with a bail jumping trial, the same preparation and effort we would bring to any other case should be brought to bear. From careful investigation and charging, to thorough presentation before the jury, we can put ourselves in the best position to bring justice to those who flee it. ❇

Endnotes

[1] For certain Class C Transportation Code offenses, there is a more specific failure to appear statute that applies: Trans. Code §543.009.

[2] "Except as provided in Subsections (e) and (f), an offense under this section is a Class A misdemeanor." Tex. Penal Code §38.10(d).

[3] See *Chacon v. State*, 2012 Tex. App. LEXIS 9677 (Tex. App.–Corpus Christi, no pet.).

[4] *State v. Ojiaku*, 424 S.W.3d 633 (Tex. App.–Dallas 2013, pet ref'd).

[5] *Frozen*, Disney, 2013 (defiant/snarky musical number optional).

[6] *Kombudo v. State*, 148 S.W.3d 547 (Tex.App.–Houston [14th Dist] 2004, rev'd on other grounds), 171 S.W.3d 888 (Tex. Crim. App. 2005).

[7] *Atchley v. State*, 2016 Tex. App. LEXIS 12540 (Tex.App.–Texarkana 2016, pet ref'd).

[8] See *Perkinson v. State*, 2013 Tex. App. LEXIS 9948 (Tex. App.–Corpus Christi 2013, no pet.).

Combatting domestic violence issues with extraneous evidence

When you prosecute domestic violence cases, it doesn't take long before the common issues become glaringly obvious:

By Rebekah Saunders
Assistant Criminal District Attorney in Galveston County

a recanting or uncooperative victim, for example, or the defendant's claim that he acted in self-defense against an aggressive complainant.

Having handled thousands of cases with victims of domestic violence during my time as a prosecutor, I now have an expectation when reviewing such files. The first thing I do is determine what the difficulty will be in that particular case. We should expect that there *will* be an issue with every one. Once you determine the issue, consider the facts that hurt the case. We can then use those "weaknesses" to argue why extraneous evidence should be admitted in the case-in-chief. In fact, extraneous acts can often explain a case's weaknesses to a judge or jury.

The State's argument for introducing extraneous evidence will likely fall into one of these two categories:

• explaining the victim's behavior: not appearing for trial, recanting, minimizing the offense, staying in the relationship, or delayed reporting of the crime; or

• rebutting defensive theories: the victim's motivation for fabricating the offense (for example, she was jealous her husband left her for another woman) or that the victim was the primary aggressor (that is, the defendant acted in self-defense).

The defense often shows its cards in the early stages of case development, so take note of these discussions in initial court settings to prepare for the defensive trial theory. Then use the extraneous acts to refute that theme.

What is 38.371?

Effective September 1, 2015, Code of Criminal Procedure Art. 38.371 allows testimony or evidence of extraneous acts regarding the defendant and victim to be introduced in a trial of domestic violence offenses. In 2019, the Texas Legislature

expanded the class of eligible offenses to any involving domestic or dating violence. Subject to the Texas Rules of Evidence, *each* party may introduce evidence to determine if the defendant committed the offense charged, "including testimony or evidence regarding the nature of the relationship between the actor and alleged victim."[1]

Art. 38.371 has expanded the scope of admissible evidence by allowing context about the nature of the relationship between the victim and abuser to be admitted during the guilt-innocence phase of trial, instead of merely offering evidence isolated to the date of offense.

Art. 38.371 has expanded the scope of admissible evidence by allowing context about the nature of the relationship between the victim and abuser to be admitted during the guilt-innocence phase of trial, instead of merely offering evidence isolated to the date of offense. However, because either side may offer the extraneous evidence, prosecutors also must be prepared for the defense to introduce evidence against the victim under Art. 38.371.

Pre-trial or during trial?

When should a prosecutor ask the court to allow her to introduce the extraneous offense evidence: in a pre-trial hearing or during the trial itself? Naturally, my answer is, "It depends." I've done it both pre-trial and during trial, and I usually base my decision on how integral the extraneous evidence is to the case. The volume or complexity of the extraneous evidence, whether through witness testimony or exhibits, may also determine when to request its admission.

If the extraneous evidence is more general in nature—the existence of an on-again, off-again relationship; history of cheating; or reasons why the couple separated—those issues can usually be raised with the judge at the beginning of trial or during the trial itself based on the line of questioning and cross-examination. Raise this request outside of the jury's presence. The judge may rule immediately or may wait to hear opening statements or witness testimony before making a ruling.

If I feel like the case-in-chief may be in serious jeopardy without the admission of the 38.371 evidence, I ask for a hearing and ruling pre-trial. I had a particularly difficult case where the defendant had two charges of strangulation and two charges of aggravated assault with a deadly weapon, which he committed against his stepdaughter and wife. In that case, I requested a pre-trial hearing on the extraneous acts I wanted to introduce. At the hearing, the victim testified about the defendant's prior acts, and I admitted the exhibits I intended to introduce (prior 911 calls, photographs, voicemail recordings the defendant left, etc.). I wanted the pre-trial ruling so that I could properly advise my witness which specific acts she would be allowed to discuss during the jury trial and so that I could prepare numerous exhibits. Additionally, this particular case was the first time a motion to introduce extraneous acts under Art. 38.371 had been filed before that judge, so I wanted to have time to brief her on the issue.

If the judge makes a pre-trial ruling to exclude the extraneous offense evidence, don't give up. Listen closely to the defense's opening statement to find its theory of the case. "Extraneous-offense evidence, under Rule 404(b), is admissible to rebut a defensive theory raised in an opening statement or raised by the State's witnesses during cross-examination."[2] Most of the time, the defense will argue the victim is a liar (if she's cooperating with the State) or that she was the initial aggressor (self-defense theory), at which time prosecutors should re-urge the extraneous offense evidence. Many times, judges will feel more comfortable admitting extraneous evidence after they've heard the defense drag a victim or witness through the mud.

What extraneous acts should I admit?

Do not throw in the kitchen sink! Be very intentional about which extraneous acts you intend to introduce. A judge is more likely to deny the request if the prosecutor raises every bad act the defendant ever committed against the victim—that makes it look like the real motive is to show character conformity evidence, which is prohibited by the Rules of Evidence. Instead, if there is a long history of violence, select extraneous offenses that are similar to the facts in the charged offense, have independent evidence to support the act (lay witnesses, photographs, recordings, etc.), or explain the victim's behavior. Even if the parties have a long history of violence, the prosecutor should show the judge that the State will be very selective in introducing the extraneous conduct to comply with Art. 38.371's "nature of the relationship" evidence and Rules of Evidence 404(b)(2) and 403.

Another option is to be generic with the information you introduce. If you want to elicit the fact that the couple has repeatedly separated when the defendant becomes violent from intoxication, or that the victim stayed in the marriage because she and the defendant have children to-

gether, tell the judge that you intend to introduce general information to explain to the jury the nature of their relationship.

"Nature of the relationship"

Judges are very apprehensive about being overturned on appeal. In my experience, they have been reluctant to allow extraneous evidence into trial, given the sparse caselaw on Art. 38.371. In 2017, a Texas appeals court issued a reported opinion on Art. 38.371 and its application in a domestic violence trial to rebut defensive theories of victim fabrication, recantation, or failure to appear for trial.[3]

One way to make hesitant judges comfortable with the "nature of the relationship" concept in Art. 38.371 is to explain that the principle is already well-established in other statutes, including:

• Art. 38.36: In murder prosecutions, admission of "testimony as to all relevant facts and circumstances surrounding ... the previous relationship between the accused and deceased."[4]

• Art. 38.37: In the prosecution of certain offenses committed against a child, "evidence of other crimes, wrongs, or acts ... for its bearing on relevant matters, including ... the previous and subsequent relationship between the defendant and the child."[5]

• Art. 38.46: In prosecuting stalking offenses, "testimony as to ... the facts and circumstances surrounding any existing or previous relationship between the actors and the alleged victim."[6]

• Art. 38.48: In prosecuting certain witness-tampering offenses, testimony or other evidence relating to "the nature of the relationship between the actor and the witness or prospective witness."[7]

Rules of Evidence 404 and 403 analysis

Art. 38.371 is still subject to the Texas Rules of Evidence, so most of the defense's objections (aside from hearsay, relevance, or the Sixth Amendment's Confrontation Clause) will focus on Rules 404(b) and 403, specifically:

1) the extraneous evidence is bad character evidence to show the defendant acted in conformity with the prior bad behavior,[8] and

2) the probative value is substantially outweighed by the danger of unfair prejudice.[9]

Of course, the State may not offer evidence of prior bad acts for the sole purpose of showing the defendant acted in conformity with his criminal propensities and therefore committed the charged offense against the victim.[10] However, because Rule 404(b)(2) does not contain an exhaustive list of exceptions, it is arguable that evidence regarding the nature of the relationship, although not explicitly listed, could be another exception under 404(b)(2). The permissible purpose of admitting the extraneous offense evidence is to illustrate the nature of the relationship between the defendant and victim.

When the defense argues that the evidence is unfairly prejudicial, the key is to argue how specific facts from the case make the extraneous acts probative and not substantially outweighed by unfair prejudice. Examples might include:

1) the proximity of time between the extraneous offenses the prosecution is trying to admit with the charged offense,

2) similarities of the offenses,

3) comparing the demeanor of the victim or defendant in the charged offense with the extraneous act,

4) the need to introduce the prior offense to give context to the victim's current behavior in trial (minimization, recantation, failing to appear, etc.), or

5) rebutting defensive theories.

Additional witnesses and exhibits

If the victim is uncooperative, look for other tools to support the case through extraneous offense evidence. Helpful witnesses may include a victim-witness coordinator, investigator, prior responding officers, domestic violence expert, or the victim's family and friends. Be creative about finding helpful exhibits on the extraneous acts outside of those collected in investigating the charged case, such as photographs of previous and subsequent injuries, calls to police for service, jail calls or mail, or medical records. Do not give up on the case merely because the victim is uncooperative or missing altogether. Get creative to account for the missing links in the case!

Conclusion

We can't win them all, but don't give up the fight just because a case has one of "those" DV issues. *Every* domestic violence case has one! Plus, it feels really good when you overcome the obsta-

When the defense argues that the evidence is unfairly prejudicial, the key is to argue how specific facts from the case make the extraneous acts probative and not substantially outweighed by unfair prejudice.

cles and see justice done in one of "those" cases. Keep calm and prosecute on. ❇

Endnotes

[1] Tex. Code Crim. Proc. Art. 38.371(b).

[2] *Bargas v. State*, 252 S.W.3d 876, 890 (Tex. App.–Houston [14th Dist.] 2008, no pet.).

[3] *Gonzalez v. State*, 541 S.W.3d 306 (Tex. App.–Houston [14th Dist.] 2017, no pet.).

[4] Tex. Code Crim. Proc. Art. 38.36(a).

[5] Tex. Code Crim. Proc. Art. 38.37, §1(b).

[6] Tex. Code Crim. Proc. Art. 38.46.

[7] Tex. Code Crim. Proc. Art. 38.48.

[8] Tex. Rules of Evid. 404(b).

[9] Tex. Rules of Evid. 403.

[10] Tex. Rules of Evid. 404; see also *Garcia v. State*, 201 S.W.3d 695, 703 (Tex. Crim. App. 2006).

Gang violence intervention

Strong links exist between gang membership and violent victimization,[1] and as I stood on the street in the summer of 2012 taking yet another report of a drive-by shooting,

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I found this victim was no exception. On top of her reputation for violence, Sandra Smith (not her real name) was on her third gang-member boyfriend from her third different gang. Her own gang involvement contributed to her victimization, but that didn't justify the shootings, nor did it provide an excuse to ignore the problem. However, we had no direct link to any specific perpetrator, so there was little to be done from an investigative standpoint.

The shootings were related to an ongoing conflict between the gang of Sandra's current boyfriend and the gang of one of her previous boyfriends. That her loyalties had switched likely added fuel to the fire, but the back-and-forth violence between these two gangs had been going on for years. The shootings at her house in the prior weeks were only a small part of the cycle of gang violence in our community, and like many of our gang cases, we had no leads to go on.

My department had been responding to drive-by shootings and assaults between these two gangs and others on a regular basis since I had started as a cop in the area in 2005. For such a small community, we were dealing with crime rates stereotypically associated with larger cities. To put the problem in perspective, our aggravated assault rate grew by an additional 53 percent between 2004 and 2011; during the same period, the rate at the Houston Police Department not only remained less than ours, but even declined by 6 percent.[2] Later, some described our gang situation as a small town with big-city problems.

The issues we were experiencing with gangs had become the status quo, and with the gang code of silence and the ability of the group to exact its own form of justice on the street, preventing many victims from cooperating, it seemed there was little we could do to stop the cycle of violence. However, with our second gang-related murder in three months, the status quo was no longer unacceptable. The situation escalated quickly, and the two gangs clashed in a shootout that ended in a high-speed crash into the wall of a church and four people dead. In a community of about 20,000, many began questioning what was being done to stop the violence. Law enforcement and prosecutors had to change our approach, and in the process, there were a number of lessons we learned, which I now share with you.

How gangs differ from other criminals

Though laws exist to deal with organized crime, problems of gang violence don't often fit the typical mold of how the criminal justice system works. The system is built on the theory of general deterrence, whereby the investigation, arrest, and prosecution of some individuals for some crimes deters others from committing crimes. Additionally, investigations often focus on separate criminal acts committed by specific individuals. However, the general deterrence model does little to stop gangs—groups whose very identity is defined by involvement in crime—and the individualized nature of cases can sometimes keep us from recognizing how we can impact the criminal organization itself.

Different problems require different solutions, and in the case of gang control, the foundation for an effective justice strategy consists of a focused-deterrence approach, along with an understanding of group crime and gang dynamics. In combination with other factors, applying this approach to our local gang problem led to a 58-

Group crime is significantly different from crimes committed by individuals in several respects: There is an increased chance of the planned crime actually occurring, a higher risk of violence, a greater possibility of criminal success, and an increased likelihood of escape.

percent drop in our aggravated assault rate from its high in 2011 to its low in 2015, a level that hadn't been seen since before 2000 but which we have since maintained.[3] The prosecutor's office plays a powerful role in gang violence intervention and can obtain significant results by providing training and investigative support to law enforcement agencies, developing local gang experts, and implementing a prosecution strategy with the group, rather than the individual, in mind.

Group crime dynamics

"To deter, disrupt, and dismantle criminal organizations" is the phrase often used to describe the mission of anti-gang efforts, and central to accomplishing that mission is an understanding of group crime and gang dynamics. Group crime is significantly different from crimes committed by individuals in several respects: There is an increased chance of the planned crime actually occurring, a higher risk of violence, a greater possibility of criminal success, and an increased likelihood of escape.[4] Crimes are often better planned and executed by the combined abilities of group members, and the perceived strength in numbers, higher degrees of negative peer influence, and reluctance of participants to back out increases the courage and lowers the inhibitions of its members. As group members successfully commit more crime together, their confidence, cohesion, and ability to commit future crimes significantly increases.

An example of group crime dynamics I share during training comes from a cell phone video of a drive-by shooting that was found through a search warrant. In the video, all four suspects encouraged each other, while the tasks were divided between two shooters who focused on hitting their target, the driver who paid attention to traffic and options for escape, and the other passenger who recorded the act and served as another set of eyes to watch for police and potential witnesses. The presence of fellow gang members made it unlikely that any individual would back out and also reduced each person's own risk of capture or injury. Had they encountered the police at any point, the size, strength, and abilities of the group would have enabled the escape of most, if not all, of the offenders.

By allowing each party to be charged with the same crime (under the Law of Parties), Texas law recognizes that co-offenders play an important role in the commission of an offense.[5] In gang crimes, the mere presence and actions of fellow gang members at the scene can facilitate the crime. Even when appearing to be mere bystanders, gang members often represent their gang by throwing gang signs and yelling the gang's name, which increases the group's courage and criminal reputation. These actions, combined with the presence of a group, intimidates witnesses and victims. Fellow gang members also watch for police, prevent others from interfering, and stand ready to physically support the primary offenders should a situation turn against them. Evidence of these group dynamics can be gathered by investigators who know what questions to ask, and qualified gang experts can explain these dynamics to a jury,[6] thereby nullifying the argument fellow gang members were nothing more than innocent bystanders.

More than anything else, gang crime depends on trust and cohesion between members. To commit crime together, gang members have to be able to trust that their fellow gang members will support them, not only physically, but also by refusing to cooperate with investigators and prosecutors. Trust that they will not betray each other is the glue that holds a criminal organization together. The tighter the bonds between gang members, the greater their involvement in crime[7] and the less likely they are to cooperate with the police. Conversely, the less trust and cohesion within the gang, the less crime the gang commits and the more likely they are to cooperate with law enforcement. Our ability to impact trust and cohesion is perhaps the most important way the criminal justice system can intervene in the cycle of gang violence. The impact of different strategies is apparent when comparing two different scenarios.

Two scenarios

In the first scenario, gang members are suspected of one or more crimes, and the police or prosecutors decide to arrest or indict group members all at once. The idea is to deal a significant blow, send a strong message, and cripple the organization in one fell swoop. This strategy has its merits for those agencies with the resources and expertise to conduct long-term, in-depth investigations into organized crime, but for those with more limited resources, the next strategy may be more appropriate.

In the second scenario, gang members are

suspected of one or more crimes and each suspect is arrested or indicted one at a time, in a slow but steady approach. There is not one fell swoop, but rather a constant chipping away at the group.

When it comes to trust and group cohesion, significant differences emerge between these two strategies. In the first where everyone's arrested at once, the suspects know one thing for sure: Their arrest was the result of something other than betrayal by their co-defendants. While there may be some fear a group member might break, the knowledge their arrest didn't come from their co-defendants cooperating with the police can provide reassurance that they all have each other's backs. If they each hold true to a code of silence and the case doesn't end in a conviction, the confidence to commit future crimes together can potentially increase if they perceive their solidarity helped them to beat the charge.

In the second scenario, however, where officers arrested suspects individually and over time, gang members may believe their arrests were the result of their previously arrested co-defendants cooperating with police. Arresting and interviewing each suspect prior to the arrest of the next can reduce the gang's ability to trust each other, and seeds of doubt can be planted—even a small break in trust can provide an opportunity to gather more information about both the current and future crimes. In this scenario, suspects are more likely to turn toward self-preservation and implicate others as the primary suspects while downplaying their own involvement. Each member may begin to perceive other members as witnesses against each other rather than as a cohesive group, even if a conviction isn't ultimately obtained.

On top of this, co-defendants in an organized crime trial may be required to testify without fear of their testimony being used against them in their own case,[8] which can encourage further breakdowns in the trust between gang members. Because they might be worried about what other parties are saying about the crime, co-defendants can become less confident about beating their current charge and more reluctant to commit crimes with the same group in the future.

A similar prosecution strategy can have the same effect, and as each member begins to suspect his fellow gang members have turned against him, each is that much less likely to commit crime with the others. As an example, my colleague, prosecutor Jon West, has effectively used this strategy for years throughout South Texas, with the most recent success being the dismantling of one gang in our jurisdiction through the prosecution of 17 out of 25 members. Some remain in the community on supervision, but as a group, they are no longer involved in crime to the extent they previously were.

Pulling levers

Gang crime can be effectively reduced through group-centered strategies, but additional progress can be made when prosecutors work with their local police agencies in a focused-deterrence approach. Focused deterrence efforts against gang crime have been studied extensively, most notably in Boston.[9] Here is a summary of what happened in that city.

During the 1990s, the city of Boston experienced an unprecedented number of youth homicides, 60 percent of which were gang-related, despite the fact that gangs in Boston at the time represented less than 1 percent of the city's youth between the ages of 14 and 24. Beginning in 1996, the Boston Police Department led an initiative dubbed Operation Ceasefire, which consisted of more than 40 law enforcement officers and youth workers who, along with relevant partners such as probation departments, community members, and state and federal prosecutors, spread the message to gang members that violence was not acceptable. The message emphasized that while all other crimes would be handled routinely, violence would elicit a strong criminal justice response on the entire gang. Groups, rather than individuals, were held accountable for outbreaks of violence by a coordinated criminal justice response.

When gang members were involved in violence, the criminal justice system focused a response on that specific gang, which included disruption of street drug activity, attention to low-level crimes, service of outstanding warrants, cultivation of informants, strict probation and parole enforcement, asset forfeiture, stiffer plea bargains, extra prosecutorial attention, and special attention from federal authorities, which all came to be known as *pulling levers*. Essentially, when members of a gang were involved in a violent act, the criminal justice system pulled every available lever against every possible gang member, placing pressure on the group to control the behavior of its members.

More than anything else, gang crime depends on trust and cohesion between members. To commit crime together, gang members have to be able to trust that their fellow gang members will support them, not only physically, but also by refusing to cooperate with investigators and prosecutors.

The result was that youth homicides dropped nearly two-thirds, from a high of more than 70 in 1990 to fewer than 20 during the years the operation was conducted, the lowest point in Boston in at least 25 years.

Boston's Operation Ceasefire ran until 2000, when a change of administration suspended the program. Though widely hailed as a success and replicated in other cities, critics were quick to point out that gang violence was already on a downward trend prior to Ceasefire, and it was difficult to determine if the reduction in gang violence resulted directly from this operation. However, in the years after the operation ended, youth homicides in Boston began an upward creep, reaching pre-1990 levels. By 2006, with gang violence again a serious problem, it became obvious that another Ceasefire-style intervention was needed. This time, Boston PD partnered with a team of researchers to study the effects of Ceasefire by matching gangs who were subjected to the Ceasefire treatment with their counterparts who were not on the receiving end of the intervention. Overall, gang shootings dropped substantially after Ceasefire was re-implemented in 2007, but the total shootings by gangs subjected to the Ceasefire treatment dropped a significant 31 percent in comparison to the other gangs.

As a focused-deterrence approach, Operation Ceasefire represents an effective alternative to the general deterrence model that forms the basis of our criminal justice system, and it is one of the few approaches rated as effective by the National Institute of Justice. Often, the extra attention is exactly what gang members need to reconsider their gang involvement, as incarceration, intensive police investigation, and other criminal justice threats are reported as one of the primary reasons for gang desistance, second only to personal and vicarious victimization.[10] The most important elements of the focused-deterrence approach are the direct advertising of the deterrence message to the target audience, including what behaviors will provoke a special criminal justice response, exactly what that response will be, and then following through with that very response.[11] Prosecutors can support local police agencies in this approach by giving special attention to gang cases, reinforcing the deterrence message, and helping police utilize resources and tools, which are readily available.

The most important elements of the focused-deterrence approach are the direct advertising of the deterrence message to the target audience, including what behaviors will provoke a special criminal justice response, exactly what that response will be, and then following through with that very response.

Resources and tools

It can be argued that Boston PD had the resources necessary to devote to the city's gang problem but that similar efforts would be impossible in smaller jurisdictions. However, when put in perspective, the 40 or so people who worked on Ceasefire represented less than 2 percent of the more than 2,000 officers in the department, and the city's large size meant it also had more gangs than most of us. Smaller agencies can implement a similar approach, sometimes with only one or two officers, when they have the appropriate training, investigative support, and an understanding of the resources available to them. Gang search warrants and search warrants for persons, for example, are some of the easy-to-use and effective means of pulling levers to reduce gang violence without requiring a significant amount of additional resources, but the first step of any gang violence reduction strategy is gathering data and evidence of gang membership by documenting gang members in a database.

Gang documentation. Addressing a gang problem in any jurisdiction first requires identifying the gangs and their members. Knowing the size and scope of the problem, the relationships between gangs and individual members, gang dynamics and organizational structures, and how to gather evidence of gang membership is the basis for successful investigation and prosecution. The initial hurdle is often that gang members are mostly known on the street only by their nicknames, making identification difficult when the nicknames aren't known or available to investigators. Gang databases provide a location to gather criminal intelligence such as nicknames and other identifiers, which can often be done by patrol officers as they come across gang members on the street, but certain criteria must be met for an individual to be documented as a gang member in a database or to bring evidence of gang membership into court proceedings.

These requirements include either a judicial self-admission of gang membership or a judicial finding that the individual is a member of a criminal street gang, which prosecutors can often obtain during the plea bargain process. Outside of this, a combination of two or more of the following is needed:

- a non-judicial self-admission,
- identification by a reliable informant,
- corroborated identification by a source of unknown reliability,

- use of gang dress, hand signs, tattoos, or symbols,
- evidence of being arrested or detained with gang members on a gang-related offense,
- use of the internet to recruit new members,
- frequenting a documented gang area and associating with known gang members, or
- visiting a known gang member while that member is incarcerated.[12]

When used together, the last two—associating with known gang members and visiting an incarcerated gang member—require one of the other criteria as well.

In documenting gang members, agencies can use their own local databases or TXGang, a searchable database maintained by the Texas Department of Public Safety, which allows agencies to store and share information on gang members with other agencies, including email notification when arrest warrants are entered for gang members in an agency's jurisdiction.

Search warrants for persons. After spreading the message to gang members that violence will result in special attention, the most effective lever to pull may be a search warrant for a person[13] arrested for violent felonies. Just as the potential for narcotics search warrants keeps drug dealers wary of how they conduct their drug business, the potential for search warrants when gang members commit violent crimes can make gang members wary of engaging in violent acts. This type of search warrant can be used to arrest specific suspects after obtaining arrest warrants in a case of gang violence or as part of the levers pulled against the whole gang when members have outstanding felony warrants. While officers can gain warrantless entry into a residence in felony cases if they have probable cause to believe a wanted person is inside,[14] a search warrant for that person provides additional assurances that constitutional rights are upheld and that officers are acting in accordance with the law.

Commonly, plain-view evidence of other crimes comes up while executing the warrant, so investigators should also be prepared to obtain another search warrant and continue with a secondary investigation after the arrest. Even if evidence of other crimes isn't apparent, there may be opportunities to gather evidence of the original offense or of gang membership through a search warrant.

Gang search warrants. Search warrants in gang cases can seek evidence of the suspect's gang membership, including photos and documents depicting the suspect in the case, the gang, or gang member names, nicknames, signs, and symbols,[15] and this evidence can often be found in gang members' homes, vehicles, and cell phones. On top of establishing gang membership, gang-related evidence can explain the motivation for the underlying crime, identify other suspects, and provide leads for further investigation.

However, to obtain this type of search warrant, an abundance of facts must establish probable cause that the suspect gang exists, that the suspects are members of that gang, and that the underlying crime was done for a gang-related purpose. Though the information is often not needed at the time it is gathered, it is the day-to-day documentation of gang membership and the dynamics of gangs within a specific jurisdiction, through documented field interviews in gang databases, that establishes the probable cause necessary for this type of warrant. Gang search warrants are not a typical warrant for most investigators, so support from the prosecutor's office may be needed in drafting one. Documentation of the affiant's expertise relating to gangs—his training, education, and experience—can also support the probable cause needed for the warrant. More information on these warrants can be found in the Gang Prosecution Manual published by the U.S. Department of Justice in 2009.

Developing local experts. Though some gangs can span large geographical areas, most are local problems requiring local expertise. Officers can develop gang expertise through the daily process of documenting gang members in their jurisdiction, as well as through in-service training. The Texas Gang Investigator's Association (TGIA) is an excellent resource for this, with many regional courses offered free of charge at least once a year, in addition to TGIA's annual conference. Many gang officers are willing to bring courses to those agencies whose officers are unable to attend the larger training sessions, as most understand the importance of working together against gang crime. Prosecutors can benefit by facilitating such training, as it helps them build stronger cases and develop local experts.

Smaller agencies can implement a similar approach that Boston did, sometimes with only one or two officers, when they have the appropriate training, investigative support, and an understanding of the resources available to them.

One way to know if a different approach is needed: gang members are disproportionately involved in violence in comparison to their peers, so review the aggravated assault rates in your jurisdiction.

Conclusion

Gang documentation and the development of local experts serve as the foundation for successful investigation and prosecution of gang crimes. Through this documentation, agencies can then implement evidence-based gang violence reduction initiatives, such as Operation Ceasefire, using tools and resources such as TXGang, gang search warrants, search warrants for persons, and investigative strategies designed to decrease gang trust and cohesion. As trust and cohesiveness within a gang erodes, gang crime and gang member victimization begin to disappear as well. The cooperation that emerges between police and prosecutors in this process can lead to significant reductions in gang violence, and safer communities for everyone.

One way to know if a different approach is needed: gang members are disproportionately involved in violence in comparison to their peers, so review the aggravated assault rates in your jurisdiction. If they've been on a significant upward trend, it could be a sign of a building crisis and soon-to-be increase in gang murders.

Please email me at Jason.Childers@co.jim-wells.tx.us with questions or for assistance. ❇

Endnotes

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[14] Tex. Code Crim. Proc. Art. 15.25.

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