The official journal of the Texas District and County Attorneys Association

# 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*

## The newest tech: gun-mounted cameras

In April 2019, a Vernon police officer was responding to a dog bite call when he noticed a man sitting in an SUV in the driveway of a house on the next block.

**By Staley Heatly**
*46th Judicial District Attorney*

The officer, T.J. Session, knew that police had been by that home on more than one occasion seeking Walter Emiliano Orellana, who was wanted on indictments from Wichita County for continuous sexual abuse of a child. Officer Session called for backup and parked his car in the street in front of the driveway so that it was partially blocking the SUV's exit. Session walked up to the driver's side of the SUV and tapped on the window just as his backup was pulling in front of the house.

The next 20 seconds of the encounter, which were captured on Session's body-worn camera, were a blur of chaos. The officer asked Orellana his name, and he lied, claiming his name was Mark. When Session asked him to step out of the vehicle, Orellana refused and started the engine. Officer Session immediately opened the door and attempted to grab Orellana by the arm, and Orellana put the SUV in reverse and hit the gas. Session was trapped between the SUV and its driver-side door, which could have knocked him down and potentially pushed him under the vehicle. The officer had to take immediate evasive action. He jumped onto the SUV's running board and grabbed the steering wheel as the vehicle rapidly reversed into the front end of the patrol car. The backs of Session's calves scraped along the front bumper of his patrol vehicle, and the SUV's door swung all the way open in the wrong direction when the two vehicles collided. Session narrowly escaped having his legs crushed between them.

While still on the running board and holding onto the steering wheel with one hand, Session drew his weapon and pointed it at Orellana as the SUV cleared his patrol vehicle. Orellana reached toward the passenger-side seat and pulled out a short-barrel shotgun. Then the shooting started. The officer fired multiple shots in a fraction of a second until he was hit in the shoulder with a shotgun blast from Orellana, which caused him to fall backward onto the ground. Officer Session quickly gathered himself and returned fire along with his backup, Officer Brandi Sosa. Orellana was struck

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# The Foundation to the rescue!

"So the State is Always Ready." That is the motivating force behind the creation of the Foundation, and it's why you and so many others support it.

**By Rob Kepple**
*TDCAF & TDCAA Executive Director in Austin*

Because of the challenges we have all experienced in these last few months, your investment in the Foundation will pay off in some new ways.

I am proud to announce that the Foundation's Board of Trustees has voted to fund the quick and heretofore unbudgeted development of TDCAA's distance learning capabilities—that's right, more online courses! That means development of our physical facility to record these presentations, reworking the website to accommodate them, purchasing and enhancing software (such as Zoom and Litmos), and editing and delivering the videos. These are huge tasks that the TDCAA staff is taking on, and it is gratifying to know we have the support of the Foundation to do it nimbly.

I want to thank the Foundation Board members from the bottom of my heart—and all of you who support our work through donations to the Foundation.

### Have you completed your mandatory *Brady* training?

This is a friendly reminder that under §41.111 of the Texas Government Code, all prosecutors have a duty to complete one hour of *Brady* training within 180 days of beginning work in a prosecutor's office. Importantly, under Court of Criminal Appeals rules, prosecutors must take a refresher course in the fourth year following completion of the previous course. TDCAA offers such an online course for free on our website, www.tdcaa.com/resources/brady.

### TDCAF.org is up and running!

I am proud to announce that the Foundation has a revamped website (at the same address as before, www.tdcaf.org). The site is simply designed to showcase the activities of the Foundation, honor the people involved in supporting our profession, and give you an easy way to make a contribution. I want to thank **Sarah Halverson** for spearheading this effort and willing the site into existence. I hope you visit the site and test out the handy donate button! ❋

## Recent gifts to the Foundation*

Jay Aldis
Richard Alpert
Kent Birdsong
Joe Edd Boaz
Kenda Culpepper
Casey Garrett
Wally Hatch Jr.
Doug Lowe
Barry Macha
Lyn McClellan *in honor of John Brewer*
Lyn McClellan *in memory of Andy Tobias*
Ed Porter
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Bill Torrey *in honor of Ken Sparks, Jay Johannes, and Carolyn Olson*
Bill Turner
Martha Warner

* gifts received between February 8 and April 3, 2020





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# TDCAA's training is still timely, relevant, and accessible

**Tom Krampitz**, my predecessor at the TDCAA helm and my mentor in this training business, preached that TDCAA needed to always deliver timely, relevant, and accessible training and services to our members.

**By Rob Kepple**
*TDCAA Executive Director in Austin*

We live by that mantra here at TDCAA World Headquarters. Weekly case summaries, frequent legislative and interim updates, high-quality conferences, a must-read journal, online *Brady* training, and a live person always on the other end of the phone have been staples of the services we provide. Building on these examples, our Long Range Plan from 2016 included the development of distance learning (i.e., online courses) to take TDCAA training to a new level. I also talked about a potential podcast in the November–December 2019 edition of this journal.

It looks like these new forms of training will be deployed sooner rather than later, due to the recent pandemic and ban on large gatherings of people. I can't tell you how proud I am of the TDCAA training team, led by **Brian Klas**, and our Training Committee, chaired by **Tiana Sanford**, ADA in Montgomery County. On a dime, the team and committee pivoted their efforts from developing live conferences to focusing on a menu of online courses for Texas prosecutors and staff. We have the advantage of the Litmos training platform, which is already live on our website, www.tdcaa.com, and which all Texas prosecutors have used forthe online mandatory *Brady* training. And we recently completed the redevelopment of our TDCAA website, so it is modernized and ready to register people for web-based training.

We are dedicated to offering essential training you need, and we are excited about the opportunity that this crisis has afforded to make our work even more valuable to Texas prosecutor offices. But don't worry: We have no intention of abandoning in-person conferences. Live meetings are important for a host of reasons and will always be a big part of our training menu.

Finally, as you read this article, we are just months into the development of these new courses and are always game for new ideas—if you've seen a great online course or heard an exceptional podcast, please share it with me. We are always looking to go to the next level!

## Honoring Ronnie Earle, a Champion for Justice

Texas lost a legendary prosecutor in April with the passing of **Ronnie Earle**, the former District Attorney in Travis County. Ronnie spent more than 30 years as the DA in the state capital and exerted state-wide influence with prosecutions by his Public Integrity Unit (after his retirement, the PIU was unfunded and jurisdictionally undercut by the legislature).

When you talk to people who were in and around state government during Ronnie's tenure, you get a mixture of reactions, all of them tending to be strong. Ronnie prosecuted some powerful people and from my view didn't mind ruffling some feathers—that comes with the job. What I always saw in Ronnie was a prosecutor who felt strongly about justice for everyone, who was true to the ethos of a prosecutor to see that justice is done.

Today we talk much in our profession about what it means to be a progressive prosecutor and how social policies interact with criminal justice policies. I believe that Ronnie was way ahead of his time on that score. He believed in community involvement in the criminal justice system and that the criminal courthouse could be a force of true change. In fact, I personally heard him repeat his mantra on more than on occasion: "We can reweave the fabric of society on the loom of criminal justice."

I will venture that many prosecutors in more conservative jurisdictions didn't share that philosophy, but their respect for Ronnie and his place in the profession was enormous, so much so that when Ronnie was roundly attacked by certain political folks back in the early 1990s, the TDCAA Board of Directors reacted by appointing him to a vacant board position.

Finally, know that the Texas District and County Attorneys Foundation has recognized just three Texas prosecutor legends as Champions for Justice to date: **Carol Vance** (former DA in Harris County), **Tim Curry** (former CDA in Tarrant County), and **Ronnie Earle**. Thanks, Ronnie, for all that you did to advance justice in Texas.

## No changes to TDRPC Rule 3.06

Last September, I wrote about a proposal before the State Bar Committee on Rules and Referenda to amend Texas Disciplinary Rules of Professional Conduct Rule 3.06(d) relating to post-verdict discussions with jurors. That rule states that lawyers should not ask questions or make comments to a member of the jury that are calculated merely to harass or embarrass a juror or to influence actions in future jury service. A committee member was concerned that in the criminal context, a prosecutor or a defense attorney might answer questions or discuss evidence that was not admitted under the rules of evidence and moved that speaking with jurors after a trial about evidence that was not admitted should be barred.

TDCAA submitted a short memo to the committee penned by **C. Scott Brumley**, County Attorney in Potter County, and **Scott Durfee**, Assistant District Attorney in Harris County. In that brief we pointed out that the rule has a culpable mental state: Is a lawyer's comment *calculated* to impact future juror service? And do we really think so little of our jurors that we are afraid to tell them about the rules of evidence and evidentiary issues? To encourage juror service, we should look to educate them about the law and the process, not give them a frustrating "I can't even talk to you about what we were doing in the courtroom while you sat in the jury room for an hour" response. Why not educate the jurors about the rule of law? Enlightening them, in the long run, would honor their service and encourage future service.

Good news: After plenty of input from many lawyers, including the civil bar, the committee elected to leave the rule as it is—a wise decision that honors jury service and the education of our fact-finders on the law. Good work by the committee.

## Protecting victims' rights

I can't imagine how difficult it is for victims of domestic violence to feel safe and trust that they are protected during an often-confusing court process. So imagine the shock when **Sally Madrid**, a victim assistance coordinator (VAC) in the DA's Office in El Paso, saw a victim of domestic violence in the courthouse without a setting of her case. This crime victim was there in response to a defense attorney subpoena that ordered her to appear at a non-court setting (without notice to the prosecutor) for the purpose of taking her cell phone.

Thinking quickly, Sally summoned prosecutor **Sarah Moore** from the courtroom, and Sarah intervened. A hearing on the ability of the defense to get a judge to order a victim to court "for subpoena purposes only" was held, followed by a mandamus action brought by the DA to prohibit such victim abuse. The Eighth Court granted the State relief in *In re State*, No. 08-19-00183-CR (Tex. App.—El Paso March 13, 2020). Put this case in your back pocket, and keep an eye out for this type of discovery abuse.

Thanks to the El Paso DA's Office for fighting for victims' rights and safety. ❊

*I can't tell you how proud I am of the TDCAA training team, led by Brian Klas, and our Training Committee, chaired by Tiana Sanford, ADA in Montgomery County. On a dime, the team and committee pivoted their efforts from developing live conferences to focusing on a menu of online courses for Texas prosecutors and staff.*

# 'We're all in this together'

As I write this, I am acutely aware that almost anything I write today about dealing with the COVID-19 virus crisis will be far outdated by the time this is published.

**By Kenda Culpepper**
*TDCAA President & Criminal District Attorney in Rockwall County*

Everything is evolving so quickly—things change from day to day. But one thing won't change and will be just as important today as tomorrow. Communication is key, and it is more vital than ever that prosecutors are talking to one another. We are all in this together, and we need to use the resources of TDCAA—and all of our colleagues—to make this new system work in the midst of a pandemic.

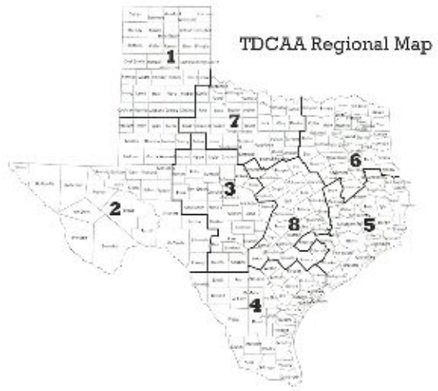
TDCAA has been hard at work to push out information to prosecutors and staff across the state. The TDCAA Board recently met by video conference to discuss the COVID-19 crisis and how to continue effectively communicating with and among Texas prosecutors. Here are some of the ways that is happening.

## COVID-19 updates

Shannon Edmonds at TDCAA has been emailing updates on COVID-19 throughout this crisis. These include so much valuable information about a host of different legal issues regarding state and county responses to the virus situation. They include a summary of events to date; quarantine enforcement; a list of the various Court of Criminal Appeals's Emergency Orders and Governor's Orders; discussions regarding open meetings, deadlines, bond issues, video conferences, various helpful motions, and the like.

If you are not receiving these regular updates, please go to www.tdcaa.com/covid-19-information to catch up on the latest. Electeds, please share those emails with staff and others who need the information.

Additionally, TDCAA Executive Director Rob Kepple and his staff are staying up-to-date on many of the issues prosecutor offices are facing. They are an amazing resource for information and can also send you in the right direction for other answers.




TDCAA Regional Map

## Regional video conferences

Each region in the state has elected a TDCAA director to represent it. These regional directors join the Executive Board and some committee chairs to form the TDCAA Board. The regions are on the map, above, and the directors are:

**Region 1: Leslie Standerfer**, Wheeler County Attorney (Wheeler)

**Region 2: Hardy Wilkerson**, 118th Judicial District Attorney (Big Spring)

**Region 3: Ricky Thompson**, 32nd Judicial District Attorney (Sweetwater)

**Region 4: Chilo Alaniz**, 49th Judicial District Attorney (Laredo)

**Region 5: Bob Wortham**, Jefferson County Criminal District Attorney (Beaumont)

**Region 6: Greg Willis**, Collin County Criminal District Attorney (McKinney)

**Region 7: Sharen Wilson**, Tarrant County Criminal District Attorney (Fort Worth)

**Region 8: Natalie Cobb Koehler**, Bosque County Attorney (Meridian)

During the last TDCAA Board meeting, I asked all regional directors to schedule video conferences with the elected prosecutors in their regions. I had hoped that it would be an opportunity to reach prosecutors across the state, talk about common issues, and discuss questions and solutions, but I could never have imagined how successful those forums continue to be. Rob Kepple and I are currently participating in a different regional forum almost every day, and I leave every one amazed at how much information is shared. I learn something new every time!


*A screen capture of a recent Region 6 Zoom meeting*

For example, I originally fashioned how my office does Zoom hearings after listening to prosecutors in McLennan, Donley, Collin, and Nolan Counties. I changed how I was scheduling my staff working remotely after listening to people in Travis, Williamson, and Midland Counties. I was able to work out a process for communicating with prosecutors in my own Region 6 (North Texas) when we needed to assure the safe transport or detention of a defendant with a history of violence or serious criminal history. The forums highlight that Texas prosecutors are facing similar issues and can productively share solutions.

However, it has also been interesting to see our differences. In one of my earlier President's Columns, I talked about how individual regions face issues unique to their areas. The state of Texas is so big! We are like several different states in one; I love the joke about how you know you are in Texas if you think of distance in hours rather than miles. So while we can always come together and talk about the ways we are the same, it is also valuable to come together and talk about what issues we can solve as a region. No one understands border issues like those counties on the southern border. No one understands vast rural distances like the Panhandle and West Texas. The coastal counties have issues unlike North Texas. So while the regional video conferences have discussed so many of the same issues, each has had at least one specific to its region. The south border talked about the legality of checkpoints. Central Texas prosecutors talked about the safety of storm shelters during tornado season. The Panhandle discussed continuing Zoom hearings into the future—they see Zoom's value because their jurisdictions are so spread out. The larger urban counties in each region have been helpful to every conversation because they start seeing issues earlier and can therefore prepare the smaller jurisdictions for problems to come. It has been a fascinating process.

If you are an elected prosecutor and haven't participated in one of these forums, I encourage you to. They last about an hour, and you can be as interactive or as quiet as you choose. If you haven't received an invitation to join, please contact your regional director. We want to get everyone involved because you still have plenty of time to engage. I am hopeful that the forums will continue throughout this crisis and beyond. We will see new and novel issues rear their heads throughout the phases of this situation, and we must communicate regarding how to effectively handle them.

*If you are an elected prosecutor and haven't participated in one of these forums, I encourage you to. They last about an hour, and you can be as interactive or as quiet as you choose.*

## Reach out to others

The third way to communicate is to personally reach out to your colleagues across the state for help. I have—a lot. Throughout my involvement in TDCAA, I have made incredible friendships among individual prosecutors state-wide. People I learn with, people I laugh with, and people I trust. Over the years, I have often picked up the phone to discuss an issue I am struggling with, but no more so than I have in the last weeks.

I have talked to folks in Travis, Kaufman, and Cass Counties about the state health authority. I have talked to people in Jim Wells County about quarantine orders and El Paso County about hotel contracts for first responders. Montgomery County and Galveston County helped me with price gouging issues. I discussed "safe at home" orders with Dallas and Comal Counties, I talked to Ellis, Brazos, and Dawson Counties about en-

*Take advantage of the relationships you have built while networking at TDCAA events, courses, and video conferences, and pick up the phone or send an email when you need something.*

forcement issues. And we have all used Harris County's resources. These are only a few of the friends and resources I have reached out to during this time.

There is no reason to start from scratch on an issue if someone has already found a solution. In addition, I am sure that each of these same people would welcome the opportunity to discuss their own issues with you. And, remember, sometimes you just need to talk to someone you trust who can make you laugh in the face of a difficult situation, someone who understands and can prop you up when you are bone-weary or frustrated. We need those relationships to keep us sane.

That is one of the great values of TDCAA: putting people together to make good decisions. Take advantage of the relationships you have built while networking at TDCAA events, courses, and video conferences, and pick up the phone or send an email when you need something.

## Closing

This has been, and continues to be, an unprecedented time for all of us, including prosecutors. We have had to learn how to work remotely and write a declaration of disaster. We have dealt with the best ways to reduce jail populations in a manner that is responsible and keeps the rest of our communities safe. We have found ways to run grand juries, electronically file cases, and communicate with police agencies, judges, witnesses, and lawyers by video conferences. And in the midst of all of it, we have kept our offices running, reviewed and filed cases, and dealt with the fears of the people around us.

I wonder if the practice of law will ever be the same? Will we start running more meetings by video? Will we work more from home? Will we always make sure our maintenance departments keep a good stock of toilet paper? Who knows? But I do hope that we continue to talk and use each other as resources. That has been a bright light in the midst of this difficult interval.

I will never forget this time in my life. But I hope to remember it not by the chaos but by the relationships I have built in the midst of that chaos. If you have any questions or concerns, please don't hesitate to contact TDCAA at 512/474-2436 or me at kculpepper@rockwallcountytexas.com. I stand ready to communicate and collaborate with you.

Stay safe and healthy! ✻





# Applying the law of Wild West shootouts to today

By its terms, the Penal Code defines self-defense as the use of force against an individual you reasonably believe is about to inflict unlawful force on you.

**By Clinton Morgan**
*Assistant District Attorney in Harris County*

Through the "multiple assailants" doctrine, though, the Court of Criminal Appeals allows self-defense not just against the prospective attacker, but also against those you think are encouraging him, even if you do not believe those people are attacking you. The Court's latest offering on this subject, *Jordan v. State*,[1] continues this confusing doctrine, but, unlike prior cases, offers actual hints at how to apply it.

The multiple-assailants doctrine in Texas dates back to at least 1884.[2] Under this doctrine, if you're being attacked by multiple people at once, you're free to use self-defense against any of them, even if that person hasn't attacked you yet. It started off as an application of the law of parties—an attack by one was an attack by all in the party, authorizing self-defense against everyone in the party.

It is illustrated by one of my favorite cases, *Black v. State*,[3] which stemmed from a West Texas shootout in 1912. Four men went into town, aiming to kill Black and his friend Hamilton. The attackers took positions surrounding Black and Hamilton. After "the firing became general," three of the attackers got shot. The Court of Criminal Appeals held that because the four were attacking as a group, Black and Hamilton could shoot any of them, even without evidence the particular target had opened fire.

This doctrine might sound antiquated, but the Court of Criminal Appeals recently affirmed its continued application to crowd shooting situations in *Jordan*.

## Showdown at the Silver Star

Jordan was leaving town, but decided, imprudently, to go with his friend Bryan and have one last dinner at the Silver Star, a restaurant where his ex-girlfriend, Varley, worked. When Jordan and Bryan arrived, Varley was there with four male friends: Royal, Crumpton, Prichard, and Stevenson.

After the predictable drama ensued inside the restaurant, Jordan and Bryan decided to leave. When they did, Varley and her friends were outside. There were words, and then Royal knocked Bryan out with a single punch.

Jordan testified that after he heard Royal punch Bryan, he ran to his car. Royal and Stevenson chased him, and Royal caught him by grabbing his face from behind. Jordan pulled a pistol from his pocket and fired three times without aiming. One round hit Royal, one hit Varley, and one hit a parked car.

Jordan was charged with aggravated assault for shooting Royal and with felony deadly conduct for shooting in the direction of Varley and Crumpton. For both offenses, the jury was instructed to acquit if Jordan acted in self-defense based on a reasonable fear of deadly force from Royal. Based on the multiple-assailants doctrine, though, the defense requested the jury instructions authorize self-defense if Jordan feared deadly force from Royal "or others with him." This request was denied. The jury hung on the aggravated assault charge but convicted on deadly conduct.

On appeal from the conviction, Jordan raised four complaints about the self-defense instruc-

*In a case where a defendant has generally admitted most of the charged conduct and is seeking a self-defense instruction, this case makes it riskier for the State to oppose the instruction.*

tion, including the lack of the phrase "or others with him." The Sixth Court rejected all of these complaints by holding that Jordan was not entitled to a self-defense instruction at all.[1] This was so, the Sixth Court held, because there was no evidence Jordan believed that Varley and Crumpton were attacking him. Because Jordan was not entitled to a self-defense instruction, any errors in that instruction were harmless.[5]

## Jordan versus the "mob"

The Court of Criminal Appeals granted review. In an opinion written by Judge Keel and joined by five other judges, that Court reversed. Whereas the Sixth Court had seen the case as a question of whether Jordan's testimony justified the use of force against Varley and Crumpton, the Court of Criminal Appeals saw it as a question of whether Jordan was justified in shooting any member of the "mob."

The Court began by describing the law of self-defense and multiple assailants. It described the latter: "When the evidence viewed from the defendant's standpoint shows an attack or threatened attack by more than one assailant, the defendant is entitled to a multiple-assailants instruction. The issue may be raised even as to those who are not themselves aggressors as long as they seem to be in any way encouraging, aiding, or advising the aggressor." For this proposition, the Court cited several old cases, including the 1884 case that explained the "multiple assailants" doctrine as a function of the law of parties.

The Court described Jordan's testimony as being that he "fired because he felt he had no other choice." The Court said this testimony would have allowed a jury to conclude he reasonably believed deadly force was necessary "to protect himself from the group's" use of deadly force. Citing *Black*, the Court noted that it did not matter whether Varley and Crumpton had attacked Jordan yet; what mattered was whether Jordan "had a reasonable apprehension of actual or apparent danger from a group of assailants that included Crumpton and Varley."

The Court then addressed three arguments raised by the State Prosecuting Attorney (SPA). First, the SPA argued that Jordan had not sufficiently admitted to the offense to satisfy the confession-and-avoidance doctrine because he denied knowing he shot in the direction of Varley and Crumpton. In response to this argument, the Court pointed to Jordan's trial testimony where he admitted to intentionally shooting the gun.[6]

Second, the SPA argued the Penal Code's plain language limits self-defense to the person actually using unlawful force: "A person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force."[7]

To rebut this argument, the Court made a grammatical point: The self-defense statute "encompasses 'others' because 'another' is defined by the Penal Code, and Penal Code definitions apply to grammatical variations of the defined term."[8]

The SPA's third argument was that because the evidence showed Royal was the only one using force against Jordan, the jury instruction gave Jordan what he wanted: the right to defend against Varley and Crumpton because of Royal's actions. The Court rejected this argument because the evidence showed Jordan "was facing a mob." The Court does not define "mob," but from these facts we can infer it includes a situation with five unfriendly people, two of whom are actively attacking the defendant.

Finally, the Court addressed harm. Because this was jury-charge error and Jordan objected, reversal was appropriate if there was "some harm." The Court reversed because it believed the instruction effectively foreclosed an acquittal: "Shooting at Varley and Crumpton would never be necessary to defend against Royal alone."

## Dissents

There were two dissenting opinions. Judge Keasler dissented, arguing Jordan was not entitled to a self-defense instruction because his testimony did not adequately confess the offense.[9] Under the "confession and avoidance" doctrine, a defendant must admit, or at least not contest, the elements of the offense to get a justification defense. Judge Keasler pointed out that felony deadly conduct required Jordan to knowingly fire in the direction of others, but Jordan testified he did not know he was firing at Varley and Crumpton.[10] Judge Keasler argued Jordan's defense was not self-defense but rather "the time-honored defense of 'You didn't prove your case.'"

Judge Yeary wrote a dissent, joined by Presiding Judge Keller.[11] Judge Yeary did not really criticize the Court's ruling on the merits of the case[12] but instead wrote to argue that the Court should have remanded the case for the court of appeals to conduct a harm analysis rather than conducting a harm analysis on its own.

## Takeaways

What should prosecutors take from this case? First, read Judge Keasler's dissent. It shows that the Court lowered the burden to get a self-defense instruction. Self-defense requires admitting a certain level of intentionality to one's acts. Jordan admitted intentionally firing the gun but denied knowingly firing it in the direction of anyone in particular. In a case where a defendant has generally admitted most of the charged conduct and is seeking a self-defense instruction, this case makes it riskier for the State to oppose the instruction.

Second, the Court is standing by the multiple-assailants doctrine, regardless of whether it is based in the current Penal Code.[13] Fortunately, this case tells us what would qualify as a "multiple assailants instruction": "[Jordan] was entitled to a self-defense instruction that referenced 'Royal or others.'" Telling a jury the defendant had a right to defendant himself against the complainant "or others" is pretty vague. It was straightforward enough here, where there were only two groups of people—Jordan and Bryan versus the "mob." But a lot of cases may not be so clear, and it may not be as obvious who is part of the "mob."

If you think the "or others" instruction will confuse a jury, ask for an instruction on the law of parties,[14] and ask that the charge limit self-defense to the defendant's fear of unlawful force from the complainant or others whom the defendant believed were in a party with the complainant. The only possible justification for a multiple-assailants instruction under the current Penal Code is the law of parties.[15]

It might still lead to absurd results: The law of parties inculpates a lot of people against whom it would be ridiculous to act in "self-defense." And I can't guarantee it won't get you reversed: Multiple assailant cases are pretty vague as to what a proper instruction looks like. But that's Texas self-defense law in 2020. ❊

## Endnotes

[1] 593 S.W.3d 340 (Tex. Crim. App. 2020).

[2] See *Cartwright v. State*, 16 Tex. Ct. App. 473 (1884).

[3] 145 S.W. 944 (Tex. Crim. App. 1912).

[4] *Jordan v. State*, 558 S.W.3d 173 (Tex. App.–Texarkana) rev'd, 559 S.W.3d 340 (Tex. Crim. App. 2020).

[5] *Id.* at 180 n.4 (citing *Hughes v. State*, 897 S.W.2d 285, 301 (Tex. Crim. App. 1994)).

[6] The Court also noted the SPA's argument was inconsistent with the State's argument at trial, where the prosecutor claimed Jordan admitted to all the elements, but the Court does not ascribe any legal significance to this inconsistency. It would be very strange for the Court to hold that the State's argument required the trial court to submit a self-defense instruction that was not supported by the evidence. Absent an explicit statement making such a holding, I think the Court's holding here is that Jordan's admission to firing the gun, notwithstanding his denial of firing at Varley and Crumpton, raised self-defense.

[7] Tex. Penal Code §9.31(a).

[8] I quote this response because I do not see how it rebuts the SPA's point. No matter how you swap out the terms "another," "other," and "others," Penal Code §9.31 always says the force is justified only against the person or persons from whom the actor fears unlawful force.

[9] *Jordan*, 593 S.W.3d at 348 (Keasler, J., dissenting).

[10] Tex. Penal Code §22.05(b).

[11] *Jordan*, 593 S.W.3d at 351 (Yeary, J., dissenting).

[12] Judge Yeary described the posture of the case and said it was "understandable" for the Court to have addressed the multiple-assailants argument, and he "[did] not fault the Court for proceeding to address this issue."

[13] All the cases cited by the Court regarding multiple assailants either pre-date the current Penal Code or rely exclusively on cases that pre-date the current Penal Code.

[14] Tex. Penal Code §7.02.

[15] See *Jordan*, 593 S.W.3d at 343 (citing *Cartwright*, the 1884 case explaining multiple assailants as a function of the law of parties), 345 (citing then-Judge Keller's concurrence in *Dickey v. State*, 22 S.W.3d 490 (Tex. Crim. App. 1999), which argued multiple assailants was a function of the law of parties).

*Telling a jury the defendant had a right to defendant himself against the complainant "or others" is pretty vague. It was straightforward enough here, where there were only two groups of people—Jordan and Bryan versus the "mob." But a lot of cases may not be so clear, and it may not be as obvious who is part of the "mob."*

# Victim services consultations by Zoom

At TDCAA, as the Victim Services Director, my primary responsibility is to assist elected prosecutors of Texas, Victim Assistance Coordinators (VACs), or other prosecutor office staff members in providing support services for crime victims in their jurisdictions.

**By Jalayne Robinson, LMSW**
*TDCAA Victim Services Director*

I am available to provide victim services training and technical assistance to you via phone, by e-mail, or during our current COVID-19 pandemic by videoconference via Zoom. The services are free of charge.

My first Zoom meeting was with Bruce Bailey, the new VAC in the Rusk County District Attorney's Office. Bruce had been with the office for only a couple of weeks and was eager to learn more about his duties and responsibilities to crime victims in his jurisdiction. Zoom proved to be pretty easy and the next best thing to sitting next to Bruce in his office and walking him through his duties. During the meeting, I was able to share and review documents with Bruce in real time. How cool is this!

TDCAA's Executive Director Rob Kepple even popped in to welcome Bruce and to wish us well on TDCAA's first victims services assistance Zoom! (There's a picture of all three of us below.)

If you would like to schedule a Zoom videoconference with me to discuss victim services, please email me at Jalayne.Robinson@tdcaa.com and we can schedule a date and time for training. I also offer group training, which includes a PowerPoint presentation through Zoom. Many VACs across Texas are taking advantage of this free offer.

Here is a Zoom FAQ link to review before we start: https://support.zoom.us/hc/en-us/articles/206175806-Top-Questions?zcid=1231. Zoom also requires an Internet connection, speakers, a microphone, and a webcam.

Please let me know how I may be of assistance to you and your office! ✻

### Photos of recent in-person visits


*TOP PHOTO AT RIGHT: Stacy Richardson, VAC in the Angelina County DA's Office. BOTTOM PHOTO: From left to right, in the Limestone County & District Attorney's Office: VAC Glyn Sloan; C&DA Roy DeFriend; and Jalayne Robinson, TDCAA Victim Services Director.*



*THIS PAGE, TOP PHOTO: (From left to right) in Liberty County: Gabriela Wheeler, VAC in CA's Office; Laurie Dugdale, Office Manager in the CA's Office; Ashley Ulkie, VAC in DA's Office; and Kathrine McCarty, First Assistant County Attorney. BOTTOM PHOTO: (From left to right) in the Wichita County CDA's Office: Jalayne Robinson, TDCAA Victim Services Director; CDA John Gillespie; and VAC Carla Tettleton. BELOW: Stephanie Crosson, VAC in the 35th Judicial DA's Office.*

# A roundup of notable quotables

**"Note to self: Do not traffic your illegal narcotics in bags labeled 'Bag Full of Drugs.' Our K-9s can read."**

—Facebook post from the Santa Rose County (Florida) Sheriff's Office, referencing a drug bust where a sheriff's K-9 alerted police to the presence of contraband inside a vehicle that had been pulled over for speeding. Officers found a pouch, which was labeled "Bag Full of Drugs," containing methamphetamine, GHB, cocaine, fentanyl, MDMA, and drug paraphernalia. www.cnn.com/2020/02/04/us/florida-bag-full-of-drugs-trnd/index.html

Have a quote to share? Email it to Sarah.Halverson@tdcaa.com. Everyone who contributes a quote gets a free TDCAA ball cap!

*"When attorneys are right in front of you, they go at it. When attorneys are on the screen, they seem to think a little more before they speak, and that makes hearings a little more pleasant."*

—Bexar County Judge Oscar Kazen, on conducting hearings remotely instead of in person. www.ksat.com/news/local/2020/04/07/bexar-county-probate-mental-health-courts-deemed-essential-during-pandemic/

**"Due to the coronavirus, the Belton Police Department is asking that all criminal activities cease until further notice. We thank you for your cooperation in this matter. We will inform you when we deem it's safe and appropriate to proceed with yo bad selves."**

—Belton (South Carolina) Police Department on Facebook

"I used to work on a tugboat so I have a lot of practice with tying knots and things like that. A lot of that experience came back into play."

—Aaron Gonzalez, who chased after Lance Erickson, who tried to break into his family's Florida home. Gonzalez body-slammed Erickson and tied him up in a neighbor's yard to await sheriff's deputies. Erickson was charged with disorderly intoxication and endangering the property of others. https://ktrh.iheart.com/featured/michael-berry/content/2020-04-03-florida-father-body-slams-hogties-man-who-tried-to-break-into-his-home/

**"I chose to play old school. I'm not a youngster, so I went back to plotting the minutiae or individual characteristics myself."**

—Timothy Jackson, a criminologist at the New Hampshire State Police Forensic Lab, who manually plotted the characteristics of a fingerprint from a body that was found in 1969 and exhumed in 2012 to obtain fingerprints. "When you're looking at a finger that's been in the ground since 1969, the epidermal layer of skin is gone," Jackson explained. "What we're truly looking at is the inner layer. It was off enough that the [databases] couldn't make the correct comparison. When I did it myself, I knew what I was looking at." The body was identified as Winston Morris, who'd been released from prison three months before his body was found by a work crew off of Interstate 93 in Salem, New Hampshire. www.star-telegram.com/news/nation-world/national/article241816921.html





# The newest tech: gun-mounted cameras (cont'd from the front cover)

eight times during the exchange. EMS arrived on the scene within minutes, and Orellana received immediate, life-saving attention. By the time of trial, he had made a full recovery.

As with most officer-involved cases in a small jurisdiction, the Texas Rangers came in to lead the investigation. The shooting had occurred on Saturday afternoon, and by Monday morning I was meeting with the lead Ranger and reviewing Session's body-worn camera footage. The footage is harrowing and shows just how quickly an officer can go from a routine interaction to a life-or-death situation. While the body-worn camera footage was clear, there were some key things that it did not show. When Session put both hands together on his weapon to start firing, his hands blocked the view of his chest-mounted camera. The footage did not reveal exactly what he was seeing with his own eyes just before the shooting started—the view was obstructed.

Fortunately, we didn't have to rely solely on the body-worn camera footage. That's because Officer Session and all other Vernon Police Department officers had been fitted with weapon-mounted cameras just a few weeks before this shooting. That weapon-mounted camera showed exactly what was in front of the barrel of Session's gun, and it proved to be a critical piece of evidence at trial.

## Weapon-mounted cameras

The Vernon Police Department has long been an early adopter of cutting-edge technology. In July 2012, VPD instituted a body-worn camera program for all patrol officers. That was well before the officer-involved shootings of 2014 that resulted in law enforcement reform advocates clamoring for body-worn cameras from coast to coast. Because of that history, I wasn't surprised to learn in February 2019 that VPD would be the first law enforcement agency in Texas to implement a weapon-mounted camera program. The camera, manufactured by Viridian Weapon Technologies, sits just below the barrel of the officer's service weapon. The camera engages as soon as the weapon is drawn from the holster, and it turns off when it is returned to the holster. It records up to six hours of 1080P HD video and audio and includes a 500-lumen LED when lighting conditions are poor. The quality of the video footage is outstanding.

Within two months of deployment, the gun cameras were capturing vital evidence for trial. In one case, an officer had initiated a felony stop on a person who was wanted for a parole violation. The suspect had prior felony convictions, including unlawful possession of a firearm. The officer approached the suspect's driver-side window with his gun drawn and ordered him out of the car. The gun-camera footage captured the defendant fleeing the stop and almost striking another officer who was standing in front of the defendant's car. That defendant was convicted by a jury of aggravated assault of a public servant and evading arrest, and he was sentenced to 30 years for aggravated assault and 20 years for evading arrest. The gun-camera footage provided the only clear evidence of the defendant's near-collision with the officer.

## Orellana's trial

While the case against Orellana was strong, he refused to admit any wrongdoing. We had body-worn camera footage, weapon-mounted camera footage, in-car video, and an officer with 41 pellet wounds to his shoulder from a .20-gauge shotgun blast. Orellana, however, felt completely justified in his actions. In fact, a couple of days after the incident, he told Texas Ranger Jake Weaver that Officer Session had "disrespected him" by putting a gun in his face. Orellana claimed that he had no choice but to shoot the officer in self-defense.

Unsurprisingly, at trial, the defense's theory of the case was that Orellana had acted in self-defense. They claimed that Orellana pulled his shotgun only after having been shot several times. On direct examination, Officer Session did a good job of walking the jury through the encounter using the video footage and still shots. Session was certain in his testimony that he had fired on Orellana only after Orellana had grabbed the sawed-off shotgun sitting next to him in his SUV.

On cross-examination, the defense offered dozens of still-shot photographs from Session's body-worn camera. They emphasized the still shots that showed obstructed views of the scene and did not show Orellana with a gun. They then

admitted several photos that showed Officer Session firing at Orellana. The defense offered four still shots from the 16:34:55 hour of the body camera footage. None of them showed Orellana reaching for a gun. (One is below.)

AT RIGHT: Officer Session's body-worn camera footage from the moment in question–the defendant's gun is not visible.


The next still shot they showed from 16:34:57 showed shell casings being ejected from Session's firearm. Only after the officer had fired numerous shots does the body-worn camera come into a position where it clearly shows Orellana with a shotgun aimed at the officer. According to the defense, at that point, Orellana was in a do-or-die situation.

After the defense finished its cross-examination, the court called a recess, and I visited with Session. He was concerned that the defense's cross-examination made it look like he shot Orellana for no reason, and he was certain that Orellana had grabbed the shotgun before he pulled the trigger on his own weapon.

While I didn't think that the jury would go for the defensive theory at all, I wanted to put Session's mind at ease and address any potential concerns that could arise from the defense's presentation. I quickly pulled up the gun camera footage and went to the 16:34:55 mark. It didn't take long to see that the defense had left out some still frames from this very second that showed Orellana reaching for something next to him in the seat. When I called Session back to the stand, we pulled up the gun camera video at that spot, and I offered a new still shot into evidence. This shot showed Orellana looking down and reaching for something next to him. (That photo is below.)

AT RIGHT: The same moment as in the photo above, only this time from the gun-mounted camera. The defendant has reached for and grabbed his shotgun (it's in blue).





AT LEFT: The same second, just a beat later, it's clear that the defendant is aiming his shotgun at the officer.

I made sure to point out through Session that this still shot was omitted in the defense attorney's selection of shots from the video's 16:34:55. Several jurors shook their heads and cast accusatory glances at the defense attorney when they realized that he had tried to play a trick on them.

The overwhelming nature of the evidence meant that the defendant's self-defense claim went over like a lead balloon. It took the jury less than 20 minutes to come back with a guilty verdict for aggravated assault of a public servant with a deadly weapon.

According to Viridian Weapon Technologies, this was the first trial in the world to offer gun-camera footage in an officer-involved shooting case. While the evidence was potentially strong enough to obtain a conviction without the footage from the gun, there is no doubt that it eliminated any concerns that the jurors may have had about the encounter between Orellana and Officer Session. Viridian created an incredible YouTube video that syncs the gun camera footage with Officer Session's body camera footage.[1] It is well worth a watch if you are interested in this cutting-edge technology. ✻

## Endnote

[1] The footage can be viewed at https://www.youtube.com/watch?v=IqsrWDYZdaU&feature=youtu.be, or search for "Viridian Weapon Tech" to find the video.

# Teamwork takes down a sexual predator

Helen Keller once said, "Alone we can do so little, together we can do so much." Never was this more apparent to us than in a recent case we tried in Ector County.

**By Amanda Navarette**
*(at left) District Attorney in Crane and Winkler Counties, and*
**Kortney Williams**
*(at right) Assistant District Attorney in Ector County*

By way of introduction, Amanda is the 109th District Attorney for Crane and Winkler Counties, and Kortney is an Assistant District Attorney in Ector County handling sex cases. We have been acquainted for a few years, as Amanda previously worked as both a prosecutor and a defense attorney in Ector County and even bequeathed to Kortney her very comfortable office chair when she left to become DA in a neighboring jurisdiction. But we had never worked a case together until we had the unfortunate luck of coming across a defendant named Vernon Lloyd Ritchey.

## Background

When we met Mary (not her real name), the victim in this case, she was a hesitant, withdrawn, and sarcastic 16-year-old. When Ritchey met Mary, she was a happy, athletic, high-achieving elementary school student living in the small town of Wink (population less than 1,000). Ritchey and Mary's families were friends, and they regularly saw each other at family functions, holidays, and barbecues. The two families became even closer when Mary's mom became best friends with Ritchey's wife.

Around the time that Mary turned 12, Ritchey began to take a special interest in her. Mary and her younger brother would often spend the night at Ritchey's home in Odessa (in Ector County), and he began to touch her inappropriately in the middle of the night while everyone else was asleep. This inappropriate touching soon progressed into a full-blown sexual relationship. Ritchey knew exactly what to do and say to make Mary essentially "fall in love" with him. He complimented her, often calling her "goddess," and played on her very normal preteen insecurities.

The first time Ritchey and Mary had sex was at Ritchey's house in Ector County when Mary was 13. Ritchey gave a cell phone to her, and the two began communicating as if they were a couple. Ritchey became even bolder in his pursuit of the girl when he accepted a job in Wink—Mary lived with her family just a mile from his job site. Ritchey began to pick Mary up—in his GPS-equipped work vehicle—during lunch and after school shortly after she turned 14. Mary told her family she was a manager of the basketball team and needed to stay after school, but in reality, Ritchey was taking her down an oilfield dirt road to have sex with her in his truck.

The last time Ritchey sexually assaulted Mary was at her house on a day she was home sick from school. He parked his truck across the street and walked to her house, and they proceeded to have sex on the couch. They were interrupted by Mary's stepdad who randomly stopped by the house for lunch. Believing she was in love with him, Mary attempted to cover for Ritchey, and Ritchey pretended to be stopping by the house for a "bathroom emergency" and to take photographs of the collectibles that Mary's dad kept in a back room. As often happens in sexual assault cases involving family friends, Ritchey was able to talk himself out of a sticky situation. Mary finally outcried to her parents about the abuse a few months later when her mom found the cell phone that Ritchey had given her.

## An agreement to work together

This case was originally investigated by the Wink Police Department, consisting of the Chief of Police and one other officer, in May 2018. After they realized that Ritchey's crimes encompassed two counties, Winkler and Ector, the Wink Chief of Police reached out to the Texas Rangers for assistance. The Rangers, in turn, contacted Amanda Navarrete and then-first assistant in Ector County, Justin Cunningham, who assigned the case to Kortney Williams. Texas law has flexible jurisdictional rules for sexual assaults and other cases involving children that allow cases to be prosecuted in multiple jurisdictions. Because some of these sexual offenses happened in Winkler County where Mary lived and some of them happened in Ector County where Ritchey lived, they could all could be prosecuted together in either county or separately in each county.

Both offices decided that the best place to try these cases was in Ector County because of the resources available, the fact that the offense with a higher charge (Continuous Sexual Abuse) occurred in Ector County, and the better sentencing climate. We also agreed that Mary should have to testify only once against her abuser. Ritchey was arrested and indicted in Ector County on the Continuous Sexual Abuse and Sexual Assault of a Child charges committed in Ector County and two counts of Sexual Assault of a Child committed in Winkler County.

The Ector County half of our team (Kortney) immediately contacted the Winkler County half (Amanda), and it was agreed, mostly at Kortney's insistence, that not only would these cases be prosecuted together, but also we would both participate in any potential jury trial. Almost immediately, it became apparent that due to a lack of resources and training on these particular cases, we had a lot of work ahead of us to put this case together in a cohesive and prosecutable format.

## Difficulties in joint prosecution

What should have been an easily prosecutable case, especially given the GPS record from Ritchey's truck that corroborated Mary's story, turned out to be anything but. Due to both of our trial schedules and the schedule of the courts in our jurisdictions, Mary's case was pending after indictment for about a year and a half before we had a realistic trial date. One of our main difficulties was juggling the schedule of our Winkler County half due to her prosecuting cases in multiple counties mixed with our Ector County half's caseload. Amanda agreed to do all of the travelling—Kortney was very grateful!—and all of our meetings about this case happened either at the Ector County Courthouse or at local restaurants during lunch. We agreed pretty early on that Vernon Ritchey was a dangerous predator and needed to spend a significant amount time in prison. It became apparent that Ritchey was not willing to take any plea offer that resulted in prison time, so we began to prepare for the trial in earnest about two months before our scheduled trial date of January 29, 2020. We agreed to start the trial on a Friday to accommodate Amanda's hectic schedule, as she is the sole prosecutor in both of her counties.

In addition to scheduling issues, this case presented unique challenges when it came to the actual evidence. First, there were a ton of reports, videos, and photographs missing from our files. We didn't discover these were missing, because they weren't documented anywhere, until we started doing pretrial interviews. It seemed as though every potential witness we talked to said something like, "Didn't you get that?" Our answer was most often a resounding "*No*." These pretrial interviews provided numerous new pieces of evidence, including school records showing Mary was tardy to her after-lunch class one day, which corroborated her statement that Ritchey had sex with her during lunch that day and dropped her off late.

Second was the issue of the physical evidence, including a vitally important pair of handcuffs that the defendant had bought and used on Mary. This physical evidence was being kept in multiple locations in Winkler County. Luckily, with the Rangers' assistance, the unfailing efforts of Ector County DA Investigator Roland Cobos, some very helpful administrators at the Odessa Police Department, and much wrangling, we were able to transport the physical evidence to Ector County.

Third, we discovered that only one of the four cell phones collected from Mary and Ritchey was ever searched. Each of the agencies involved in this case assumed that the other agencies had done the phone dumps, but nobody had. Again, luckily for us, the Odessa Police Department, which was never even contacted during the initial investigation, was happy to help.

Fourth and perhaps most importantly was our ongoing fight about the GPS records. We knew from Mary's original Children's Advocacy Center (CAC) interview that multiple sexual assaults occurred in Ritchey's work truck. We also found out shortly before trial that the Wink Po-

*What should have been an easily prosecutable case, especially given the GPS record from Ritchey's truck that corroborated Mary's story, turned out to be anything but.*

lice Department had not only requested the GPS records from Ritchey's work truck but had also received and reviewed these records, which was a complete surprise to us. After attempting unsuccessfully to reach the company that possessed these records and after Kortney had angered the company's corporate counsel in Ohio by refusing to let her be involved in pretrial interviews, Amanda stepped up and used not only her "District Attorney" title but also her calm demeanor to convince the company to resend us all of the GPS records. Our teamwork here was crucial and provided us with "slam dunk" corroboration to use at trial.

In addition to the pretrial issues we had to address, we had to figure out who would handle which responsibilities during the trial. Kortney had home-court advantage, but Amanda had more experience. Kortney is more passionate and gets easily fired up about cases, while Amanda is more deliberate and steady. Amanda handled the "Winkler County" witnesses, including the police officers, Texas Ranger, and family members, all of whom she had a rapport with. Kortney handled Mary, the outcry witness (our CAC interviewer), the GPS witness and information, cross examination, and the sometimes hostile questioning of Ritchey's wife. We also spent quite a bit of time considering our strengths and what would work for this trial. As a result of that deliberation, Amanda was put in charge of opening statement and first close, and Kortney handled voir dire and second close. Our strengths and weaknesses balanced each other out and the trial flowed exceptionally well.

*We learned that when prosecuting cases with multiple jurisdictions, you have to be very effective communicators. When multiple law enforcement agencies work on a case, there can often be a lot of miscommunication. Looking back, we should have initially sat down with everyone involved and had serious conversations about where evidence should go and who should be the point person.*

## Going to trial

We selected a jury on Friday, January 29. Our goal was to select jurors who would not be afraid of a big sentence but at the same time could relate to a teenage girl who at one time believed she was in love with her abuser.

Mary's mom testified first. She talked about the behavioral changes leading up to her daughter's outcry. She had an extreme amount of guilt about not seeing Ritchey for the monster that he was, and that guilt was both extremely hard to witness and very relatable for the jury.

Mary testified next. She was brave and tough. As with most victims in sexual assault cases, Mary was complicated. She was cold and analytical when talking about her abuse, and then she would burst into tears when she left our office or the witness stand. She had trouble going into detail about each instance of abuse but was rock-solid on the facts she was willing and able to talk about. She never wavered in her testimony, and the details she provided when she described how Ritchey coached her through her first time having sex were chilling for the jury and for us.

After calling our CAC interviewer and law enforcement officers, we made the decision to call Ritchey's wife to the stand. We debated whether or not to call her because she was still actively involved with the defendant, speaking to him on the phone several times a day and visiting him often. We did get her to corroborate small details about the Mary's story, including several times Mary spent the night at their house or was with Ritchey alone. She also corroborated that the phone found in Mary's possession belonged to her husband, though she claimed Mary must have stolen it. The most helpful thing Ritchey's wife said was that she was glad we couldn't access the text messages on Ritchey's phone because it was "less evidence" for us, though she later attempted to backtrack on this statement.

Following her testimony, we called Ritchey's boss to the stand to explain the GPS records. We both spent numerous hours poring over the GPS data and came to the realization that we could line up Ritchey's movements on multiple occasions that he had sex with Mary. On each of these instances, we tracked Ritchey to a church a block from her school where he picked her up each time, his drive out to that oil field road, and his return trip to the church to drop her off. We tracked two instances where he picked her up during lunch, one of which coincided with her being tardy, and seven times after school. We were also able to track Ritchey as he picked Mary and her brother up for a weekend at his house and even his trip to the mall to buy the handcuffs. Finally, we were able to trace Ritchey's trip to Mary's house, the one when her stepdad walked in on them, and could pull up a map that showed his truck parked down the block.

Ritchey testified in his own defense, denied everything, and said Mary was a liar. Fortunately for us and unfortunately for him, his argument that all of our GPS evidence was a mere coincidence did not sway the jury. In fact, the jury convicted Ritchey of each count (Amanda helped Kortney not be too nervous while waiting what seemed like an eternity for a verdict) and sentenced him to 75 years on the Continuous charge and 20 years on each of the Sexual Assault charges. The judge stacked his sentences and he will serve 135 years in prison; it'll be 105 years before he is eligible for parole.

## Lessons learned

Our teamwork on this case resulted in a life sentence for a sexual predator, and we learned from each other throughout the process. First of all, we learned that when prosecuting cases with multiple jurisdictions, you have to be very effective communicators. When multiple law enforcement agencies work on a case, there can often be a lot of miscommunication. Looking back, we should have initially sat down with everyone involved and had serious conversations about where evidence should go and who should be the point person. Folks at the Odessa Police Department were supremely helpful, and we should have looped them in sooner.

Second, even more so than in a normal case, we learned to plan for things to go wrong. When multiple agencies and jurisdictions are involved, things are bound to go sideways, and if you are prepared for that, you can do something about it. Third, we learned to prepare early. As prosecutors, we often find ourselves prepping witnesses for trial right until the moment we pick a jury and sometimes even during trial. When prosecuting a multi-jurisdictional case, though, these pretrial meetings and preparation need to happen sooner. We found out extra information, which we were then able to pursue further, because we prepped early.

Finally, we learned to remember that we are all in this together. Amanda's steadiness and Kortney's passion combined perfectly in this case—but only because we allowed each other to operate in our own areas of strength. It helped that we already knew each other, but our respect for one another and our friendship grew throughout the trial process.

Each joint-county prosecution presents its own unique challenges and rewards, but when we remember that we really are better together, we can accomplish so much more than we ever could alone. ❋

# The last words a jury hears before deliberations

My ideal job is one where my only responsibility would be conducting jury trials. I would like nothing more than to dispose of the tedium of intake, plea negotiations, docket call, and the like.

**By Zack Wavrusa**
*Assistant County & District Attorney in Rusk County*

As stressful and exhausting as they might sometimes be, jury trials are by far the most rewarding part of being a prosecutor.

I am especially fond of closing arguments. They provide attorneys with a stage unlike any other. It is exceptionally gratifying to deliver a powerful closing argument—our sole opportunity to explain to the jury what a just verdict is, based on the law and evidence presented to them.

Successful closing arguments, like everything else in this profession, require careful preparation, planning, and strategy. The importance of closing arguments cannot be overstated. All of the work that attorneys put into a jury trial culminates in closing argument. For that reason, it is vitally important for prosecutors to make the most of that opportunity. Prosecutors owe it to themselves and crime victims to understand everything that can and cannot be done at close. The underlying principles of closing argument remain the same, regardless of the given facts or offense alleged.

That said, closing arguments are more art than science. Two prosecutors could start with the exact same case, do a brilliant job with it, and still end up with markedly different closing arguments. To really have an in-depth discussion of closing arguments, let's take a fact scenario and talk about one direction closing argument could take.

## Case scenario

Let's say that Danny Defendant, who was honorably discharged from the United States Army and declared 100-percent disabled because of post-traumatic stress disorder (PTSD), spent an evening drinking heavily. His pregnant wife, Sally Jo, had driven him to a bar at his request and later called police when her husband threatened to kill himself. Danny shot at the responding officer, Deputy Dudley. The deputy was not injured, and after backup arrived, officers were able to take Danny Defendant into custody. Inside the trailer, sheriff's officers found that one bedroom was in the process of being decorated as a nursery, plus several empty alcohol and wine bottles, a wide variety of firearms, ammunition, and Tannerite, a low-grade explosive often used by marksmen as a target for long-range shooting practice.

The defendant is indicted for the first-degree felony of Aggravated Assault on a Public Servant. The case is called for trial approximately 15 months after the offense because of a delay to evaluate the defendant after his attorney files a notice to raise the insanity defense.

## The trial

In her opening statement, defense counsel does not deny that her client fired the rifle at Deputy Dudley, but she insists that he suffered from PTSD, and as a result of that mental disease, was incapable of knowing the difference between right and wrong. Therefore, the jury should find him not guilty of aggravated assault.

The defense's first witness is a well-qualified forensic psychologist, who testifies that it is his professional opinion that the defendant's PTSD impacted his ability to distinguish between right and wrong in this case. On cross-examination, you discuss the role the defendant's voluntary intoxication played in his behavior on the night in question, and eventually the psychologist clarifies that he believes the defendant's inability to distinguish from right and wrong was due to his PTSD as well as his voluntary intoxication.

The defendant testifies next. He didn't know how much time passed before he heard a vehicle making its way down the driveway, and he was convinced whoever was in the vehicle was there to kill him—he had to kill that person or he himself would be killed. He expresses remorse at learning the person he shot at was a law enforcement officer because he has a lot of respect for law enforcement and the services they provide society.

On cross-examination, the defendant admits to drinking heavily for several hours before the shooting. He was drunk even by his own rather high standards, he says. He tells the jury that he did not know where his wife was at the time of the shooting but admitted that her car was not in the driveway and that for all he knew at the time, he could have been firing into her vehicle instead of the deputy's.

After the defendant's testimony, the defense rests its case in chief. In rebuttal, you call the State's own forensic psychologist, who concurred in the PTSD diagnosis but also stated that defendant's behavior on the night in question was not caused by his PTSD but rather by his voluntary intoxication.

## The charge

At the charging conference, the judge:

- denies defense counsel's request for an instruction on not guilty by reason of insanity (NGRI), saying that the psychologist most favorable to the defense said that it was the combination of PTSD and alcohol, not PTSD alone, that led to the defendant's actions;
- includes the definition of intoxication;
- includes an instruction that voluntary intoxication is not a defense;
- does not include an instruction on deadly force in defense of property; and
- includes the lesser-included of aggravated assault with a deadly weapon, per the defense's request.

With evidence complete and the charge of the court read to the jury, it's finally show time. So ... what are we allowed to say in closing argument? What are we prohibited from saying? How should we organize it? Is there a strategic element to closing argument?

## What can I talk about?

The Court of Criminal Appeals has held that there are four permissible areas of jury argument:

1) summation of the evidence;
2) reasonable deductions from the evidence;
3) answering the argument of opposing counsel; and
4) pleas for law enforcement.

This rule may seem restrictive at first glance but, in reality, Texas attorneys are given considerable latitude when it comes to delivering their closing arguments.

One of closing argument's true challenges is strategically organizing everything you can talk about into an effective "first" close and "second" close. ("Second" close is the one that occurs after defense counsel makes its single closing argument.) There are 254 counties in Texas, and while there aren't quite as many ways to organize the closing argument in any given case, there are a lot. When deciding what to talk about where, consider the following questions, to name a few:

1) Will I be splitting the closing argument with co-counsel or flying solo?

2) Have I kept all the promises I made in opening statement?

3) Is there a confusing part of the law I need to spend time explaining? and

4) What will be the defense's strategy in closing argument?

After you have thought about those questions a bit, you have to figure out what to talk about in first close and what to save for second close. This decision will vary from case to case, but if you are looking for a jumping-off point for your close, my general approach is as follows:

**First close.** When it comes to first close, it is important to remember that defense counsel will deliver its closing argument after you. If you put yourself out on a limb in first close, a skilled defense attorney will find a way to make that limb break. For that reason, I generally treat this as the more conservative of the two halves of closing argument—that is, this is when I summarize the evidence and discuss the straightforward deductions that can be drawn from that evidence.

*Closing arguments are more art than science. Two prosecutors could start with the exact same case, do a brilliant job with it, and still end up with markedly different closing arguments.*

*It can be very tempting to start the second close by responding to defense counsel's argument. Sitting quietly at counsel table while the defense delivers closing argument can be excruciating. Many prosecutors' gut instinct is to come out swinging against the defensive theory, but I strongly encourage you to stick to your own case theory in the opening moments of second close.*

Again, one of my goals with first close is to not provide defense counsel with additional ammunition to use against me.

After discussing the evidence and the most difficult-to-refute deductions from that evidence, I will discuss the portions of the court's charge that I believe are the most important. When possible, I discuss all necessary elements of the charge in first close. Discussing the charge tends to be one of the drier things in closing arguments, and I don't want the second close to lose any of its momentum or drama because of Penal Code definitions or elements of a defense eating up precious minutes.

After I discuss the evidence, deductions, and charge of the court, I return to the theme of my case before retaking my place at counsel table. Ending first close with your theme will provide a lot more momentum than if you end with a dry explanation of the court's charge.

**Second close.** This is where you really pull out all the stops. It is last thing jurors will hear before retiring to the jury room for deliberations, and prosecutors need to make it count.

It can be very tempting to start the second close by responding to defense counsel's argument. Sitting quietly at counsel table while the defense delivers closing argument can be excruciating. Many prosecutors' gut instinct is to come out swinging against the defensive theory, but I strongly encourage you to stick to your own case theory in the opening moments of second close. The State's case theory is what you told the jury the evidence would show in opening statements, and it's what you argued to the jury in first close. Your case theory is correct. It is the truth. And there is nothing the defense will have said during its closing argument to change that. If the first thing the jury hears out of your mouth in second close is a response to the defensive theory, you are telling the jury that the defense's closing argument was meaningful and you are worried about what the defense attorney had to say.

Begin second close with the State's theory of the case. You don't have to repeat the summary of evidence that happened in first close, but do touch on the critical facts of the case again. Don't be afraid to come at a fact from a different angle. Tell the story from another witness's perspective if you can do so persuasively. While you are telling your story again, discuss the reasonable deductions from the evidence that you held back from first close. Now that the defense attorney has completed her closing argument, you don't have to worry about her taking some deduction you make to the extreme and turning your own words against you.

After you have spent at least a little time telling your story again, feel free to move into your response to the defense's argument. The defense attorney will almost certainly have addressed your theory of the case in her closing, so jurors will be expecting you to do the same with your closing—don't disappoint them.

Finally, I encourage you to end your closing argument with a plea for law enforcement (described in detail later in this article). It's one of the most powerful tools in a prosecutor's toolbox, and it should be a part of every closing argument.

Once you have a firm grip on the flow of your closing argument, from the beginning of first close to the end of second close, it's time to figure out just what it is that you want to say.

## Summary of the evidence and reasonable deductions

Summarizing the evidence is supposed to be the easy part, right? No. How much advocating can one do when recounting the testimony of witnesses? A lot.

Summarizing the evidence in the case needs to be much more than a recitation of each individual witnesses' testimony. If your summary of the evidence amounts to nothing more than "Deputy Dudley said X. Then he said Y. Finally, he said Z," jurors will be tuning out or nodding off to sleep in no time. Your summary of the evidence needs to hold jurors' attention, and you do that by telling them a story, not reciting facts. Really, this subhead should be called "Telling Your Story."

Verbal storytelling is literally an ancient practice. Long before pre-historic law enforcement officers began drafting pictograph offense reports on cave walls in France, people were telling each other stories. Everybody is accustomed to oral storytelling. It transcends age, race, gender, sexual orientation, and any division you can think of. People are going to pay much closer attention to a story than they are a lecture.

Good storytelling takes practice.[2] I strongly advise against anyone writing out his closing argument in full and simply reading it to the jury. However, writing it out fully can be helpful during the early phases of preparation and practice because it will help you transform the list of facts to which the State's witnesses testified into a coherent story that will keep jurors' attention. Once you perfect telling that story, boil it down to something more concise if you end up needing to consult your notes during closing.

Let's apply this process to the Deputy Dudley's case.

**Phase 1: Writing down the elements of the story**

Deputy Dudley told you:

- He was dispatched to County Road 255D in reference to a possible mental health crisis on January 1, 2018.
- The residence at that location was a double-wide mobile home with a back porch.
- He didn't have his lights on because it's department policy to leave them off when responding to mental health crises.
- He was fired upon as soon as he tried to get out of the patrol vehicle.
- He turned the car's lights on and was shot at again while at the vehicle's rear.
- He then turned off the patrol lights and took cover.

Do you see how a dry recitation of facts like these might lose a juror's interest? We don't read books, listen to radio broadcasts, or watch TV programs that tell stories this way because it would be awful. If it would make an awful book, radio program, or television show, why would it make a good closing argument?

Now let's take a look at these same facts—combined with some reasonable deductions from those facts—in a story format.

**Phase 2: Putting it all together**

"Deputy Dudley reported to work at the Rusk County Sheriff's Office on January 1, 2018, with the same goal that every law enforcement officer has at the beginning of every shift: make it home alive. During his shift, his radio crackled to life with a report from dispatch that Danny Defendant had threatened to kill himself. Dudley had responded to calls regarding mental health episodes before, but he never had a call end up like this one. If he had known what was in store for him as he approached the dimly lit mobile home, if he knew the trouble that sat waiting for him on that back porch, he might have turned around, dropped his car off at the sheriff's office, and found a new way to support his wife and children. Under those circumstances, nobody would have blamed him. Unfortunately for Deputy Dudley, he didn't have the benefit of foresight that night.

"After pulling into Danny Defendant's driveway, he put his patrol car into park and was immediately greeted with the thunderous crack of a .444 Marlin rifle. Deputy Dudley didn't even have time to process what he heard before a hollow-point round—which is meant to kill a bear or an elephant—tore through the front of his patrol car.

"Rightfully panicked, Deputy Dudley managed to switch on his overhead lights in the split second he had before taking cover behind the vehicle. No sooner had he huddled behind the right-rear corner of his car before a second boom cut its way through the cool night air. The accompanying round was closer to its intended target this time—it punched a hole in the rear passenger side door mere feet from Deputy Dudley's head. He knew the danger he would face if he tried to creep back down the muddy driveway to escape his would-be murderer—all Deputy Dudley could do at that point was turn off the flashing lights on his car and hope that the ensuing darkness would buy him enough time for backup to arrive."

It goes without saying that the story in Phase 2 does a much better job explaining to the jury what happened on January 1, 2018, than the list of facts in Phase 1. You can never tell a jury to "put themselves in the victim's shoes,"[3] but, when you utilize storytelling, like we did above, you don't have to. Good storytelling helps the jury understand the events from the protagonist's point of view—in this case, Deputy Dudley is the protagonist.

Good storytelling also allows you to interject reasonable deductions from the facts in evidence in a natural way that is not easily replicated when you are simply recapping the testimony of witnesses. This is because reasonable deductions are practically a byproduct of the storytelling process. Jurors are more ready to accept the deductions when they are part of a narrative, whereas when deductions are added to a dry recitation of facts, it's been my experience that the jury looks at them as mere speculation.[4]

Like I alluded to earlier, good stories can be written, but good storytelling is not read. How you get from the full-fledged story of Phase 2 to something more compact and useful at trial is really a point of personal preference. Some prosecutors might use the bullet point list of facts from Phase 1 as their trial notes. Others will rely on a PowerPoint presentation to refresh their memo-

*Verbal storytelling is literally an ancient practice. Long before pre-historic law enforcement officers began drafting pictograph offense reports on cave walls in France, people were telling each other stories.*

ries as they go along. Still others might create a hybrid of sorts that combines bullet points with complete sentences.[5] Finding out what method works best for you will take some time. The important thing is that you work toward delivering a closing argument that is seamless and engaging. The work we do is too important to risk losing jurors' attention because we're shuffling through papers or putting our heads down to read aloud.

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## Enhancing the story with visuals

We have all heard that "a picture is worth a thousand words." The etymology of the phrase is murky but its meaning is pretty clear: Humans are visual creatures and we are more likely to pay attention to information if there is an accompanying visual. If you need further proof, know that Google's search algorithm is designed to identify if there are images in articles and on web pages. It doesn't "see" the images, but it knows they are there, and their presence determines where the article or page will appear in search results.

Use this fact to your advantage and incorporate visuals into closing argument. Deciding what images to use can be tough and, like so much in this profession, will vary from case to case. Crime scene photos might do quite a lot to enhance your closing if the crime was violent. Be choosy, though—not every picture in evidence needs to be shown to the jury. Pick images that will make the most impact in your story. If you are trying a white-collar crime, consider including charts or graphs in closing. They will not only help the jury understand information that can oftentimes be overwhelming, but they will also identify patterns to the criminal behavior that might not be readily apparent. Audio and video clips from admitted exhibits are also great tools to enhance closing argument. Did the defendant make a particularly damning admission in the midst of the standardized field sobriety tests? Play it for the jury again. Sure, you can always tell the jury what the defendant said, but nothing beats letting the jury hear the admission straight from him. Did the victim in a domestic violence case minimize her offender's actions when she testified at trial? Did you admit the 911 call as part of the case in chief? Play it for the jury. Let them compare the victim's calm testimony on the witnesses stand to her excited utterances on the 911 call.

For our hypothetical case involving Sally Jo and Danny Defendant, let's talk about what audio or visual aids we could use to bolster our closing argument. We could certainly replay clips from Sally Jo's 911 call to show how fearful she was that her husband would do something dangerous that night. Weigh what you stand to gain from replaying it against the possibility that it encourages the jury to look at the defendant as a mentally ill person whose disability got the better of him. Remember, the defense attorney promised them the option of a "not guilty by reason of insanity" verdict and, even though that option won't be on their verdict form, it is likely still an idea that they will consider.

In addition to the 911 call, there are at least two other visual tools you can use in closing argument that have little to no chance of coming back to bite you. Those are the patrol vehicle's hood and right-rear door—the ones punctured by the defendant's bullets. Bringing those items out before the jury again will provide a physical means of connecting them to the violence of the defendant's crime. There is going to be a visceral quality to seeing the two damaged pieces of the car up close that simply talking about can't replicate. As the prosecutor, you want to use the combination of your words and the two exhibits to give the jury some idea of what it must have been like for Deputy Dudley to be crouched behind his patrol car hoping that the metal would be strong enough to protect him from the defendant's rifle shots.

## Explaining and arguing the charge of the court

Before either party gets a chance to deliver closing arguments, the court will read the charge of the court (a.k.a. jury instructions) to the jurors. The charge of the court is not just an opportunity for the judge to hear his own voice—it's a crucial part of the process.

The charge of the court is divided into two parts: the abstract and the application paragraph. The abstract portion is where the court explains what laws are applicable to the case. This portion includes an explanation of the jurors' role in the trial, important definitions, descriptions of what the State must prove with respect to the charged offense, and the rules for any defense that might have been raised by the evidence.

The application portion of the charge gives the jury authorization to convict. It will lay out the elements of the offense and tell the jurors that if they find the all of those elements have been proven beyond a reasonable doubt, they must find the defendant guilty. If there is a lesser-included offense or an applicable defense, the application portion of the charge will also break those down for the jury.

There is always, *always* something from the court's charge that needs to be explained or argued to the jury. To argue the charge most effectively, familiarize yourself with the general instructions that are a part of every jury charge. These often contain matters of great importance to the jury, and you should not have to refamiliarize yourself with their contents before every closing argument. By having those general instructions committed to memory, we are freed up to focus on the instructions unique to the particular offense for which the defendant is on trial.

What elements of the court's charge might be important for us to discuss in Deputy Dudley's case? From the general instructions, I would want to remind the jury of what I call the "common sense" instruction. The actual language will vary depending on whether the person preparing the charge is working off the State Bar's Criminal Pattern Jury Charge books or one of the many alternatives. Regardless of its source, the instruction will tell the jury something akin to, "You are exclusive judges of the facts proved. You are allowed to make reasonable inferences from the facts in evidence and judge the facts through the light of common experience." In this case, the jury will be able to convict only if they find the defendant "intentionally or knowingly" threatened serious bodily injury to Deputy Dudley. Short of a confession, the jury will always be forced to use common sense to figure out what was going through the defendant's mind at the time of the offense. In this case, we should remind the jurors that they didn't check their common sense at the door, and when they retire to deliberate, their common sense will tell them that the defendant firing on Deputy Dudley as soon as he exited his vehicle and again just moments later were intentional acts. Tell them that it defies reason to think that the two shots in quick succession, one striking mere feet from the deputy's head, were the result of bad luck on the officer's part or a mistake on the defendant's.

It will also be important to argue the definition of "public servant" and the accompanying presumption. Here, the court's charge will give the statutory definition of public servant from Texas Penal Code §1.07(a)(41).[6] The aggravated assault statute also says that the defendant is presumed to have known the person assaulted was a public servant or a security officer if the person was wearing a distinctive uniform or badge indicating the person's employment as a public servant.[7] In this case, you would want to point out both the definition of public servant and the presumption. Remind jurors of the testimony you elicited on these points. Failure to persuade the jury of the "public servant" element beyond a reasonable doubt will, at best, result in the conviction of a lesser-included offense and, at worst, provide the ammunition defense-oriented jurors need to persuade their fellow jurors to acquit outright.

*There is always, always something from the court's charge that needs to be explained or argued to the jury.*

Remember too, that the defense attorney made promises during her opening statement that the jury would have the option of finding the defendant not guilty by reason of insanity. In this case, an instruction on not guilty by reason of insanity was not included in the charge because there was not sufficient evidence to warrant its inclusion. We would need to make it clear to the jury that there is no instruction permitting them to find the defendant not guilty by reason of insanity. Don't assume that they will notice its absence from the court's instruction on their own.

When you tell them this option isn't available, also turn them toward the instruction that states voluntary intoxication is not a defense. Remind them of Sally Jo's testimony that she had driven the defendant to a bar herself and argue that, being pregnant, she would have done so only because she knew her husband intended to drink to the point of intoxication and would need a sober ride home. Bolster this deduction by pointing out the investigators' observation of empty alcohol containers strewn through the home's kitchen. Be forceful in your assertion that the defendant's conduct will not be excused because he chose to drink.

## Responding to defense's argument

How you respond to the defense argument is going to depend on:

1) the type of offense for which the defendant is on trial,

2) the type of argument made by the defense attorney, and

3) the "persona" that you take on in the courtroom.

The jury expects you to respond to defense counsel's arguments, but if you choose the wrong

approach, you can lose credibility with the jury and potentially lose the whole case. Think carefully about how you want to respond after taking the entire trial into account.

The type of offense is an important consideration when deciding how to handle your response to the defense's argument. A run-of-the-mill drug case likely requires an even-tempered, analytical approach. In that kind of case, prosecutors will want to marshal the favorable evidence they have to rebut the defense's argument and explain how defense counsel's claims are flawed. In a sexual assault or homicide, the prosecutor might want to aggressively refute the defense's argument.

*The jury expects you to respond to defense counsel's arguments, but if you choose the wrong approach, you can lose credibility with the jury and potentially lose the whole case.*

In any given case, there might be a variety of arguments that a prosecutor could pursue. This fact is no different for defense attorneys, and the strategy they choose should impact how we respond to it. Sometimes, defense attorneys will heap praise on the prosecutors opposing them. They will tell the jury what a great job prosecutors did with the case but this time, they are missing something. Other times, when the trial judge allows it, defense attorneys will attack the integrity of the prosecution team and aggressively argue that some ulterior motive on the part of the victim, law enforcement, or prosecutor's office is the driving force behind the trial. Whenever possible, I tend to fight fire with fire and reason with reason. Like everything else with closing arguments, the circumstances of each case will dictate the appropriate way to respond to defensive arguments.

Considering the facts of our example case, one strategy would be to deliver a fiery rebuke of the defense's argument. Defense counsel, no doubt, developed some sympathy for the defendant by accepting the blame for failing to secure a "not guilty by reason of insanity" instruction and by emphasizing the defendant's honorable military service. However, defense counsel also completely ignored all the evidence about the defendant's voluntary intoxication. As prosecutors, we could point out that the defendant could have spent that evening in the company of his caring wife—they could have worked on their child's nursery, for instance. Instead, the defendant had his wife act as his chauffeur while he drank away his self-control. We could end our response to the defense's argument by pointing out that both the defense's psychologist and the State's psychologist agreed that the defendant's behavior was a result of his voluntary intoxication and that the court's charge makes it clear that voluntary intoxication is no defense to his crime.

## Plea for law enforcement

This is the single most powerful tool in the prosecutor's toolbox. It is our way of combatting the threat of jury nullification, and it's our chance to go beyond arguing why the evidence shows the defendant is guilty and argue why it's important that the jury fulfill its responsibility as the trier of fact and actually find him guilty as supported by the evidence.

A plea for law enforcement can be made in any case. During such a plea, a prosecutor can discuss the relationship between the jury's verdict and the deterrence of crime in general.[8] Prosecutors may argue how the jury's verdict will impact the community.[9] A prosecutor can't argue that any particular segment of the community demands a particular verdict or punishment,[10] but we can argue about the impact of the verdict on smaller groups that make up the community.[11]

Please remember that a plea for law enforcement does not mean a plea on behalf of law enforcement officers. Prosecutors make a plea for law enforcement when they proclaim the importance of the law and why it is necessary for the jury to apply the law as written.

In Deputy Dudley's case, the prosecutor could make a plea for law enforcement in every sense. Ask the jury how officers can be expected to go into unknown, potentially dangerous situations and not receive the protections the law says they are entitled to. Argue that an acquittal on these facts amounts to a *de facto* endorsement that nothing is a crime if you get drunk enough first. If would-be cop killers know that a night of heavy drinking is all they need to get away with murder, then no law enforcement officer in the county will ever truly be safe. What Danny Defendant did is a serious crime with potentially grave consequences, and every single person in the courtroom is lucky that the results weren't worse.

## The last, best chance

Closing arguments are technically not evidence, but their importance cannot be overstated. Before the jury retires to deliberate, the last words they hear from any person involved in the case come from the prosecutor during closing argument. These arguments are our last chance to explain a complicated legal issue and to persuade juror who are still on the fence about the defendant's guilt.

Take the task of closing argument seriously. We owe it to our victims, our law enforcement officers, and our community to treat this final opportunity as seriously as we do every other phase of the trial. ✻

## Endnotes

[1] *Felder v. State*, 848 S.W.2d 85, 94-95 (Tex. Crim. App. 1992).

[2] I was honored to be able to offer some more in-depth storytelling advice in the May–June 2019 issue of this journal. If you are looking for more storytelling inspiration, I hope you find my previous article helpful.

[3] See *Brandley v. State*, 691 S.W.2d 699, 712 (Tex. Crim. App. 1985).

[4] Here's an example of "recitation style": Deputy Dudley testified that the first time he was fired upon was when he got out of his vehicle. Dudley said the second shot happened when he took cover behind the vehicle. The defendant was trying to murder him. Here are the same facts using "storytelling style": The first shot taken at Dudley came right as he exited the vehicle. The second came as he took cover behind it and missed him by mere feet. Dudley had to act fast or the defendant's next shot might not miss.

[5] This third approach, a combination of bullet points and complete sentences, is the one I take. I find that as I practice my closing argument, I inevitably come up with an impactful way of telling a particular part of the story or a smooth way to transition from one important point to the next. To help remember the specific language I use, I write out the entire phrase in my notes. I'll inevitably not look at my notes and end up saying something different, but just having it there feels like a little bit of a lifeline should I need it.

[6] Remember to define words or phrases only when they are defined or otherwise given special meaning by statute. In most instances, it will be considered error to provide the jury with non-statutory definitions. Avoid the temptation to add to the definition as well. See *Ratliff v. State*, 2020 Tex. App. LEXIS 1270 (Tex. App.–Austin 2020) (finding error in trial court's decision to charge the jury that a member of the Llano Police Department was a public servant).

[7] Tex. Penal Code §22.02(c).

[8] *Shippy v. State*, 556 S.W.2d 246, 257 (Tex. Crim. App. 1977).

[9] *Adams v. State*, 685 S.W.2d 661, 671 (Tex. Crim. App. 1985).

[10] *Cortez v. State*, 683 S.W.2d 419 (Tex. Crim. App. 1984).

[11] *Rhodes v. State*, 450 S.W.2d 329, 331-332 (Tex. Crim. App. 1970) (law enforcement officers); *Strahan v. State*, S.W.2d 626 (Tex. Crim. App. 1962) (drivers sharing the highway with drunk drivers); *Carver v. State*, 510 S.W.2d 349, 355-356 (Tex. Crim. App. 1974) (women and children).

*A plea for law enforcement is the single most powerful tool in the prosecutor's toolbox. It is our way of combatting the threat of jury nullification, and it's our chance to go beyond arguing why the evidence shows the defendant is guilty and argue why it's important that the jury fulfill its responsibility as the trier of fact and actually find him guilty as supported by the evidence.*

# Who must register as a sex offender?

*Editor's note: This chart included an error in the last issue of this journal, so we are reprinting a corrected version.*

**By Hilary Wright**
*Assistant Criminal District Attorney in Dallas County*

| PC § | Offense | Length of Registration |
|---|---|---|
| 15.01-031 | Any attempt, conspiracy, or solicitation (as defined by PC Ch. 15) to commit any "attempt-eligible offense" | 10 years |
| 20.02 | Unlawful Restraint, victim <17 years of age | 10 years (lifetime if D already *is* or *becomes* a sex offender as an adult) |
| 20A.02(a)(3) | Trafficking: Sex labor through force, fraud, or coercion | Lifetime |
| 20A.02(a)(4) | Trafficking: Benefit from sex labor | Lifetime |
| 20A.02(a)(7) | Trafficking: Sex labor of person <18 years of age | Lifetime |
| 20A.02(a)(8) | Trafficking: Benefit from sex labor of child | Lifetime |
| 20A.03 | Continuous Trafficking of Persons [if consisted of 20A.02(3), (4), (7), or (8)] | Lifetime |
| 20.03 | Kidnapping, victim <17 years of age | 10 years (lifetime if D already *is* or *becomes* a sex offender as an adult) |
| 20.04 | Aggravated Kidnapping, victim <17 years of age | 10 years (lifetime if D already *is* or *becomes* a sex offender as an adult) |
| 20.04(a)(4) | Aggravated Kidnapping involving intent to violate or abuse the victim sexually | Lifetime |
| 21.02 | Continuous Sexual Abuse, victim <14 years of age | Lifetime |
| 21.08 | Indecent Exposure upon a *second* violation (which cannot be a deferred adjudication) | 10 years |
| 21.09 | Bestiality | 10 years |
| 21.11(a)(1) | Indecency with a child by contact | Lifetime |
| 21.11(a)(2) | Indecency with a child | 10 years (lifetime if D already *is* or *becomes* a sex offender as an adult) |
| 22.011 | Sexual Assault | Lifetime |
| 22.021 | Aggravated Sexual Assault | Lifetime |
| 25.02 | Prohibited Sexual Conduct | Lifetime |
| 30.02(d) | Burglary with intent to commit sexual felonies | Lifetime |
| 33.021 | Online Solicitation of a Minor | 10 years |
| 43.02(c-1)(2) | Prostitution if the person solicited is <18 years of age | 10 years |
| 43.04 | Aggravated Promotion of Prostitution | 10 years |
| 43.05(a)(1) | Compelling Prostitution | 10 years |
| 43.05(a)(2) | Compelling Prostitution, victim <18 years of age | Lifetime |
| 43.25 | Sexual Performance by a Child | Lifetime |
| 43.26 | Possession or Promotion of Child Pornography | Lifetime |
| And also … | A violation of the laws of another state, a foreign country, federal law, or the Uniform Code of Military Justice for "federally similar offense" or based on the violation of an offense containing elements substantially similar [but not for a deferred adjudication] | Same as the similar Texas offense |





# No nurse should be no problem

The ideal Driving While Intoxicated (DWI) case follows a systematic formula from roadside to conviction: A law enforcement officer conducts an unassailable investigation that reveals multiple signs of intoxication.

**By Nathan Alsbrooks**
*Assistant District Attorney in Montgomery County*

Later, a nurse draws the defendant's blood in a sanitary place, and a forensic scientist tests the specimen to determine its alcohol concentration. A prosecutor will rely on all three of these participants to testify at trial.

This path to success sounds simple, but criminal prosecution isn't always so straightforward. Prosecutors may face the task of trying a DWI without testimony from the blood draw nurse, and talented defense attorneys are eager to exploit a nurse's unavailability to confound judges and confuse juries. They will use the nurse's absence to attack the admissibility and reliability of forensic blood testing. But with careful preparation and cogent presentation on the State's part, the law concerning nurse unavailability is highly conducive to successful prosecutions.

## The law of the draw

When §724.017 of the Texas Transportation Code applies (that is, that a blood draw is performed on the defendant under implied consent or exigent circumstances, but arguably not with a search warrant), the State must prove the statutory requirements that the draw was done by qualified personnel in a sanitary place. Meeting this statutory burden is possible without testimony from the blood draw nurse. Instead of the nurse, a law enforcement officer, for example, may testify to his familiarity with the blood draw procedures developed through training and experience, and he may testify that those procedures were followed during the blood draw. The officer may also testify to the rapport he's developed with hospital staff, which may have led to his direct personal knowledge of a nurse's credentials or a hospital's policies.

One helpful document is the Blood Withdrawal Procedure Form (reprinted on page 32), created by my office years ago. It is essentially a step-by-step checklist detailing appropriate procedures that an officer and nurse would sign once the draw was complete to attest to all procedures being followed. Ideally, the form would be used by all law enforcement officers in the course of their investigation, as well as by prosecutors to tailor their direct examination of peace officers.

Additionally, a supervisor from the medical facility may testify concerning a nurse's credentials. Supervisors may describe specific policies that exist at a medical facility establishing that blood draws must be performed by qualified personnel and that the place is sanitary within the meaning of the statute.

In *Adkins v. State*,[1] the court addressed an officer's capacity to testify regarding a sanitary blood draw site. The court affirmed that a reasonable environment does not necessarily mean a medical one; rather, the environment must be "a safe place in which to draw blood." The proper inquiry for a court to consider is whether the environment invited an "unjustified risk of infection or pain." In other words, establishing that an environment is reasonable does not require any direct medical knowledge or training. Police officers (and a nurse's supervisor, for that matter) are fully capable of establishing reasonableness

**BLOOD WITHDRAWAL PROCEDURE FORM**

- ❒ 1) Officer placed suspect under arrest for a Chapter 49 offense involving operation of a motor vehicle.
- ❒ 2) Officer read DIC-24 to suspect and did provide suspect with written copy.
- ❒ 3) Suspect did ❒ consent / ❒ refuse to give blood sample / ❒ unconscious or incapable of refusal.
- ❒ 4) Officer did remove vial from blood collection kit.
- ❒ 5) Expiration date on blood kit/vial is _____.
- ❒ 6) Officer did fill out label that came with kit completely except for the time blood was drawn.
- ❒ 7) Vial was closed when handed to the nurse.
- ❒ 8) Preservative/anti-coagulant powder was seen in vial.
- ❒ 9) Nurse/technician did the following in withdrawing blood from subject:
  - ❒ Used betadine (or other:_____) solution to disinfect arm.
  - ❒ Officer should save swab packaging.
  - ❒ Rotated vial as directions indicated 8 times so as to mix blood with preservative anti-coagulant.
- ❒ 10) Vial (top never having been opened) was then delivered to officer and officer finished completing label by adding time blood was drawn and officer and nurse/technician initialed label, which was used to seal vial top closed.

Signed by:

_____
Arresting Officer/PD Dept.

_____
Nurse/Medical Technician

SUSPECT NAME_____ DATE: _____

OFFENSE NO._____ TIME OF BLOOD DRAW: _____



of the environment without a blood draw nurse's testimony.

## Defense arguments

Regardless of whether §724.017 applies, the defense maintains an arsenal of arguments related to nurse unavailability that prosecutors must be prepared to answer. The defense may argue, for instance, that:

1) the blood's chain of custody is illegitimate or incomplete,

2) the person who drew the blood was unqualified,

3) the Sixth Amendment's Confrontation Clause has been violated when the blood draw nurse does not testify,

4) *Kelly*'s third prong (that the scientific technique at issue was properly applied on the occasion in question) isn't satisfied without testimony from a blood draw nurse because the State cannot prove the draw was performed correctly,[2]

5) even though the Court of Criminal Appeals has ruled that §724.017 does not apply when a blood draw is performed pursuant to a signed warrant, the defense may nonetheless argue that a blood draw was unreasonable under the Fourth Amendment, and

6) blood analysis is unreliable absent testimony from the nurse who drew the defendant's blood.

I'll address each of these arguments in turn.

**Chain of custody.** The most straightforward legal issue implicated by the absence of a blood draw nurse is chain of custody. In *Yeary v. State*,[3] the court found that the State adequately proved a complete chain of custody because an officer observed the nurse draw the blood sample before placing it in a vial. The same vial was later analyzed by a forensic scientist who testified at trial that he analyzed the defendant's blood after removing the unbroken seal. The key to satisfactorily addressing chain of custody is that a prosecutor must link the blood with the defendant. A law enforcement officer likely marked, packaged, and sent the collected blood to a laboratory, and he likely observed this same blood being physically collected from the defendant's body. (Again, this is where the Blood Draw Procedure Form is handy—it attests to several links in the chain of custody.) An officer can testify to all of these things at trial.

**A nurse's qualifications.** A supervisor may be the surest lynchpin to prove an absent nurse's qualifications to a jury. Specific knowledge of every supervisor will vary, but it is likely they'll be able to answer an assortment of basic questions. Why was this nurse assigned to draw blood? What training and experience has the nurse undergone to prepare for this task? How long has this nurse drawn blood on behalf of your medical facility?

Absent a supervisor, a peace officer can provide some testimony about a nurse's qualifications, too. On the front lines of protecting the public from intoxicated drivers, though, officers often interact with nurses they've never encountered before. An officer may be able to testify only to circumstantial factors that indicate a nurse's qualifications. In *Adkins*, the court implicitly noted a potential stumbling block for the State by highlighting that the defendant made no timely objection to an officer testifying regarding the nurse's qualifications—an officer, after all, may lack personal knowledge about the licensure or professional standing of someone carrying out the blood draw. Moreover, testimony concerning these subjects from the officer may be hearsay.

To meet this challenge, start with a few basic questions of the law enforcement officer. The goal should be to elicit personal knowledge from the officer based upon reasonable deductions he made at the blood draw. "Have you seen this nurse draw blood on previous occasions? Did you articulate the need for a blood draw professional upon entering the medical facility? What type of uniform was the healthcare professional wearing when she interacted with you? Was her job title or professional standing present on the uniform itself or on an accompanying name tag?"

***Kelly*'s third prong.** Adkins further argued that testimony from the nurse who drew his blood was essential under the third prong of *Kelly*, but the court rejected this argument because the testifying analyst was able to discern the quality of the blood sample when he tested it. The analyst testified that there were no clots in the sample and that no analytical exceptions to the standard operating procedures were noted in his report. The court found that this testimony from a qualified forensic scientist supported the third prong of *Kelly*, that the scientific technique at issue was properly applied on the occasion in question.

*Executing a blood draw is certainly a vocational practice, but it is not reliant upon the same scientific theory and methodology that underlies forensic alcohol testing. In other words, the* Kelly *standard, as it pertains to the admissibility of a blood test result, does not extend back in time to the blood draw itself.*

*Discuss the blood draw process with jurors, always emphasizing the straightforwardness and simplicity of a blood draw. Most jurors have been through one–blood draws are hardly surgery.*

The *Adkins* decision has not kept defendants from arguing that *Kelly*'s third prong is unsatisfied when a nurse does not testify. *Kelly*'s practical purpose is to prevent junk science from infiltrating the criminal justice system, and the scientific practices and principles underlying blood analysis have been universally accepted as reliable in Texas. In *Adkins*, the court looked strictly to the scientific process initiated and orchestrated by the blood test analyst when applying *Kelly*—it did not include the blood draw process itself within the scope of its *Kelly* inquiry. Executing a blood draw is certainly a vocational practice, but it is not reliant upon the same scientific theory and methodology that underlies forensic alcohol testing. In other words, the *Kelly* standard, as it pertains to the admissibility of a blood test result, does not extend back in time to the blood draw itself. The forensic analyst who tested the blood must testify that the blood was in satisfactory condition when it was tested. That subject matter alone is sufficient to satisfy the third prong of *Kelly*.

**Confrontation.** Adkins argued that admitting his blood test result without the nurse's testimony violated his right to confrontation under the Sixth Amendment, and the court rejected this argument as well. Because the analyst could determine the quality of the sample and because the analyst testified, the court found the defendant's Sixth Amendment right to confrontation was not violated.[4] Forensic reports regarding blood alcohol analysis are considered testimonial, and the analysts who performed the tests are witnesses for purposes of the Sixth Amendment. However, nurses do not aid in the analysis of blood, nor do they provide work product that is relied upon by analysts.

In *State v. Guzman*,[5] the appellate court addressed another blood draw conducted pursuant to a warrant and found that the trial court erred when it granted a defendant's motion to suppress the blood test result on grounds that the nurse who drew the blood did not testify (she was deceased by the time of trial). The State instead called the nurse's supervisor to testify concerning her qualifications to satisfy the Sixth Amendment.

The defendant's argument in *Guzman* hinged on two assertions: first, that his Sixth Amendment right to confrontation was violated, and second, that cross-examination of the blood draw nurse was necessary to ensure that "proper procedures" were followed. The court held that with respect to blood tests, the expert responsible for establishing foundational reliability in any particular case is the analyst who tests the blood sample, not the nurse who drew it.

In *Alford v. State*,[6] the court found no violation of the defendant's Sixth Amendment right to confront witnesses when a blood draw nurse did not testify. A supervisor testified that the nurse who drew Alford's blood was a trained phlebotomist with the knowledge and ability to properly collect blood samples, but the supervisor acknowledged he could only assume that the nurse followed proper procedures in drawing Alford's blood because he was not present when the blood was taken. The court asserted that under the Sixth Amendment, neither the supervisor nor the nurse's testimony was necessary, so long as they played no role in the scientific analysis of the defendant's blood. In *Alford*, there was no analysis of reasonableness of the search itself under the Fourth Amendment, nor was there statutory analysis under §724.017.

**An unreasonable search.** Notwithstanding §724.017's applicability, the defense may argue that a blood draw was unreasonable under the Fourth Amendment. When the defense argues that a blood draw constituted an unreasonable search, the State must show medical reasonableness of the blood draw. When Adkins contested his blood draw procedure as an unreasonable search under the Fourth Amendment, the court noted that a warrant-based search is presumptively reasonable—it is the defendant's burden to prove that a search is unreasonable. In assessing reasonableness, the court first determines whether the police had a legal justification to conduct the search. In *Adkins*, this legal justification was never contested. The court then addressed whether the search warrant's method of execution was reasonable, and the court looked to the qualifications of the person who drew the blood and the environment where it was drawn. The defendant argued that the nurse was not qualified to draw blood but did not object at trial when an officer testified that she was a registered nurse. Additionally, the court noted that defense counsel repeatedly referred to the person drawing blood as a "nurse" during his questioning of the arresting officer. This misstep on the defense's part was a tacit recognition of the nurse's qualifications.

In summary, arguments pertinent to reasonableness under the Fourth Amendment will closely mirror those arguments related to §724.017.

**Blood analysis is unreliable.** The defense will also utilize a nurse's unavailability to persuade the jury against relying on forensic blood analysis. This tactic is often achieved by grandstanding to make a routine blood draw appear to be a complicated medical operation. It is important for prosecutors to address nurse unavailability to mitigate these arguments in voir dire. Discuss the blood draw process with jurors, always emphasizing the straightforwardness and simplicity of a blood draw. Most jurors have been through one—blood draws are hardly surgery. Contrast the blood draw's simplicity to more complicated procedures. Analogize medical analysis inside a laboratory to forensic blood alcohol testing. Bring attention to the fact that medical analysis is tailored to particular medical issues and does not hinge on who drew the blood subjected to analysis.

Bottom line: Be prepared to elicit testimony from your forensic scientist that the blood sample was in satisfactory condition at the time it was tested.

## Conclusion

In summary, two of the most common arguments used to contest admissibility of blood results in the absence of a blood draw nurse are completely baseless. The courts have held there is no violation of the Sixth Amendment right to confrontation when a nurse does not testify and that the *Kelly* standard does not apply to the blood draw procedure itself.

When §724.017 is not applicable, a nurse's unavailability may spur defendants to argue that a blood draw was an unreasonable search under the Fourth Amendment. When courts consider the reasonableness of a blood draw under the Fourth Amendment, qualification of the person who drew blood is one point of inquiry. It is certainly advisable to secure the testimony of a nurse's supervisor to address the qualification question, but testimony from a law enforcement officer may suffice, though proceeding on the basis of law enforcement officer testimony alone may prove a more perilous course given the officer may lack direct personal knowledge. The law concerning nurse unavailability remains highly conducive to successful prosecutions. Do not allow a nurse's unavailability to become the stumbling block that derails your case. ❖

## Endnotes

[1] 418 S.W.3d 856 (Tex. App.–Houston [14th Dist.] 2013, pet ref'd).

[2] See *Kelly v. State*, 824 S.W.2d 568 (1992).

[3] 734 S.W.2d 766 (Tex. App.–Fort Worth 1987, no pet.).

[4] *Hall v. State*, No. 02-13-00597-CR (Tex. App.–Fort Worth 2015, no pet.); *Russell v. State*, No. 14-15-00036-CR (Tex. App.–Houston [14th Dist.] 2016, pet. ref'd), *cert. denied*, 137 S.Ct. 835 (2017).

[5] 439 S.W.3d 482 (Tex. App.–San Antonio 2014, no pet).

[6] No. 02-16-0030-CR (Tex. App.–Fort Worth 2017, pet ref'd).

*The key to satisfactorily addressing chain of custody is that a prosecutor must link the blood with the defendant. A law enforcement officer likely marked, packaged, and sent the collected blood to a laboratory, and he likely observed this same blood being physically collected from the defendant's body.*

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