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The Texas Prosecutor

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

Snapshot of a killer

On the evening of May 13, 2016, 25-year-old Rhonda Chantay Blankinship (Chantay to her family and friends) went for her usual evening walk around her neighborhood in the North Lake neighborhood in rural Brown County.

By Jane Starnes
Assistant Attorney General in Austin

As she did every evening around sunset, she called her grandfather to say she was down by the community mailboxes and was on her way home.

But Chantay never came home. Her worried grandfather, Charlie Barnett, drove around the neighborhood looking for her. By morning, her family had called police and reported her missing. The police didn't require the usual waiting period to file a missing person report because Chantay was intellectually disabled. She had been diagnosed with pervasive developmental disorder as a child, and although she had graduated from high school, she could not read or write more than a few words. She had a speech impediment and could not drive, hold a job, or live independently. She lived with her grandfather, boyfriend, and other family.

Chantay Blankinship

She loved listening to music on her phone, shopping for clothes, eating at the local café, and walking around her neighborhood. She attended the North Lake Community Church and sang in the choir. She was pretty and very petite, standing less than 5 feet tall and weighing 89 pounds. She also had seven siblings who were very protective of her. Everybody loved Chantay. She had no enemies. When news of her disappearance spread, people from throughout the community volunteered to be part of the search party and scour the area looking for her.

About five miles from Chantay's neighborhood stood an old, dilapidated Victorian house on several acres of land. It was a place where high school kids met to drink and party. The house looked like the perfect scene for a horror movie,

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Visionary leadership and advanced trial advocacy

In August, the Baylor University School of Law hosted another successful Advanced Trial Advocacy Course by TDCAA.

By Rob Kepple
TDCAF and TDCAA Executive Director in Austin

I'd like to thank **Dean Brad Toben** and his staff for their hospitality. Baylor is a first-class facility, and they always roll out the red carpet for our profession.

This popular training is limited to 32 students, and this year we had more than 80 applicants. The August course was designed around a domestic violence by strangulation case, but the objective is always the same: to take prosecutors with three to five years of trial experience and help them take their advocacy skills to the next level.

I want to take a moment to recognize the visionary district attorney who offered enduring financial support for the program to our Foundation: **Ken Magidson**, former Harris County DA (and former United States Attorney for the Southern District of Texas). Ten years ago, Ken recognized that even with declining crime rates and a de-emphasis on criminal justice by the general public, Texas prosecutors need to be ready when called upon to do justice in the courtroom. It is incumbent upon TDCAA and the Foundation to give prosecutors the tools they need. Thanks, Ken, for helping us realize the vision for the Foundation: "So the State is always ready." ❇

Recent gifts to the Foundation*

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Criminal justice and the homelessness crisis

I was shocked to read in the *New York Times* that the homeless rate in Los Angeles skyrocketed last year.

By Rob Kepple
TDCAF and TDCAA Executive Director in Austin

(You can read about it at www.nytimes.com/2019/06/05/us/los-angeles-homeless-population.html.) And many of you have seen the recent news exposé titled "Seattle is Dying," which shows in graphic detail the impact of the homeless crisis in that city. (Search for it on YouTube.) The issue of homelessness has hit home here in Austin, where the city council recently repealed an ordinance that opens the door to camping in public areas. Homeless people—long a fixture in our state capital—are now camping openly on sidewalks and in parks.

My reaction to the new public angst over this growing problem is: "Welcome to our world. Now what do you want to do about it?" The criminal justice system has been the default solution for those with mental illness and drug addiction for a very long time, and I know how frustrated prosecutors and other criminal justice professionals have been over the lack of resources and solutions for these two big societal problems. It has been gratifying to see states work diligently to divert people with mental illness and drug problems from our prisons and jails. That has certainly happened in California, but with a continued lack of treatment and support options, I wonder out loud if it has fueled a modern re-creation of the infamous Skid Row in Los Angeles.

But look at it this way: The problem of chronic mental illness and addiction is now camping on the streets for everyone to see, *not* hidden away in our jails. It isn't just "our" problem anymore, and that could fuel the drive for resources and solutions that we haven't seen before. Let's hope.

Legislative Update hot topics

Usually when we start our Legislative Update tour, we never know what topics will generate the most interest. This year was an exception because we all know that HB 1325, the bill that legalized hemp, dominated the trainings. It has proven to be (another) great lesson in unintended consequences linked to the passage of a major piece of legislation. From the inability to chemically distinguish between hemp and marijuana, to the CBD oil "grandfather clause," to the unexpected influx of smokable hemp in pretty packages from Oregon, this new law has been a challenge. Perhaps the greatest lesson for legislators and the lawyers who draft legislation, the Legislative Council, is to insist that bills of this scope do not have immediate effective dates.

But there are a few bright spots tucked in there too. Congratulations to Chambers County DA **Cheryl Lieck** and ADA **Eric Carcerano**, who persevered though many legislative sessions to secure the passage of HB 1399, which greatly expands the collection of DNA samples from defendants upon initial arrest (see §411.1471 of the Tex. Gov't Code). That is the kind of bill that will save lives in the future. In addition, congratulations to Comal County CDA **Jennifer Tharp**, who spent three sessions and countless hours to finally gain passage of HB 3582, deferred adjudication for DWI offenders. This is a huge change in the law, and we hope it will provide incentives for offenders to get the treatment they need so they do not reoffend.

Speaking of DWI, another very popular part of the our presentation was the unveiling of the new "driving while stoned" testing procedures invented by the Royal Canadian Mounted Police. It's very impressive, and we can only hope that

the National Highway Traffic Safety Association adopts the test in the U.S. soon. You can see a demonstration here: www.youtube.com/watch?v=2PLC_cBJwk4.

Thanks to the Legislative Update Team

I need to take a moment to thank some remarkable people who make up our Legislative Update training team. First and foremost, I hope everyone recognizes the absolutely Herculean effort that TDCAA Governmental Affairs Director **Shannon Edmonds** puts into the Legislative Updates. First, he's part of the 140-day legislative session—think of it like a capital murder trial, and Shannon is the lead prosecutor. But the day the trial ends, Shannon then becomes the appellate and writ lawyer, and he has only five weeks to write the brief (which in our case is the 90-page *Legislative Update* book) and prepare for oral argument (the three-hour presentation itself). Burning the midnight oil with him once the session is over is our Communications Director **Sarah Halverson**, who edits and produces the book, then becomes our own production department to format videos for the presentation.

As all that is going on, Senior Staff Counsel **Diane Beckham** produces the best criminal law code books in the state—in the mere six weeks after the session ends—and turns them over to our Sales Manager **Jordan Kazmann**, who has them delivered to your office well before most laws take effect on September 1. Finally, our training and registration team of **Andie Peters, Dayatra Rogers,** and **LaToya Scott** coordinate the logistics of training nearly 3,000 people in 22 locations over five weeks—and they make it look easy!

Finally, I want to thank all those who get on the road with Shannon to present the training: Tarrant County ACDA **Vincent Giardino**, Montgomery County ADA **Tiana Sanford**, TDCAA Training Director **Brian Klas**, and TDCAA DWI Resource Prosecutor **W. Clay Abbott**. What a dedicated team—thank you!

Congratulations to the No. 1 Gang Prosecutor!

Congratulations to Harris County ADA **Caroline Dozier**, who was recently named the 2019 Texas Gang Investigators Association (TGIA) Prosecutor of the Year. (That's Caroline in the photo at right with TGIA President Martin "Ringo" DeLeon.) The TGIA is a not-for-profit volunteer organization made up of law enforcement, corrections, probation, parole, and prosecution professionals who focus on gang-related crimes such as human-trafficking, drugs, and violence. The TGIA was formed to promote a closer working relationship among gang investigators across Texas and the nation, and it takes time to recognize a prosecutor each year for her outstanding contributions in the battle against gangs and organized crime. Congratulations, Caroline, on this honor!

Proposed changes to TDRPC 3.06

In 2017, the legislature created the State Bar Committee on Rules and Referenda. Its objective was to create a vehicle for attorneys and others to recommend, vet, and eventually seek a referenda on changes to the disciplinary rules. This nine-member panel meets on a regular basis. Attorneys and members of the public can recommend changes to the rules, go to some of the meetings, and make comments on proposals. (The website is www.texasbar.com/AM/Template.cfm?Section=cdrr&Template=/cdrr/home.cfm.)

We've been advised that at its September 3 meeting, the committee was to begin discussions on a proposal to amend the comments to Rule 3.06(d) relating to the propriety of lawyers discussing with jurors after the trial evidence that was excluded. The section in question states: "(d) After discharge of the jury from further consideration of a matter with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service."

The question is whether it is ever appropriate to talk to jurors about evidence that was not admitted, such as a defendant's criminal record when he didn't take the stand or evidence of a victim's past that was excluded as irrelevant. If you are interested in this issue, keep an eye on the committee's work as it moves forward. ❇

Think of our Legislative Updates like a capital murder trial, and Shannon Edmonds is the lead prosecutor. But the day the trial ends, Shannon then becomes the appellate and writ lawyer, and he has only five weeks to write the brief (which in our case is the 90-page Legislative Update *book) and prepare for oral argument (the three-hour presentation itself).*

An update on tackling cognitive and implicit bias

When TDCAA decided to teach about cognitive and implicit bias from a prosecutor perspective, I have to admit I was a little hesitant.

By Jarvis Parsons
TDCAA President and District Attorney in Brazos County

While I knew the topic was important to address and there could be huge benefits to it, a lot of other things went through my mind. Mostly I was worried about the response from people. If I am confessing all of my sins, I wondered how people would react toward me. Would my colleagues look at me the same way? Would I be treated differently? I have had prior experiences where I'd brought up subjects like racial and gender bias, and I was met with defensiveness and denial—even from people whom I considered friends.

Ironically, it took a little nudging from my partner in (fighting) crime, Bill Wirskye, First Assistant Criminal District Attorney in Collin County, to take on this project. And he was right to prod me: The reaction from the TDCAA membership has been overwhelmingly positive.

Since January of this year, Bill Wirskye and I have taught on implicit and cognitive bias, either separately or together, in 15 different sessions. Response has been tremendous. Prosecutors from all over the state have approached Bill and me with thoughtful questions about how cognitive and implicit biases affect them in their offices. Teaching on this topic has not only given me a chance to explain in more depth some of the concepts in our presentation, but it has also educated me. Listeners have opened my own eyes to see that there are other subsets of bias that we have yet to unravel as presenters, as an organization, and as a profession. Because of those conversations, for example, we have started talking about biases in physical attractiveness and gender and how those may impact prosecutors' decision-making. These additions to our presentations were made directly because individuals interested in making a difference in the profession volunteered that these were other areas that may need addressing.

It is interesting that my passion in speaking about this topic was based in implicit *racial* bias. However, I noticed that when I started presenting on gender issues in offices and courtrooms, I could tell that the very real experiences of bias had affected the women prosecutors in the audience. I often ask how many women have ever walked in the courtroom and been mistaken for someone other than an attorney, and about half of the women in the room raise their hands—and this is in 2019! We have come a long way, but we still have far to go.

These issues that we are tackling are not unique to Texas. Since we started this project, I have had the opportunity to present for prosecutor offices elsewhere too—in Washington D.C., Maine, and Idaho. In D.C., I was asked to give this talk to the National District Attorneys Association, and in Maine, prosecutors from seven counties wanted to learn more about implicit bias.[1] Those counties cover 78 percent of the population of Maine! In Boise, Idaho, more than 100 prosecutors, public defenders, city government executives, and judges came to hear Texas prosecutors lead the way in addressing cognitive bias. It has been a joy and an honor to go to these places and share a little bit about our experiences here in the great State of Texas.

We as prosecutors have a great and awesome responsibility. It is not to only to do justice. It also extends to understanding what the truth is in a

particular situation. Sometimes the one thing that stops us from seeing justice done doesn't lie in the facts of the case. It lies in the way we look at the facts and, most importantly, how we see the people most affected by those facts—our victims and defendants. It is so easy to see injustice around us that many times we forget to check our own hearts and minds. Put more simply, it's sometimes easier to pick out the speck in someone else's eye than to remove the log in our own.[2] My hope is that as we progress down this road of understanding our own biases, we can better understand how we see the world and, consequently, become better advocates for our communities. As Carl Jung put it, "Your vision will become clear only when you can look into your own heart. Who looks outside, dreams; who looks inside, awakes." ❇

Endnotes

[1] Maine county offices included in these talks were Androscoggin, Cumberland, Knox, Lincoln, Penobscot, Sagadahoc, and York Counties.

[2] Matthew 7:5 (paraphrased a little, but you get the point).

Law & Order Award winner

State Senator Royce West (D-Dallas), center, was honored with TDCAA's Law & Order Award at a recent Legislative Update in Dallas. He is pictured with Dallas County Criminal DA John Creuzot (left) and TDCAA Director of Governmental Relations Shannon Edmonds (right), who co-presented the award to Sen. West in recognition of his work on assistant prosecutor longevity pay, family violence prevention, and discovery and transparency issues in the 2019 session.

Tracking system for rape kits

Survivors of sexual assault will soon be able to follow their evidence kits as they wind their way through the various parts of the criminal justice system, thanks to a new statewide program.

By Jalayne Robinson, LMSW
TDCAA Victim Services Director

It is a result of House Bill 281, which passed in 2017. It mandates a statewide sexual assault kit tracking system overseen by the Department of Public Safety, and its implementation date is September 1, 2019.

After they undergo a sexual assault exam, survivors will receive credentials from the hospital, which will enable them to log onto a website to track the kit. The rape kit will be labeled with barcodes that are entered into a database, and everyone who handles the kit—hospital staff, law enforcement, lab personnel, and prosecutors—will update the system as the kit passes through. The online system will report the location of the kit and whether the kit is in-transit, in-process, or completed, and survivors can see all of it.

In the past, many survivors of sexual assault felt left out in the evidence process, and it was hard for these victims to understand the many stages their evidence kit may travel through before completion. This new program aims to end that confusion. Pilot phases of the new system have already been tested this summer in Amarillo, Arlington, El Paso, Lubbock, and Houston and went statewide September 1.

Overview of new laws on victim services

In case you were not able to attend one of our Legislative Updates this summer, below are some of the new or updated laws that pertain to victims of crime.

Code of Criminal Procedure changes:

- Art. 42.03 was changed so that a court may not limit the number of victims or their relatives who give a post-sentencing allocution about the offense, defendant, or effect of the offense on the victim—unless the court finds that additional statements would unreasonably delay the proceeding.
- Art. 56.021 now grants a victim the right to a forensic medical examination within 120 (instead of 96) hours of a sexual assault, indecent assault, stalking, or trafficking.

Crime Victims Compensation (CVC) changes:

- Art. 56.32 has two new offenses that qualify as "trafficking of persons": online promotion of prostitution and aggravated online promotion of prostitution.
- Art. 56.42 now includes a child victim of a murder attempt in the child's residence to the list of victims who may receive a one-time relocation assistance payment from CVC.

Protective orders changes:

- A new protective order registry has been established by Senate Bill 325. Though the law becomes effective September 1, 2019, it applies only to an application for a protective order filed, or a protective order issued, on or after **September 1, 2020**. See Government Code §§72.151–.158 for more information.
- There's a new criminal offense called Indecent Assault, a Class A misdemeanor, which is eligible for a protective order and temporary ex parte orders.

KP-VAC Seminar

Our Key Personnel & Victim Assistance Coordinator Seminar is coming up November 6–8 at the Embassy Suites Hotel and Conference Center in San Marcos. Don't miss this opportunity to network with other key personnel and victim service coordinators from prosecutor offices across the state and learn from the awesome workshops of-

fered. Visit www.tdcaa.com/training for registration and hotel information.

Board elections

Elections for the East Area (Regions 5 & 6) and South Central Area (Regions 4 & 8) for the 2020 Key Personnel & Victim Services Board will be held on Thursday, November 7 at 1:15 pm at the Key Personnel & Victim Assistance Coordinator Seminar in San Marcos. The Board assists in preparing and developing operational procedures, standards, training, and educational programs for TDCAA. Regional representatives serve as a point of contact for their region. To be eligible to run for the board, each candidate must have the permission of his or her elected prosecutor, attend the elections at the KP-VAC Seminar, and be a dues-paying TDCAA member.

If you are interested in training and want to give input on speakers and topics at TDCAA conferences for KP and VACs, please consider running for the board. If you have any questions, email me at Jalayne.Robinson@tdcaa.com.

Tree of Angels

The Tree of Angels ceremony is a meaningful Christmas program specifically held in honor, memory, and support of victims of violent crime. The first program was implemented in December 1991 by Verna Lee Carr, victim advocate with People Against Violent Crime (PAVC) in Austin.

The Tree of Angels program provides an opportunity for communities to recognize that the holiday season is a difficult time for families and friends who have suffered the crushing impact of violent crime. This special event supports surviving victims and their families by making it possible for loved ones to bring an angel ornament to place on a Christmas tree.

Over the past 28 years, Tree of Angels has become a memorable tradition observed in many Texas communities. This year, the designated Tree of Angels week is December 2–8.

If you are interested in hosting a Tree of Angels in your community, a how-to guide is available. Please note the Tree of Angels is a registered trademark of PAVC, and PAVC is committed to ensure that the original meaning and purpose of the program continues. For this reason, PAVC asks that you complete the information form on the website www.treeofangels.org to receive the how-to guide. After the form is completed electronically and submitted to PAVC, you will receive instructions on how to download the guide. PAVC asks that you not share the electronic document to avoid its unauthorized use or distribution.

If you have any questions regarding the how-to guide or about hosting a Tree of Angels in your community, please contact Licia Edwards at 512-/837-PAVC or pavc@peopleagainstviolentcrime.org

In-office VAC visits

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

If you are a new VAC or if your office would like to schedule a victim services visit, please email me at Jalayne.Robinson@tdcaa.com. I am available for inquiries, support, in-office consultations, or group presentations or to train new VACs in your office. Please see some photos from my recent visits to Kaufman and Kimble Counties below. ❇

LEFT: From the Kimble County Attorney's Office (left to right): Kendra Powers, Secretary; Andrew Heap, County Attorney; and Jalayne Robinson, TDCAA Victim Services Director. BELOW: Kaufman County CDA's Office Victim Services Group Training.

Clarity on tampering with a governmental record

Penal Code §37.10 is broader than its name implies.

By Clinton Morgan
Assistant District Attorney in Harris County

"Tampering with a Governmental Record" sounds like it proscribes tampering—i.e., altering a thing that exists—with a governmental record—i.e., some record the government has. Like breaking into the courthouse at night and changing property records so that I now own my neighbor's pool.

But §37.10, which takes up a whole page in the TDCAA code book, covers many things that feel more like forgery or fraud. Making a fake driver's license from scratch is "tampering with a governmental record," even though it involves no tampering and the government has no record of it. Given the length and breadth of the statute, it is unsurprising that most appeals from it deal with what, exactly, it makes an offense.

In *Chambers v. State*,[1] the Court of Criminal Appeals dealt with a case in which the defendant, a government employee, submitted false reports to a government agency. It later turned out that the reports he submitted were not required reports. Is submitting a false, but optional, report "tampering with a governmental record?" The Court held that it could be. But the fact that the agency collecting the report had no use for it meant the defendant could not have the "intent to harm or defraud," meaning the offense is merely a misdemeanor.

Background

Chambers was the chief of police of Indian Lake, a small town in Cameron County. While he was the only paid year-round police officer, the department had "20 to 30" volunteer reserve officers. In January 2015, the Texas Commission on Law Enforcement (TCOLE) audited the department's records and determined the department did not have valid firearms proficiency records for several reserve officers.

TCOLE gave the department 10 days to correct this deficiency. The letter from TCOLE advised that if the department did not comply, it could take administrative actions against Chambers's peace officer license or assess a hefty administrative penalty.

Chambers ordered his only paid subordinate, Avalos, to falsify the missing proficiency records. Avalos contacted TCOLE about this, and TCOLE told him to follow Chambers's instructions. Avalos did so, creating and submitting 14 false reports. Chambers was then charged with 14 counts of tampering with a governmental record. The indictments alleged he did so with the intent to harm or defraud, which made the offense a state jail felony.

The jury was instructed with two statutory definitions of "governmental record": "anything belonging to, received by, or kept by government for information," or "anything required by law to be kept by others for information of government."[2] The jury convicted Chambers on all counts. He was given probation and a fine.

On appeal, Chambers re-urged an argument he had made at trial: The reports were not "governmental records." It turns out he had a point. Every police agency must maintain firearms proficiency records for every peace officer it "employs." But as the appellate courts here would later determine, based on provisions in the Administrative Code, Occupations Code, and Local Government Code, reserve officers are not "employed," they are "appointed." Thus the police department had no obligation to maintain the reports, and TCOLE had no authority to demand them.

Chambers presented this argument in a few ways on appeal. First, he argued that because the

department was not required to keep the firearms proficiency records, they were not "governmental records"; thus, the evidence was insufficient to show he committed the charged offense. Second, he argued that the trial court had erred by rejecting his request to instruct the jury on the statutes showing that reserve officers were not "employed." Third, he argued that because TCOLE had no use for the reports, it was impossible for him to have intended to harm or defraud the agency by submitting false reports.

The Thirteenth Court rejected all these arguments.[3] Regarding sufficiency, the Thirteenth Court pointed out that Penal Code §37.01 has several definitions of "governmental record," only one of which is something the government is "required" to keep. Even if TCOLE or the local department was not required to keep the reports, they were something "belonging to, received by, or kept by government for information" because they were created by Chambers and Avalos in their capacity as government employees.

The Thirteenth Court rejected the jury-charge complaint for a similar reason— whether the reserve officers were "employees" went only to whether the reports were "required," not to whether they were governmental records.

Regarding the intent to defraud or harm, Chambers argued that there could not have been harm or fraud because the State had neither a proprietary nor pecuniary interest in the reports. The Thirteenth Court rejected this notion, pointing to cases holding that one can "defraud" someone else by "caus[ing] another to rely upon the falsity of a representation, such that the other person is induced to act or is induced to refrain from acting."[4] Because Chambers had ordered the false reports to be filed to prevent TCOLE from fining him, the Thirteenth Court held the evidence was sufficient to show an intent to defraud.

On discretionary review, the Court of Criminal Appeals upheld the first two holdings but reversed the third. It remanded the case to the Thirteenth Court to address a question that court had missed on the first try.

Writing for a six-judge majority, Judge Newell began his opinion by addressing Chambers's jury-charge argument. Chambers argued the jury should have been instructed on the section of the Local Government Code that shows reserve officers are "appointed" and not "employed."[5] The court held that the omission of this instruction was harmless because it went only to whether the government was required to keep the firearms proficiency reports, not whether they were "governmental records" under other statutory definitions.

Chambers advanced an alternative argument, that there must be a "government purpose" for a document to constitute a "governmental record." Using the plain text of the statute, the Court rejected that argument as well: The "government purpose" of a record is relevant for some theories of liability under §37.10 but not others. Implicit in these holdings was a rejection of Chambers's sufficiency challenge regarding whether the reports were "governmental records."

Legal impossibility

The Court looked more favorably on Chambers's argument that the evidence was insufficient to show he had the intent to defraud or harm. Section 37.10 has a complicated punishment scheme, ranging from a Class C to a second-degree felony, but most instances of the offense are a Class A misdemeanor, unless the State alleges and proves the defendant had the intent to harm or defraud, in which case it is a state jail felony.[6]

The Court treated Chambers's argument as an issue of "legal impossibility." This seldom-used doctrine applies to attempt or intent crimes, and it holds that if the act the defendant attempted or intended to commit was not a crime, then the attempt or intent cannot be criminalized. For example, in *Lawhorn v. State*,[7] the case on which the Court relied, the defendant was an inmate who escaped from custody. Twenty minutes later, he broke into a house while hiding from police. He was convicted of burglary with the intent to commit the felony offense of escape. The court overturned the conviction because the offense of escape had already been completed, so whatever Lawhorn intended to do when he broke into the house could not be the felony offense of escape.

In *Chambers*, the Thirteenth Court had jumped to the conclusion that Chambers's intent of keeping TCOLE from acting against him was an intent to harm or defraud. The Court of Criminal Appeals backed up a step. It viewed Chambers's intent more discretely: He intended to stop TCOLE from taking administrative action against him. Because TCOLE had no legal right to take administrative action against Chambers,

Section 37.10, which takes up a whole page in the TDCAA code book, covers many things that feel more like forgery or fraud. Making a fake driver's license from scratch is "tampering with a governmental record," even though it involves no tampering and the government has no record of it.

it could not have been defrauded or harmed by Chambers's act. Thus, the evidence was insufficient to show Chambers had the intent to harm or defraud.

Sufficiency claim

After this interesting holding, the Court turned to a matter that will interest only appellate lawyers. In the Thirteenth Court, after raising a general sufficiency claim in his original brief, Chambers had filed a reply brief clarifying that he believed the evidence was insufficient to support the jury's rejection of a statutory defense that bars prosecution if "the false entry or false information could have no effect on the government's purpose for requiring the governmental record."[8] The Thirteenth Court had not addressed this argument. Normally a party cannot raise a new issue in a reply brief, but here the Court of Criminal Appeals held this wasn't a new issue, but a clarification of the original issue, so it remanded the case for the Thirteenth Court to consider. There are presently no cases interpreting this statutory defense, so this case will merit attention again when the Thirteenth Court issues its opinion on remand.

Judge Keasler dissented without opinion. Judge Slaughter dissented in an opinion joined by Judge Yeary. She would have held the evidence insufficient to show that the firearms proficiency reports were "governmental records." That is because the applicable definition of "governmental records here" requires that the "record" be "kept by government *for information*." Judge Slaughter believed that because TCOLE had no use for the reports, the evidence was insufficient to show they were kept "for information."

Chambers and Alfaro-Jimenez show that prosecutors and defense attorneys alike need to pay particular attention on these cases and take both the statute and the charging instruments literally.

Takeaways

There are a couple of takeaways from this case. The most obvious is that §37.10 is a big, complicated statute that covers a lot of things. This point was emphasized a week after *Chambers*, when the Court of Criminal Appeals released *Alfaro-Jimenez v. State*.[9] There, the defendant was charged with tampering with a governmental record for creating a fake Social Security card. But the State used the wrong definition of "governmental record" in the charging instrument, and the defendant was acquitted on appeal. *Chambers* and *Alfaro-Jimenez* show that prosecutors and defense attorneys alike need to pay particular attention on these cases and take both the statute and the charging instruments literally.

The second takeaway regards the doctrine of impossibility. It does not come up often, so this case is a useful reminder. In attempt or intent offenses, the question is not, "Did the defendant attempt or intend to commit a crime?" but rather, "Was the act the defendant attempted or intended to commit a crime?" Even if a defendant thinks he is harming or defrauding someone, if the specific act he does could not cause harm or fraud, that is not criminal. ❇

Endnotes

[1] ___ S.W.3d ___, No. PD-0771-17, 2019 WL 2612770 (Tex. Crim. App. June 26, 2019).

[2] See Tex. Penal Code §37.01(2)(A), (B).

[3] *Chambers v. State*, 523 S.W.3d 681 (Tex. App.–Corpus Christ 2017) rev'd, ___ S.W.3d ___, No. PD-0771-17, 2019 WL 2612770 (Tex. Crim. App. June 26, 2019).

[4] *Id*. at 690 (quoting *Wingo v. State*, 143 S.W.3d 178, 187 (Tex. App.–San Antonio 2004), aff'd, 189 S.W.3d 270 (Tex. Crim. App. 2006)).

[5] See Tex. Loc. Gov't Code § 341.012.

[6] Tex. Penal Code §37.10(c), (d).

[7] 898 S.W.2d 886 (Tex. Crim. App. 1995)

[8] Tex. Penal Code §37.10(f).

[9] ___ S.W.3d___, No. PD-1346-17, 2019 WL 2814864 (Tex. Crim. App. July 3, 2019)

Order up! More 'advanced' training is ready

If you are an avid reader of previous Training Wheels columns (hi, Mom!),

By Brian Klas
TDCAA Training Director in Austin

you know that much of TDCAA's training is driven by the course evaluations and training questionnaires we collect at our many events across the state. After reading a few thousand of those forms, I've seen certain trends show up. None of you will be surprised to hear that new prosecutors request training to help them manage "humongous" dockets. Other than suggesting that you dismiss all odd-numbered cases, there isn't much TDCAA can do for you. (Please don't do that.) Efficiency and speed come with experience, so the best way to manage giant misdemeanor dockets is commit yourself to mastering your profession—and that means more TDCAA training and a continued devotion to the vocation.

Aside from concern over large criminal (criminally large?) dockets, I see a ton of comments with a desire for more advanced training. "I thought the talk was a little basic," "I would like more advanced topics," "It needed a track for more experienced prosecutors," or some variation of the same are all responses that I've read multiple times after a conference. Here's the thing: I love getting feedback from attendees. I know that whoever wrote such a comment wanted something different from what he got. I also know that the commenter believes that whatever he didn't get both exists and requires some background to understand. I know that when attendees write these suggestions, they know what they meant, but *I'm* not sure what they meant. There aren't two Codes of Criminal Procedure, one for new prosecutors and one for advanced prosecutors; there isn't a way of conducting voir dire that we switch to after our 50th jury trial; and experienced prosecutors aren't issued special rings that give them access to a secret cache of helpful caselaw.

Glib responses aside, it is my job to figure out what training you want and deliver it, and I need your help.

Scratching the "advanced" training itch is something that the entire TDCAA training team and training committee are committed to. Stealing a thought from W. Clay Abbott, TDCAA's DWI Resource Prosecutor, I believe that more often than not, what our attendees are asking for is really more *specific* training. You want to hear analysis on a singular portion of the code, ways to address narrow situations on voir dire, and a deeper dive into certain caselaw. If the issue, then, is moving from generally discussing a topic to covering specific components of that topic, tell me what those components are. Again, I want to deliver the most necessary and relevant training I can. To do that, I need to know where the gaps are. What new defense theories are you seeing? What line of cases are giving you trouble? What criminal justice issues are you interested in? If you are able to answer those questions, you will be the architect shaping the future of TDCAA training. Yes!

Don't worry—we aren't sitting back waiting for you to do all the work with your input. There are a lot of training opportunities for all you salty prosecutors out there. At the obvious end of the spectrum is our yearly Advanced Trial Advocacy Course. It happens every late July or early August in sunny Waco. We can accept only 32 attendees, but those people will enjoy a week of training narrowly tailored for a specific case type. It is an opportunity for good prosecutors to become great.

Additionally, we offer two specialty schools every year (in April and June). At these schools, we present a broad mix of topics both for newer and more experienced attendees. You will definitely hear some things you have heard before—that is the nature of professional training. Much of the advanced training at these schools comes from your peers. The questions people ask, the discussion in forums, and the networking with

Photos from our Homicide Seminar

other prosecutors and office staff all are ripe opportunities for professional development.

I'd also invite you all to look for training in the cracks of these presentations. For instance, I will never skip a voir dire talk—I don't care what the overarching topic is. Advocacy talks are just as much about the presenter as the subject matter, and TDCAA's presenters are some of the best prosecutors in Texas and by extension some of the best in the country. Different speakers can deliver the same content in entirely different ways, and I have never failed to learn something during one of these presentations. The principle is no different from advising prosecutors to watch one another in trial.

For our non-prosecutor members, we have annual seminars devoted to training just for you with our Investigator School and KP-VAC Seminar (online registration now open!) And for everyone, there is the Annual Criminal & Civil Law Update every September. The Annual conference has six tracks and will always feature advocacy training, and we are increasingly adding topics that are of particular interest to anyone working in the criminal justice field.

The TDCAA training team exists to make sure our membership has access to the most timely and relevant training possible. We cover a lot of bases, but I know that we can do more. I encourage everyone in our membership to become part of the training. Let us know what you need. Let us know what you are interested in. Do you have a wacky idea for future training? Let me know and I promise not to ridicule your wacky idea. If it is really wacky, like incorporating a puppet show at trial, I may reference it anonymously.

Whether it is by course evaluation, email, letter, or comment during a break, tell me what you need, and I will do my best to deliver it. ❇

A roundup of notable quotables

"Philadelphia doesn't have a prosecutor. The city has a public defender with power."

—Philadelphia U.S. Attorney William McSwain, commenting on local district attorney Larry Krasner, who won election in 2017 on a progressive platform promising to end "mass incarceration," eliminate cash bail, and divert more defendants into treatment programs. McSwain pointed to police statistics that show homicides up 8 percent and shootings up 7 percent during Krasner's first 18 months in office. www.theeagle.com/news/nation/newly-elected-prosecutors-push-progressive-reforms/article_d7a09bcc-a206-5857-bd16-27196d585462.html

"I would say, 'Thank you for choosing me and not another 17-year-old girl.' Another 17-year-old girl probably wouldn't have been able to handle it the way that I have. I truly believe that all the abuse I'd been through in my life helped me get out of that situation."

—Lisa Noland, who survived kidnapping and sexual assault by Bobby Joe Long, who was scheduled for execution in May for killing 10 women during eight months in 1984 that terrorized the Tampa Bay, Florida, area. Noland was the only woman to survive her abduction and rape, and she gathered and left behind evidence that led to Long's capture. She planned to attend his execution. www.yahoo.com/finance/news/survivor-recalls-florida-serial-killer-hes-set-die-142127299.html

Have a quote to share? Email it to the editor at Sarah.Halverson@tdcaa.com. All contributors will get a free TDCAA ball cap!

"When your father's killed in a drunk driving accident, you have this hatred. And—I want you to understand—my personality is unforgiving. I still hate the Cowboys because they fired Tom Landry."

—Brent Lynn, whose father, Richard, was killed by an intoxicated driver in 2012. That intoxicated driver, Seth Donnelly, recently died of heatstroke in a Texas prison, and Brent found himself grieving for Donnelly on hearing the news. www.star-telegram.com/opinion/opn-columns-blogs/bud-kennedy/article232253057.html

"It's not a crime, I thought. I saw it on TV when I was in prison."

—career criminal Glenn Kerivan of Weymouth, Massachusetts, to the Boston Herald newspaper after he was arrested for shoplifting in Norfolk County. Kerivan had seen *Suffolk* County District Attorney Rachael Rollins announce at a news conference that her office would no longer prosecute 15 "minor" crimes, including shoplifting, so Kerivan swiped $126 worth of groceries at a Stop & Shop. Problem is, that grocery store is in *Norfolk* County, which is not the new DA's jurisdiction. "I would like people to be reassured," said Cape & Islands DA Michael O'Keefe, "that irrespective of what happens in Suffolk County, shoplifting is most certainly a crime in the rest of Massachusetts." www.bostonherald.com/2019/05/16/shoplifter-finds-suffolk-da-rachael-rollins-no-prosecute-list-doesnt-work-everywhere

"The only people who are interested in trying a death penalty case are lawyers who have never done it."

—Larry Moore, First Assistant Criminal District Attorney in Tarrant County, in a *Dallas Morning News* article on seeking the death penalty. www.dallasnews.com/news/crime/2019/07/26/like-dallas-serial-murder-suspect-das-seek-death-penalty-crimes-heinous-enough

Snapshot of a killer (cont'd from the front cover)

with dried, rotted wood falling away from the structure and holes in walls and the roof. Two days after Chantay's disappearance, neighbors volunteered to search for her. Two of them, Charlie Radle and Jackie Neal, approached the abandoned property. They saw a clump of hair and a bright colored, rubber bracelet just inside the gate, and they noticed fresh tire tracks. They went inside the gate, walking through the weeds to a storm cellar a few yards from the house. Just outside the storm cellar, they saw another bright, rubber bracelet. Radle and Neal looked down inside the open storm cellar and saw Chantay, lying head-first down the concrete stairs and wearing only a T-shirt. Her head and face were covered in blood. A bloody lawnmower blade lay nearby.

An autopsy revealed that Chantay died from blunt force trauma to her head, face, and neck, consistent with the lawnmower blade being used as the murder weapon. There was also a shoe print on her chest. The medical examiner found evidence of strangulation, and there was evidence she had been sexually assaulted. Based on semen found in Chantay's body during the autopsy, a DNA profile was developed.

The investigation

Sgt. Scott Bird from the Brown County Sheriff's Office, Texas Ranger Jason Shea, and many other officers from the Brown County Sheriff's Office began the investigation. More than 100 people were interviewed. All of the registered sex offenders in the area were investigated, and several people submitted to polygraph examinations. More than 30 men consented to providing DNA samples. These samples were compared to the DNA from Chantay's body, but no match was found.

With the approval of the Texas Department of Public Safety, the DNA sample from Chantay's body was entered into the CODIS system. However, the sample did not return any hits, nor did a familial search in CODIS generate any leads.

Law enforcement couldn't find anyone with a motive to kill Chantay. Her boyfriend had been at work at his restaurant job the night she disappeared, and he was ruled out as a suspect. Family members and multiple other people were also ruled out. Investigators even followed up on bizarre leads, no matter how far-fetched they seemed. Someone said they saw Chantay get into a stranger's car; a woman said her boyfriend bragged about killing Chantay; another woman said her ex-husband was in an occult gang and the gang killed Chantay as part of a ritual. None of these tips led to any credible evidence.

While the police kept working on finding Chantay's killer, the tips became less frequent, and the case stalled for several months. On the one-year anniversary of her death, the North Lake Community Church held a service in Chantay's memory. There was a candlelight vigil to remind people that Chantay's killer was still on the loose. The local newspaper ran an article, reminding people of the $5,000 Crime Stoppers reward. Yet the case still remained unsolved with no further avenues for traditional investigations available.

A new idea: DNA phenotyping

One night, a Brown County Sheriff investigator, Carlyle Gover, was watching a true crime television show that mentioned a new technique called DNA phenotyping. Gover told Sgt. Scott Bird about this technique. Bird was skeptical, but given their lack of progress on the case, he searched online and found a company that did DNA phenotyping called Parabon Nanolabs.[1] Still skeptical, Bird called Parabon Nanolabs and spoke with Dr. Steven Armentrout, the president of the company. Parabon gave Bird the names of several law enforcement agencies that had used Parabon's services and the names of the investigators as references. Bird called these investigators and found that the agencies that had used Parabon's services had about a 50-percent success rate. Given the lack of progress on the case, a 50-percent chance of success seemed promising.

But a major hurdle to overcome before Bird could get the green light to send a DNA sample to Parabon was the cost. Brown County Sheriff's Office had already spent quite a bit of money on the case, mainly on lab fees, and they just didn't have an extra $3,600 in the budget. The sheriff told Bird that he could do it if the District Attorney's Office would agree to pay for half the cost. When Bird first approached Brown County District Attorney Micheal Murray with the idea of sending a DNA sample to Parabon Nanolabs, Murray was also skeptical. But during a congenial discussion at TDCAA's Annual conference, Bird convinced Murray to pay for half the phenotyping cost. Once he had permission, Bird obtained swabs

from Chantay's body from the medical examiner's office and sent them to Parabon Nanolabs to get the process started.

About Parabon Nanolabs

Parabon Nanolabs, based out of Reston, Virginia, offers services including DNA phenotyping and genetic genealogy.[2] In this case, only DNA phenotyping services—the science of predicting which traits affect a person's appearance—were utilized.

DNA phenotyping uses Single-Nucleotide Polymorphism (SNP) technology to generate a digital composite drawing, or "mugshot," of a potential suspect. The company does this using a large database of subjects from whom they have collected DNA and 3D facial scans. Traits that affect appearance are, to varying degrees, genetic—meaning they are inherited from one's parents. We commonly observe this principle in the similarities in appearance among family members. Parabon Nanolabs has identified certain genetic markers to correspond with externally visible characteristics of a person, and that's how the DNA phenotyping compiles all of these predictions to generate a digital "mugshot," which Parabon calls a snapshot.

During a congenial discussion at TDCAA's Annual conference, Sgt. Bird convinced Brown County District Attorney Micheal Murray to pay for half the phenotyping cost.

With a sufficiently large collection of subjects, Parabon Nanolabs has developed algorithms to make statistical predictions of hair color (natural hair color, not dyed), eye color, skin tone, level of freckling, facial morphology (face shape and facial features such as the nose, mouth, and eyes), and ancestry of the person. For example, if the suspect has European ancestry, the lab can generally report the specific region of Europe his ancestors come from. The algorithms can also determine if the contributor of the sample has Hispanic, Asian, African, Middle Eastern, or Native American ancestry.

The company can potentially generate leads in cases where there are no suspects or database (such as CODIS) hits; it may also narrow suspect lists, rule out suspects, or help solve unknown human remains cases. According to Dr. Armentrout, Parabon's services are most appropriately used as a tip-generating tool or as an exclusion tool, and he generally discourages the use of DNA phenotyping to develop probable cause or as a basis of a search warrant. Once a tip is generated, police can focus on a possible suspect and obtain a surreptitious or consensual DNA sample from the suspect.

The science behind DNA phenotyping has not yet been tested in court or been the subject of a *Daubert*[3] hearing, although Dr. Armentrout says he believes the science would withstand such a challenge, as it generally boils down to basic, well-accepted DNA science, plus statistics. It is worth noting that Parabon's techniques have not been published in peer-review journals, nor been subjected to any external validation studies, because Parabon maintains that its methods are proprietary. However, in 2016, the University of North Texas, with funding from the National Geographic Society, conducted a blind evaluation of Parabon Snapshot, and the results were presented at the 2016 International Symposium on Human Identification. According to Dr. Bruce Budowle, executive director of the University of North Texas Center for Human Identification, the evaluation generally found the eye color, hair color, and ancestry results to be accurate. The face morphology results were not as accurate, but the evaluators also had limited data to work with. Dr. Budowle believes that the technique may be useful when traditional investigation techniques have been exhausted, and Parabon's Snapshot may be helpful to spark interest in a cold case, either by law enforcement or the public.

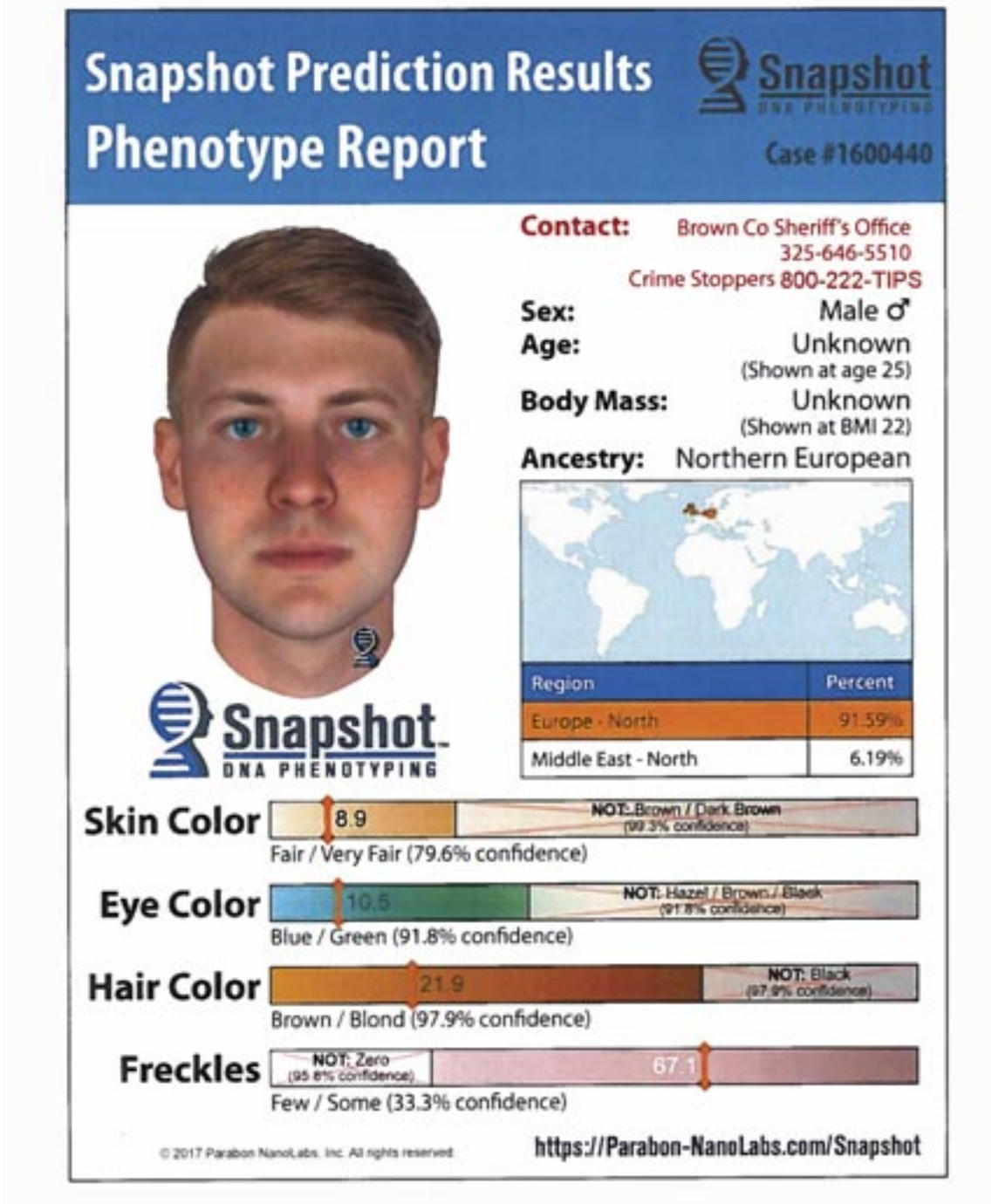
The technique has been criticized by the defense bar and civil rights groups as being "science fiction." There are certainly valid criticisms of DNA phenotyping,[4] including that a person's appearance is not solely a result of his or her DNA. People can dye their hair, grow a beard, use drugs, engage in lifestyle choices that affect their appearance, or lose or gain weight. However, if police are using DNA phenotyping to exclude suspects or to generate tips and then follow up with more traditional methods, there should be little or no need for a *Daubert* hearing about it. Police and prosecutors should be aware of the limitations and not be too quick to include or exclude a suspect based solely on a DNA phenotyping image.

Parabon Nanolabs requires the law enforcement agency or laboratory to submit a sample of the DNA. If there is at least one nanogram of DNA remaining, the lab can use that for the analysis. Parabon will not base its analysis on a previously developed STR profile done by another lab, as it needs some actual evidence instead of reports from another lab. In this case, the Brown County Sheriff's Office sent a swab collected from Chantay's body to Parabon Nanolabs.

It took a month from the time Sgt. Bird submitted the DNA samples to receive the report. The report generated revealed the following:

- the contributor of the DNA is male;
- he is primarily of Northern European ancestry (91.59 percent Northern European and 6.19 percent Northern Middle Eastern),
- his skin color is fair to very fair, with a 79.6-percent confidence associated with this finding,
- his eye color is blue to green (not hazel, brown, or black) with a 91.8-percent confidence associated with this finding,
- his hair color is brown to blond (not black), with 97.9 percent confidence, and
- he has few to some freckles, with 33.3 percent confidence.

The report generates a visual image based on age 25 and a body mass index of 22. The age and BMI can be adjusted if this information is known to police. Here is the image generated in our case:



One of Chantay's brothers told police, "That looks like Ryan Riggs," a neighbor and the brother's former classmate. Up until that point, 21-year-old Ryan Riggs had not been on anyone's radar. He was an acquaintance of Chantay's boyfriend and lived in the neighborhood, but he did not have a close relationship with Chantay or her family.

Sgt. Bird posted the digital "mugshot" that Parabon Nanolabs generated on the Brown County Sheriff's Office Facebook page. Police also showed it to Chantay's family. One of Chantay's brothers told police, "That looks like Ryan Riggs," a neighbor and the brother's former classmate. Up until that point, 21-year-old Ryan Riggs had not been on anyone's radar. He was an acquaintance of Chantay's boyfriend and lived in the neighborhood, but he did not have a close relationship with Chantay or her family.

Ryan Riggs

After Chantay's brother noticed the similarity between the digital image and Ryan Riggs, police attempted to speak to Riggs, but he was nowhere to be found. His parents said they didn't know where he was. Law enforcement tried for several days to find him, but he had apparently left town. During their investigation, deputies discovered that Riggs had illegally dumped some trash, so a warrant was obtained for a charge of illegal dumping. Deputies attempted to find Riggs to execute this warrant, but he was still not home or at work. Riggs' parents claimed they hadn't seen him for almost a week and a half, although he had been in the house to leave $20 and a note apologizing for missing his mother's birthday. Six days later, Ryan Riggs re-appeared.

It was a weirdly calm, matter-of-fact confession, much different from a typical one because there were no denials and no back-and-forth that usually occurs before a suspect finally admits his involvement. Riggs came right out of the gate with, "I'm the one who murdered Chantay Blankinship."

Riggs's surprise confessions

On November 15, 2018, exactly 18 months after Chantay's body was found, Riggs showed up at the North Lake Community Church accompanied by his parents. Riggs, who had been a sporadic attendee at that church, met with the pastor, Ron Keener, and confessed to Keener that he had murdered Chantay Blankinship, though he made no mention of sexually assaulting her. He told Keener that he wanted to confess to the Wednesday night church congregation "to make things right." Keener said he would allow Riggs to address the congregation but that he would be calling Brown County Sheriff Vance Hill as soon as the service was over.

Riggs stood up in front of the sparsely-attended congregation and confessed, "I'm a murderer. I killed Chantay Blankinship." He gave no details, and again, made no mention of sexually assaulting her. Several members of the congregation gasped. Some came up and hugged him. Immediately after making his stunning confession at the church, Riggs went with Pastor Keener and his parents to the Brown County Sheriff's Office. There Riggs gave a two-hour confession to Sgt. Bird and Texas Ranger Jason Shea.

It was a weirdly calm, matter-of-fact confession, much different from a typical one because there were no denials and no back-and-forth that usually occur before a suspect finally admits his involvement. Riggs came right out of the gate with, "I'm the one who murdered Chantay Blankinship." Riggs said he knew Chantay, just like everyone in the community knew her. He said he saw her by the community mailboxes, asked her to hang out, and took her in his truck to a lookout point by the lake. He said he talked and flirted with Chantay, then took her to a secluded area, strangled her in the front seat of his truck, took her clothes off, and raped her. He said Chantay fought him, but she couldn't scream because his arm was pressing against her neck.

After he raped her, and while she was unconscious but not dead yet, he took her to the abandoned Victorian house. He said he dragged her and threw her over the fence, then got a lawn mower blade out of the back of his truck and beat her on the head and face with it to make sure she was dead. Riggs said he was thinking, "I need to make sure she doesn't wake up and tell on me." Riggs admitted he'd also stomped on Chantay's chest. After he left her body in the storm cellar, he took Chantay's cell phone and threw it away several miles down the road. Riggs told police, "I wanted both things to happen, the rape and the murder." He described "having a part of me that wants nothing but destruction and evil." He admitted he knew Chantay had disabilities and chose her because she was small and would be "an easy target."

When asked why he confessed, Riggs told police he had been at home hiding when they came to serve the warrant for illegal dumping, and "I knew the cops weren't there at the house about the trash." He admitted that he had gone on the

run after that day. He said that he had contemplated suicide and "spent time talking to God." He claimed that God told him, "If you want salvation, this is what you need to do.'" Riggs said he went to the church "to turn myself in to God. Now I'm turning myself into the law." When asked what punishment Riggs thought he deserved, he replied, "Death, for sure."

Fortunately for us prosecutors,[5] the officers had the foresight to take the interview a step further and did not stop once they got the confession. They kept Riggs talking and dug deeper into his background. He told them about his drug use, his family, and his childhood. This information was helpful later when we had to assess whether to seek the death penalty—specifically, as we looked for evidence to prove future dangerousness and any mitigating evidence. Riggs admitted to using and selling methamphetamine frequently, but said he was not high the day of the crime. He said that he'd made a half-hearted attempt at suicide before, that on numerous occasions he'd tried to drown his pet chihuahua in a five-gallon bucket of water, that there was a family history of mental illness, and he hinted at some sexual abuse by a relative.

Riggs admitted to attending Chantay's funeral and participating in the search party. It was evident from the interview that Riggs was articulate, literate, and coherent. While his confession was unusual, he was not exhibiting any active symptoms of mental illness. He was able to define rape as "non-consensual sex, sex against your will," and understand other legal concepts. He consented to the police taking a buccal swab for a DNA sample. Lab tests confirmed that his DNA was a match to the semen found in Chantay's body.

Whether to seek death

The State issued subpoenas for Riggs's school records, juvenile criminal records, medical records, and mental health records. We determined early on that when he was 16, Riggs broke into a house and stole a gun, allegedly because he was suicidal due to problems with a girlfriend. After he made threats that he wanted to kill himself with the stolen gun, he was hospitalized in a psychiatric facility for a few days. He was diagnosed with depression, but there was no diagnosis of any kind of psychotic disorder. He had some brief follow-up treatment with a counselor, but there was no further documentation of mental illness.

Riggs had a couple of other run-ins with the law as a juvenile and some minor discipline problems at school, but nothing major. We could tell, as the case progressed, that the only defense his lawyers might raise at guilt-innocence would be insanity, but more likely, the defense would concede his guilt and spend all its time trying to disprove future dangerousness and prove mitigation to save Riggs from a death sentence. Of course, the wild card in the case was how a jury would react to Riggs's confession at the church and whether jurors would view this acceptance of culpability and display of remorse as mitigating.

Deposition of an elderly witness

Chantay had lived most of her life with her grandfather, Charlie Barnett. At the time of Chantay's death, Mr. Barnett was 87 years old. He was a sharp, witty, and somewhat crusty old guy who had been a Navy diver and a police officer for many years. He seemed to be in relatively good health, and even though he was officially retired, he still worked at night operating a street cleaning machine for his brother-in-law's company. He said he was planning on living to 110 years old.

But, as I explained to him, the law[6] allows us to take a deposition of a witness over 65 years of age, and even though he was currently in seemingly good health, a deposition was an insurance policy in the event something happened to him before trial. At a jury trial, we would need Mr. Barnett to introduce the jury to Chantay, describe her disabilities, and give us the timeline of the night of her disappearance. Mr. Barnett agreed that a deposition would be a good idea.

We filed a motion to take his deposition, and the defense agreed to it. We set a date, scheduled a court reporter and videographer, and reserved a courtroom. Mr. Barnett's deposition went off without a hitch, although he told us afterward that it rattled him to his core to sit in the same room with "that son-of-a-bitch," Riggs.

As it turned out, it was a good thing we did this deposition, because a few months later, Mr. Barnett had a stroke. The stress of losing Chantay and learning the horrible details of her death had clearly taken a toll on him.

The guilty plea

As the case progressed, we had pretrial hearings, and a trial date was set for September 2019. At one of our meetings with Riggs's attorneys, the

Fortunately for us prosecutors, the officers had the foresight to take the interview a step further and did not stop once they got the confession. They kept Riggs talking and dug deeper into his background. He told them about his drug use, his family, and his childhood.

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defense team made it clear that Riggs would be willing to plead guilty to capital murder if the State waived the death penalty. Defense counsel gave us a preview of its punishment case, including some of the mitigation evidence. And as usual in a capital case, counsel also brought up the costs to the county that would be incurred in expert fees, mental health evaluations, and brain scans.

After meeting with Chantay's family and discussing this plea option, the family agreed that the State should allow Riggs to plead guilty and be sentenced to life without parole. After almost three years of grief, the family wanted closure. They wanted the certainty of a plea and waiver of appeal, and they didn't want to endure a trial and years of appeals.

On February 15, 2019, Ryan Riggs admitted his guilt in court, pleaded guilty to the capital murder of Rhonda Chantay Blankinship, and was sentenced to life without parole. Chantay's whole family, including Mr. Barnett, was in attendance. Her mother, Michelle McDaniel, gave an emotional victim impact statement, and there wasn't a dry eye in the courtroom. Mrs. McDaniel told Riggs, "You will never get married. You will never have grandkids for your mom and dad. My daughter would have forgiven you because that's the way she was. I hope one day you'll realize everything you've done, not only to us, but to your family."

By the end of the day, her family had posted online a photo of Chantay, sitting by the lake playing with her phone, with the caption, "I got my justice." ❇

Endnotes

[1] https://parabon-nanolabs.com/.

[2] Genetic genealogy mines data from public databases such as Ancestry.com to look for the suspect's DNA or a relative of the suspect. Parabon has made this service available since May 2018, but it was not available when the Riggs sample was submitted.

[3] *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), the U.S. Supreme Court case outlining the standard for admitting scientific evidence and expert opinions in court. The Texas standard for the admission of "hard sciences" is *Kelly v. State*, 824 SW2d 568 (Tex. Crim. App. 1992).

[4] Here are some articles critical of DNA phenotyping: Curtis, Caitlin, & James Hereward, "How Accurately Can Scientists Reconstruct a Person's Face From DNA?", The Conversation Smithsonian.com, May 4, 2018. https://www.smithsonianmag.com/innovation/how-accurately-can-scientists-reconstruct-persons-face-from-dna-180968951/; and Stanley, Jay. "Forensic DNA Phenotyping," ACLU Speech, Privacy and Technology Project, November 29, 2016. https://www.aclu.org/blog/privacy-technology/medical-and-genetic-privacy/forensic-dna-phenotyping.

[5] The Brown County District Attorney's Office requested the assistance of the Office of the Attorney General on this complex case, and Ms. Starnes was appointed as a special prosecutor. District Attorney Micheal Murray and Assistant District Attorney Elisha Bird were also prosecutors on the case.

[6] Tex. Code Crim. Proc. Art. 39.025.

Assisting prosecutors in investment fraud cases

The Texas State Securities Board (SSB) has a successful and growing program of working with county and district attorneys to prosecute investment scams.

By Joe Rotunda
Director of the Enforcement Division, Texas State Securities Board in Austin

The SSB employs 33 attorneys, examiners and other personnel assigned to offices in Austin, Corpus Christi, Dallas, and Lubbock. Enforcement personnel investigate illegal investment offerings and uncover admissible evidence, secure key testimony, and audit complex financial records. They pursue law enforcement actions to stop Ponzi schemes, retirement frauds, and other investment scams.

Equally important, SSB enforcement personnel routinely assist district attorney's offices in the prosecution of white-collar criminals. From 2017 through mid-2019, the SSB assisted local prosecutors in 12 counties to secure convictions of 19 criminals in 11 counties, resulting in prison sentences totaling 284 years, community supervision of 55 years, and orders of restitution totaling $7.6 million. In addition, 19 individuals were indicted in seven counties during that time period.[1]

Securities fraud cases

The SSB is responsible for administering the Securities Act,[2] a state law designed to protect Texas investors. The Securities Act authorizes the SSB to license persons who sell securities, issue permits for securities sold in Texas, and conduct on-site inspections of registered firms. The SSB is also a law enforcement agency that investigates illegal securities schemes and refers criminal cases to local district attorney's offices.

The SSB's law enforcement program often investigates classic fraudulent securities schemes, such as scams where a suspect falsely promises safe, secure returns through the purchase of worthless stocks, bonds, or promissory notes. The investigative authority is broad, though, and the statute authorizes the SSB to investigate many different types of passive investment opportunities. For example, the SSB recently investigated fraudulent schemes involving oil and gas drilling programs, real estate flipping deals, medical marijuana dispensaries, precious metals, industrial shipping containers, and Bitcoin and other cryptocurrencies. White-collar criminals are notoriously creative, but state law is flexible, designed to adapt to fraudsters' new or evolving schemes.

Although many white-collar criminal offenses are codified in the Texas Penal Code, the Securities Act codifies criminal offenses specifically relating to the offer and sale of securities. For example, the Securities Act provides third-degree felony punishment for a person who offers or sells securities without a license or who offers and sells unregistered securities.

The statute also requires that all persons who offer or sell securities truthfully disclose all known material facts to potential investors. A promoter of a securities scheme who intentionally fails to disclose material facts to potential investors, such as prior felony convictions or key regulatory actions, or who knowingly misrepresents a relevant fact, such as the profitability of an investment program, commits securities fraud. The offense is punishable as a first-degree felony if the amount involved is $100,000 or more. The statute further permits the aggregation of securities fraud, and prosecutors can therefore prosecute widespread schemes involving numerous victims in a single case in a single county.

White-collar criminals are notoriously creative, but state law is flexible, designed to adapt to fraudsters' new or evolving schemes.

Prosecutorial assistance

When an investigation uncovers evidence that proves a suspect engaged in securities fraud or another crime tied to a securities offering, the SSB refers the case to the appropriate district attorney's office. These referrals typically include a summary of the case, the evidence necessary to prove the elements of the offenses, and draft indictments.

The referrals recognize that white-collar criminal cases present unique challenges. Prosecutors are often unable to prove financial crimes through traditional evidence, such as a video recording of an altercation or the testimony of a responding officer. Instead, prosecutors may need to secure and introduce voluminous financial records, such as corporate banking records and securities trading statements. These records are often inherently complex, involving numerous transactions and significant amounts of funds. Not surprisingly, prosecutors may need to rely on a witness to audit these files, analyze the use of money, and summarize convoluted transactions for a jury.

The SSB can assist local prosecutors in securing and analyzing financial records. State law requires registered financial firms to provide records to the SSB, and the agency often serves confidential administrative *duces tecum* subpoenas that direct banks and credit unions to produce client files. Its examiners regularly analyze these records to identify victims and audit investment programs, working through criminal cases involving more than $100 million over the last three fiscal years. They can summarize these transactions at trial, providing testimony showing the perpetration of investment scams and the theft or misapplication of victim funds.

In many instances, SSB attorneys can serve as expert witnesses in securities laws. Its attorneys also frequently serve as appointed special prosecutors and assist district attorney's offices in prosecuting securities fraud and related white-collar felonies. Many attorneys are either former prosecutors or have prosecutorial experience, and they can offer their experience and assistance from the time a case is received to its presentation to a grand jury and throughout a trial before a judge or jury.

Recent sentences include 18 years on a plea agreement in Wichita County for a Galveston oilman who stole nearly $500,000 from investors who purchased investments in oil wells; a 25-year sentence in Jim Wells County—and $2.8 million in restitution—for the owner of an unregistered financial services firm who stole from his clients; and 79 years in prison in Dallas County for the perpetrator of a small-business loan scam. That was one year for each victim in the $4.9 million fraud.

Prosecutors assigned to cases involving investment scams can contact the SSB through this article's author, Joe Rotunda. He can be reached at 512/305-8392 or jrotunda@ssb.texas.gov. ❇

Endnotes

[1] The SSB's most recent report, "Blind Faith, Fraud, and Millions of Dollars Lost," is available at https://www.ssb.texas.gov/sites/default/files/YEAR_IN_ENF_2018_post.pdf.

[2] Tex. Rev. Civ. Stat. Arts. 581-1–581-45.

That's crazy! The State argues a defendant's incompetence

"It shall be the primary duty of all prosecuting attorneys ... not to convict, but to see that justice is done."[1]

By Erin Lands
Assistant District Attorney in Hutchinson County

I was reminded of this obligation during an unusual situation I was recently in: arguing to a jury that a defendant was incompetent ... while defense counsel maintained that her client was competent—pursuant to the defendant's wishes. Every other contested competency issue I've ever been a part of, heard of, or read caselaw about was a defendant arguing *incompetency* and the State maintaining the defendant is competent.

Raising the issue of competency

The State, the court, or counsel for the defendant can suggest a defendant may be incompetent to stand trial.[2] This motion can be supported by affidavits, and the judge will typically conduct an informal inquiry to determine whether there is evidence of incompetency.[3] The inquiry is a low bar, and it does not allow for rebuttal with evidence of competency.

In my jurisdiction, the court allows the moving party to announce its own supporting facts and to call a witness to explain where the incompetency concerns are stemming from. (I have been in a situation, for instance, where the defendant was lying about being incompetent, and calling a witness is a great way to commit a defense witness to his or her reasons for believing the defendant to be incompetent. But that's another story.)

In this particular case, the defendant was charged with aggravated assault with a deadly weapon after threatening grocery store shoppers with a knife. Both the State and defense counsel agreed to an order of examination of the mental condition of the defendant. The order did not state who initially raised the issue of incompetency, and we did not put any supporting facts on the record, both of which I would later regret. These omissions came back to haunt me in the jury trial.

The expert's opinion

The Texas Code of Criminal Procedure outlines the qualifications for both the examiner and the examiner's report.[4] Included in the report should be the expert's clinical observations and specific criteria supporting the observations.[5]

We use the same expert for all of our examinations, so I know what to expect. Fortunately, he records the examination and essentially transcribes verbatim a defendant's responses to his questions. This transcription comes in handy during a jury trial, but if your evaluator does not transcribe his examinations, look for expert notations about a defendant's appearance and demeanor and any responses not appropriate to the questions.

In our case, the transcription served me well. The defendant spoke of his longtime drug use, medical history, previous stays in mental health facilities, recent time-travel trips to and from the year 2035, and his dealings with Lucifer. Ultimately, the expert concluded that this defendant was incompetent. While the defendant did have some understanding about the charges against him, his understanding of reality and the facts surrounding the charges made him unable to effectively communicate with his attorney.

So, both the State and defense should be able to agree the defendant was incompetent, right? Wrong.

A backward jury trial

It may be tempting, when defense counsel approaches and suggests, "Hey, I think my guy is incompetent, but he won't let me agree to an incompetency finding," to say "Cool! Tee up the criminal charge and let's try it on the merits!" Don't do it.

It may be tempting, when defense counsel approaches and suggests, "Hey, I think my guy is incompetent, but he won't let me agree to an incompetency finding," to say "Cool! Tee up the criminal charge and let's try it on the merits!"

Don't do it.

Our defense attorney believed she had to honor the defendant's wishes that he proceed as a competent person even though she did not believe he was competent to stand trial. I'm not here as the guru in all things ethical, but there is some guidance on this subject in the Texas Disciplinary Rules of Professional Conduct. I will concede defense counsel is obligated to zealously represent a client,[6] but Rule 1.02 states a lawyer must seek "other protective orders" with respect to a client whom the lawyer reasonably believes lacks legal competence.[7]

Even more compelling, a defendant has a right to stand trial as a competent person.[8] This right cannot be waived.[9] The United States Supreme Court has stated, "It is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently waive his right to have the trial court determine his capacity to stand trial."[10] The criminal trial of an incompetent defendant violates due process.[11] Therefore, under our obligation to see that justice is done, prosecutors cannot and should not proceed to trial or with a guilty plea in a situation where we believe a defendant to be incompetent.

Cue the backwards jury trial. That's where I the prosecutor argued, on the defendant's behalf, that he is incompetent, and that a fair trial mandates he be restored to competency before proceeding on his criminal charges.

The burden of proof—to prove the defendant incompetent—again fell on me. A defendant is presumed competent to stand trial unless proved incompetent by a preponderance of the evidence.[12] The relevant time-frame for determining a person's competency is at the time of the proceedings rather than the time of the offense.[13] In voir dire, I went over and over with the panelists regarding the lower burden of proof and the competency standard so my jurors knew that a competent defendant would have: 1) the present ability to consult with his lawyer with a reasonable degree of understanding, plus 2) a rational as well as factual understanding of the proceedings against him.[14]

In the hearing, I called two witnesses. The first, of course, was the expert who performed the evaluation. That's the easy witness, given he had found the defendant to be incompetent. My second witness was the defendant's attorney. I anticipated calling her as a witness prior to trial, and an attorney was appointed to the defendant (or to the defense attorney?) for the period of time defense counsel was on the stand.

Can a prosecutor call defense counsel to testify like this? I don't know—but I did, and I based my argument on the fact that competency trials are civil in nature.[15] I limited my questioning of defense counsel to personal observations and opinions. Generally, personal observations are not privileged.[16] Plus, the limited caselaw on this matter supports the conclusion that an attorney may testify at a competency hearing without violating the attorney-client privilege.[17] The purpose of the attorney-client privilege is to promote unrestrained communication between an attorney and client in all matters in which the attorney's professional advice is sought,[18] and an attorney's testimony does not violate privilege where no communications between counsel and defendant have been revealed.[19]

With that in mind, I questioned defense counsel on her opinion of whether her client was competent to stand trial. I asked her if she disagreed with the examiner's assessment and opinion. She didn't. I questioned her about unusual behaviors she had witnessed in her client, who wore a ski bib to his trial, and she stated she had seen none. She would not—and said she *could* not—give an opinion one way or the other regarding his competency.

Because the defense attorney was noncommittal on the stand regarding her opinion about her client's competency, I regretted not putting in the record at the initial inquiry where she stood on her client's competency. Had I committed to the order for a competency examination that she raised the issue of his incompetency, I could have confronted her on that. In hindsight, I should have insisted on putting something on the record during a docket call, something about her basis for requesting the examination, her personal observations, and other factual information. It is easy for a witness to forget side

comments such as, "He's not right," made in passing six months prior, but that statement could have been key evidence for a juror who was on the fence.

The verdict: incompetent

I am thankful that jurors found the defendant incompetent. Had they not, a likely incompetent man would have proceeded to his criminal trial and may not have allowed his attorney to raise the insanity defense, which I believe would be his strongest argument. As he was taken into custody to await transport to the state hospital, his comment to the judge was, "I may be incompetent, but I'm not crazy."

The defense attorney filed notice of appeal, but neither party is entitled to make an interlocutory appeal after a verdict on competency.[20] If the jury's verdict had been that the defendant was competent, I believe my obligation would have been to raise a variety of issues on appeal after a finding of guilt at his criminal trial. Fortunately, the defendant was gifted 12 jurors who agreed with the fundamental fairness in the right to stand trial as a competent person.

A prosecutor's obligation is to see that justice is done. I understood what this duty meant better than ever before on the day I argued a defendant's incompetency against his counsel's wishes. ❇

Endnotes

[1] Tex. Code Crim. Proc. Art. 2.01.

[2] Tex. Code Crim. Proc. Art. 46B.004(a).

[3] Tex. Code Crim. Proc. Art. 46B.004(c), (c-1).

[4] Tex. Code Crim. Proc. Art. 46B.021-46B.026. My good friend, Ashley Davis from the Lubbock County Criminal District Attorney's Office, outlined the requirements of the competency report in her article "How to evaluate a competency report," *The Texas Prosecutor*, Vol. 48, No. 4 (July–August 2018). She was also a sounding board for this jury trial.

[5] Tex. Code Crim. Proc. Art. 46B.025.

[6] Tex. Disc. R. Prof. Cond. 1.01 Comment 6.

[7] Tex. Disc. R. Prof. Cond. 1.02.

[8] *Pate v. Robinson*, 383 U.S. 375, 378 (1966).

[9] *Pate*, 383 U.S. at 384.

[10] *Id*.

[11] *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996) (citing *Medina v. California*, 505 U.S. 437, 453 (1992)).

[12] Tex. Code Crim. Proc. Art. 46B.003(b).

[13] *Lasiter v. State*, 283 S.W.3d 909, 925 (Tex. App.–Beaumont 2009, pet. ref'd).

[14] Tex. Code Crim. Proc. Art. 46B.003(a).

[15] *Morales v. State*, 830 S.W.2d 139, 140 (Tex. Crim. App. 1992); Our belief is that all the rules apply–for example six peremptory strikes–but the verdict must be unanimous.

[16] See *Kay v. State*, 340 S.W.3d 470, 474-75 (Tex. App.–Texarkana 2011, no pet.); *Manning v. State*, 766 S.W.2d 551, 556 (Tex. App.–Dallas 1989, no pet.).

[17] *Manning*, 766 S.W.2d at 556.

[18] *Cruz v. State*, 586 S.W.2d 861, 865 (Tex. Crim. App. 1979).

[19] *Church v. State*, 552 S.W.2d 138, 142 (Tex. Crim. App. 1977).

[20] Tex. Code Crim. Proc. Art. 46B.011.

As he was taken into custody to await transport to the state hospital, his comment to the judge was, "I may be incompetent, but I'm not crazy."

When civil liability gives rise to criminal prosecution

"I paid this contractor $20,000 to update my kitchen, and I have been calling and texting him for about six months, and he never showed back up after doing the demolition. I want to press charges against him!"

By Ty Stimpson
Assistant Criminal District Attorney in Tarrant County

Prosecutors hear such stories from people in our communities all too often, and these tales traditionally end with law enforcement and even some of our offices telling the complainants, "I'm sorry, but we can't help you—that's a civil matter."

But what if I told you that there could possibly be criminal prosecution as a recourse for consumers who find themselves in these situations? There is!

During my time handling white-collar cases, I came across many individuals who either hired a contractor who did not complete the job or who never even started the project after receiving funds at the initial consultation. Another common scenario is after a severe storm that caused roof damage to many houses in an area—contractors would have individuals sign over their insurance checks to repair their roofs, and then they'd abscond with the funds. Victims are left without a roof and have no insurance money to fix it.

With Texas weather being so unpredictable and hurricane season upon us, I feel the need to equip my fellow prosecutors with the knowledge I've obtained handling these types of cases for the next time you receive such calls.

Approaching each case

Typically, when I receive a complaint regarding a contractor, the first question I ask is: Did the contractor perform any work? The reason I ask this question is to determine if the citizen is complaining about the quality of the work, incomplete work, or no work performed at all—each scenario should be handled differently. When the complaint is about the poor quality of the work, that is likely a civil matter. Where things get tricky is when complaints involve partial performance of a job.

With complaints where a contractor has done some work, I first look to see what the contract language says (if there is a contract). Many times, these cases involve a homeowner paying a contractor to complete a remodeling project on a home. The homeowner usually pays half the cost upfront and the other half upon completion of the job. What prosecutors often see is the contractor takes the initial payment, completes demolition, and disappears. The victim calls and calls the contractor and receives excuse after excuse as to why work has stopped, until finally all communication ceases. The victim is now left with part of his home demolished and his money gone. What makes partial performance difficult to prove is showing that the contractor had the intent to deprive the victim of her property—money in these cases—and the intent to deprive is what makes this situation criminal, as opposed to negligent actions that would be the basis for a civil case.

What tends to help prosecutors with "partial performance" complaints is the contractor usually has a history of doing this to other people. How do you go about finding additional potential victims? I'm glad you asked. In a case I once handled, our office received a complaint from a homeowner who contracted with Richard Wallace to install an iron rod door and staircase. Wal-

lace abandoned the job after completing about 30 percent of it, but he took 100 percent of the payment. After my initial review, I was hesitant to accept the complaint due to the contract language. In the contract, there was nothing specific to designate what work was to be completed before the contractor could submit a draw for additional funding or what exact work was to be completed for the amount contracted, but I decided to investigate more before rejecting the case. I conducted an online search of Wallace's business name and found multiple negative reviews accusing him of stealing money from consumers.

What happened next some may call "luck," but I like to call it "great investigative skills." I decided to contact one of the consumers complaining about Wallace online, and this man turned out to be a retired commercial airline pilot who kept a spreadsheet of other people who had fallen victim to Wallace's shady business tactics. Armed with this information, I sent letters to the individuals on the spreadsheet inquiring if they suffered loss after Wallace abandoned a job. My letter was not quite on the level of "Have you or a family member been affected by mesothelioma?" but I did provide my investigator's contact information to make a complaint against Wallace. That letter and subsequent investigation resulted in nine victims from five neighboring counties with a combined loss of over $100,000 listed in the indictment, with an additional six victims who were not included in the indictment for various reasons. Everyone shared the same story: They contracted with Wallace to perform a job he would start, then he inevitably came up with numerous excuses as to why he wasn't working on it, before ceasing all communication—leaving the victims without their money and with an incomplete project. What started off as one complaint ballooned into many, and it ultimately led to a plea agreement that included a substantial amount of restitution paid upfront.

"No work performed" scenarios tend to be more straightforward than "partial performance" complaints. Unlike partial performance, where some work has been done and the State must show the contractor's intent to deprive the homeowner of money, jobs where no work has been performed tend to be easier to show the contractor intended to rip off the consumer. Another case I handled may be classified as "luck" as opposed to "great investigative skills." Mario Vila was a contractor who specialized in residential outdoor construction and advertised his business on Craigslist. Various homeowners paid substantial down payments to Vila for materials, but he never performed any of the work. One of the homeowners located other victims and had a sit-down interview with a local news station's consumer protection reporter. Upon seeing the news, Vila himself contacted the station to tell his side of the story. In the end, the case was presented to me essentially gift-wrapped—with the victims having already conducted their own investigation along with supporting documents and a video-recording of the defendant explaining why he never performed any work. As you would expect when the State is armed with this great evidence, the case led to a guilty plea with ful restitution paid upfront.

Now, not every contractor fraud case is going to be that simple and straightforward, but it does go to show that there are painless ways to effectively prosecute these kinds of cases.

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Criminal charges

Traditionally the statute prosecutors use to try individuals accused of stealing money from others is Penal Code §31.03 (theft). With contractor fraud cases, not only do I include §31.03 in my indictment, but I also include a count for §32.45 (misapplication of fiduciary property). On its face, §31.03 would seem like the more straightforward statute, but from my experience, §32.45 may be just as effective. Unlike theft, which requires a culpable mental state, you can secure a conviction under §32.45 without necessarily proving a culpable mental state. When you dissect §32.45, misapplication involves dealing with property contrary to an agreement under which the fiduciary holds the property.[1] Under §162.006 of the Texas Property Code, contractors are required to deposit money into a construction trust fund for contracts over $5,000. How many contractors do you believe abide by this requirement? If you answered, "Very few," you would be correct. In my experience, rarely are contractors compliant with §162.006.

The way I determine if the contractor deposited the victim's funds into a trust account is by tracing the funds through bank records. This is where effectively using grand jury subpoenas comes in handy. If a victim paid for a contractor's services by check, subpoena the victim's bank records to see into which account at what financial institution the check was deposited. (In the

The reason I prefer to file a notice of specific acts after an indictment and not include it in the indictment is that if, for some reason, the accounting changes with a loss associated with a specific victim, you can file an amended notice of specific acts rather than having to amend or dismiss the indictment.

subpoena, be sure to request the check images. Typically, financial institutions usually just send statements unless you specify otherwise.) In my experience, what you will uncover is that the account contains comingled funds—construction trust funds and the contractor's personal expenses—which violates §162.006. As a result, the contractor's lack of compliance gives you the basis for a §32.45 charge.

Both §31.03 and §32.45 allow the State to aggregate the total loss for the victims,[2] which is helpful when contractors have ripped off multiple people along the lines of $3,000 here and $5,000 there. Instead of multiple counts of lesser theft charges, the ability to aggregate gives prosecutors the potential to reach the third- or second-degree felony range.

The biggest difference between §31.03 and §32.45 is the notice requirement under §32.45.[3] An indictment for misapplication of fiduciary property must state the specific transactions that allegedly violate the statute.[4] What I do to fulfill this requirement is file a notice of specific acts—once the case is indicted—showing the amounts associated with each victim and the date the misapplication occurred. The reason I prefer to file a notice of specific acts *after* an indictment and not include it *in* the indictment is that if, for some reason, the accounting changes with a loss associated with a specific victim, you can file an amended notice of specific acts rather than having to amend or dismiss the indictment.

Another charging option to consider is §162.031 of the Texas Property Code (misapplication of trust funds). Under this statute, misapplication of trust funds over $500 gives rises to criminal prosecution. I have used §162.031 in situations where, despite my investigating for additional victims, there's only the one complainant. If I'm able to show the contractor had the intent to defraud with a loss over $500, the offense is a third-degree felony.[5]

Every month across the state we see news stories involving contractors who bilk tens of thousands of dollars out of citizens in our communities. Before we are quick to reject these complaints due to unfamiliarity, it's important that we take the time to investigate them and use the Penal Code and other legal statutes to our advantage.

Conclusion

Traditionally, we prosecutors try to steer clear of gray areas of the law, especially with regard to contractor fraud cases. But rather than being quick to declare a complaint a civil matter, conduct some investigation before rejecting it. You never know how many consumers in your county you will protect by prosecuting that shady contractor. ❇

Endnotes

[1] Tex. Penal Code §32.45(a)(2)(A).

[2] Tex. Penal Code §31.09.

[3] *State v. Moff*, 154 S.W.3d 599 (Tex.Crim.App.2004).

[4] *Id*.

[5] Tex. Prop. Code §162.032(b).

Special issues in voir dire

Why do prosecutors lose cases when our ethical responsibilities require us to prosecute only defendants whom we *know* are guilty?

By Ryan C. Calvert
Assistant District Attorney in Brazos County

Why are defendants often acquitted, even in cases with seemingly strong evidence?

The simple answer is that some issue prevented jurors from seeing what we see. In a jury trial, citizens are brought into the alien environment of a courtroom and asked to apply unfamiliar law to complex factual scenarios, despite having no legal education or experience. The person responsible for ensuring that jurors understand both the law and how to evaluate the facts is the prosecutor. The mechanism prosecutors use to equip jurors for success is voir dire. In short, juries are as good as the prosecutors who seat them.

In the struggle to select and prepare a jury to do justice, prosecutors face some common pitfalls, including the following:

1) circumstantial evidence
2) Law of Parties (the defendant is not the primary actor)
3) unlikable victim or witnesses
4) one-witness cases
5) elimination of strong State's jurors by the defense

A jury's ability to overcome these issues can mean the difference between "guilty" and "not guilty," between justice and injustice. A jury's capability to understand and evaluate a case is determined not by the jurors themselves, but by the prosecutor. By identifying when these issues might affect a case and determining how best to address them in voir dire, the prosecutor makes a just and accurate outcome far more likely.

Circumstantial evidence

A common challenge prosecutors face is the absence of direct evidence of a defendant's guilt, such as eyewitnesses or a confession. In other words, the prosecutor's case is circumstantial. Circumstantial cases require jurors to bring together multiple pieces of evidence that in and of themselves are not definitive, but when taken in combination with each other, they prove what happened.

During the trial of a circumstantial case, the defense lawyer will argue that every piece of the State's evidence has a possible innocent explanation. The obvious (and fatal) flaw in this argument is that it requires jurors to consider each piece of evidence in a vacuum, without regard to any other evidence. Therefore, the value of circumstantial evidence comes primarily from its relation to all other known facts. By way of illustration, while it's true that wearing a ski mask does not make one a bank robber, when a man is wearing a ski mask, carrying a gun in one hand and a bag of money in the other, and running out of a bank while being chased by the bank's security guard, that person is a bank robber.

Circumstantial evidence is most often associated with crimes such as murder, robbery, or burglary. The *concept* of building a circumstantial case, however, applies to a vast array of crimes, including misdemeanor DWIs. After all, unless a defendant admits he is intoxicated to the arresting officer at the time of the traffic stop, the prosecutor's proof of intoxication *while driving* is always circumstantial. An arresting officer can only form an *opinion* that the defendant is intoxicated based on various observations made at the time of driving. A blood test merely shows that a defendant's alcohol concentration was above the legal limit an hour or more *after* he was driving. Yet, when taken in *combination*—the officer's observations that a defendant was driving at 2:00 a.m., failed to maintain a single lane, smelled

The puzzle is just one of many potential illustrations of circumstantial evidence. In this area, prosecutors can get truly creative.

strongly of alcohol, had glassy bloodshot eyes, showed all possible clues on HGN, could not follow instructions or maintain balance on the Walk and Turn or One Leg Stand, *and* had an alcohol concentration above .08 an hour later—the suggestion that a collection of innocent explanations exists simultaneously to account for all of that evidence is unreasonable. As Yankee great and American philosopher Yogi Berra once said, "That's too coincidental to be a coincidence."

To prepare jurors to accept a circumstantial case, prosecutors can draw upon limitless examples and hypotheticals. A simple yet extremely effective example which prosecutors might use to illustrate the strength of circumstantial evidence is the jigsaw puzzle. Each puzzle piece represents a piece of evidence in a case. When the pieces are considered together, they make a clear and undeniable image, even if certain pieces are still missing.

The puzzle is just one of many potential illustrations of circumstantial evidence. In this area, prosecutors can get truly creative. One example I occasionally use is a short video clip from the classic movie *Raiders of the Lost Ark*. The clip shows the film's heroine, Marion Ravenwood, running through the streets of Cairo being chased by a man with a knife. Marion runs through a darkened doorway, followed a second later by the villain. Immediately after the knife-wielding man disappears through the doorway, the audience hears a metallic "*Clang*!" and the man's unconscious body falls back through the doorway. A moment later, Marion emerges from the door with an iron skillet in her hand and runs away.

After watching the clip, jurors typically have no doubt that Marion hit the man with her skillet, despite the fact that they did not actually *see* it happen. When asked how they can be sure what happened without seeing it, jurors respond with the known facts:

- Marion is running with a skillet in her hand,
- she disappears into a doorway followed immediately by the man trying to harm her,
- the instant the man goes through the doorway, there is a sound of metal striking something hard,
- immediately thereafter the man collapses back through the doorway, and
- Marion instantly emerges from the same door and runs away, still holding her skillet.

Now, is it theoretically possible that some unseen person was lurking just inside that doorway with another metallic object, waiting to hit the second person that comes through the door? Yes. But when combining all the known facts, such a scenario is not reasonable. And if there is only one reasonable explanation for what happened, then there is no reasonable doubt. Such an analysis is a useful model for any case based upon circumstantial evidence.

Occasionally, some jurors balk at the example and creatively seek to invent alternate explanations for what they just saw on the screen. In doing so, these jurors accomplish two things: First, they make the prosecutor's job easier when deciding whom to strike, and two, these jurors ensure that their jury service will not extend beyond voir dire. Jurors who instinctively look for exotic ways to explain away large amounts of circumstantial evidence are ill-suited to hear circumstantial cases.

Establishing this theme of looking at the "totality of the circumstances" in voir dire is an effective way to prepare jurors to overcome the potential weakness of a circumstantial case. Prosecutors can preempt the defense's chief argument (that there are innocent explanations for all of the State's evidence) by asking jurors two simple questions:

"Is it reasonable to consider pieces of evidence one at a time instead of looking at them in context of each other?" and *"Why not?"*

Through this discussion, the prosecutor prompts jurors themselves to reject the defense's theory of the case before the defense lawyer ever has a chance to speak.

Law of Parties

Prosecutors commonly try cases where multiple defendants acted together to commit a crime. Such scenarios in Texas invoke the Law of Parties,[1] which states that all people who solicit, encourage, aid, or attempt to aid in the commission of a crime are guilty of the same crime, regardless of whether a defendant was a primary or secondary actor. Misdemeanor prosecutors confront Law of Parties issues on theft, burglary of a motor vehicle, and assault cases. In felony courts, Law of Parties scenarios are more common, often playing a role in drug, burglary, robbery, and even murder and capital murder trials.

In most "parties" cases, one or more co-defendants are factually less culpable than others. The getaway driver in an aggravated robbery, for example, is less culpable than the person who threatened the victim with a gun. Yet by law, both defendants are guilty of the same crime. Some jurors struggle with this concept, feeling that it is unfair to a defendant who was not the primary actor in a crime. Thus, in cases involving the Law of Parties, a prosecutor's voir dire objectives should include the following:

- ensuring that the jurors clearly understand the Law of Parties,
- making clear that the extent of a defendant's involvement in a crime may be considered in determining what *punishment* is appropriate, and
- identifying and eliminating any jurors who disagree with the Law of Parties or feel that they cannot apply it.

Consider the following discussion:

"Juror No. 10, the New England Patriots won the Super Bowl—again—this year. Members of the winning team get Super Bowl rings. Tom Brady is the Patriots' quarterback. He deserves a ring, right?"

"Yes."

"What about the punter? Should the Patriots' punter get a ring?"

"Yes."

"Why? He's the punter. Don't you think the quarterback is more important to the team winning a Super Bowl than the punter?"

"It doesn't matter. The punter is a part of the team. He should get a ring too."

"Juror No. 11, players aren't the only ones who get rings. Even coaches and front office staff get Super Bowl rings as well. Those folks never even set foot on the field. Should they get rings?"

"Yes."

"Why? They don't even play!"

"No, but they have their jobs to do too, so they're still helping the team."

"Juror No. 12, your neighbors say that people who contribute to the team should get rings, even if their job is less significant than other players or if their role doesn't even require them to be on the field. How do you feel about that?"

"I agree."

"Why?"

"Because everyone has their job to do and they are still a part of the team."

"Does everyone agree with that?"

Jurors agree.

"Well, if you understand that, then you understand the Law of Parties. ..."

Through simple examples like this, prosecutors can cause jurors to *accept* the Law of Parties before they even know what it is. Jurors typically grasp the concept that members of a team share in an outcome, regardless of what each teammember's individual role was. At its core, the Law of Parties stands for the same principle.

Many jurors will naturally (and appropriately) feel that less-culpable defendants should be treated less harshly. Thus, an effective prosecutor makes clear to jurors during voir dire that, despite being convicted of the same *crime*, different parties might receive vastly different *punishments* (just as a quarterback's and punter's salaries differ from one another). This knowledge can save jurors from being struck for cause when they feel strongly that the extent of a defendant's role should count for something.

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Even when jurors understand the Law of Parties, though, some will still believe the law treats less-culpable defendants unfairly by convicting them of the same crime as primary actors. By welcoming these opinions, prosecutors flush out those jurors who must be struck. The ultimate question jurors must answer is whether they will convict a defendant if evidence proves beyond a reasonable doubt that he participated in a crime, even if he was not the primary actor. If the answer to that question is "no" or, in the alternative, if jurors cannot promise the court that the answer will be "yes," then those jurors may be struck for cause.

Unlikable victim or witnesses

How often do prosecutors lament before a trial, "The jury is going to *hate* the victim!"? Victims and witnesses to crime are frequently people whom jurors will dislike. Many victims and witnesses would, on other days, be criminal defendants. Nevertheless, the laws that protect the most loved and respected members of a community must also protect the drug dealers, gang members, and thieves. Thus, when a prosecutor knows that jurors will dislike a victim or witness, that issue must be addressed in voir dire.

Theodore Roosevelt once said, "No man is above the law, and no man is below it." This quote is an effective way to begin a conversation with a jury panel about unlikable victims. Asking jurors

what that quote means prompts them to talk about how the law applies to everyone. Prosecutors can follow up by giving jurors hypotheticals about crimes committed against those whose choices or lifestyles contribute to making them victims. By initiating a frank and honest discussion with jurors about whether victimizing a criminal is any less of a crime, the prosecutor prompts jurors to state what will become a theme of the prosecutor's case: "The law should protect everyone equally."

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Through this discussion, the prosecutor defuses the issue of a "bad" victim. Though the prosecutor cannot disclose the specific facts of the case during voir dire, this discussion tells jurors what to expect. The prosecutor gets jurors' *permission* to present a victim who is flawed. Some jurors may, nevertheless, struggle to convict a defendant for committing a crime against a victim who is also a criminal.[2] The question a prosecutor must ultimately pose to jurors is whether they can promise to convict a defendant once each element of the crime is proven *beyond a reasonable doubt*, even if jurors disapprove of a victim or his choices. Again, any jurors who will not convict once the burden of proof has been met, or cannot promise that they will, are subject to being struck for cause.

Just as prosecutors must use voir dire to prepare jurors for problem victims, the same is true for problem witnesses. If a prosecutor intends to call witness whom jurors will not like, the prosecutor must address the matter in voir dire. This is particularly true if a witness is an informant or cooperating co-defendant who received a benefit in exchange for information. For example:

"Juror No. 1, you're a firefighter. If I wanted to know about your daily behavior, who am I going to have to talk to?"

"The people I work with."

"Other firefighters who are around you all the time, right?"

"Exactly."

"Juror No. 2, you're a teacher. If I wanted to know what how you act every day, who are the best people to tell me?"

"The teachers and students I'm with every day."

"Juror No. 3, if I want to know what's going on inside a criminal conspiracy, who am I going to have to talk to?"

"Someone in the conspiracy."

"Right. Do you think they're going to talk to me, their friendly neighborhood prosecutor, out of the goodness of their hearts?"

"Probably not."

"Juror No. 4, do you think that there are times where the only way we can get information to bring to juries is to make a deal with someone that we don't like very much?"

"Yes."

*"*Should *we do that?"*

"I think so."

"Why?"

"Because it's important to get all the information that you can."

It's important to note that this discussion must be extensively looped throughout the jury panel. Additionally, the prosecutor must acknowledge the elephant in the room of whether information from a witness who is testifying in exchange for a benefit might be tainted. Effective prosecutors make clear in voir dire that *they* will let the jury know precisely what benefit a witness has received so that jurors can consider it in deciding a witness's credibility. Additionally, the prosecutor can weave this conversation back into a larger discussion about circumstantial evidence, corroboration, and weighing each piece of testimony against every other known fact in a case. Ultimately, the prosecutor must convey to jurors in voir dire that she would not prosecute a case based on such testimony *alone*.

During this discussion, the prosecutor has two objectives. First, she prepares jurors to look past a witness's flaws. Second, the prosecutor identifies jurors who will struggle to believe such witnesses. Jurors expressing skepticism about the credibility of criminal witnesses, or those who openly reject the concept of prosecutors making deals for testimony, must be struck from the jury in cases that depend on such testimony.

The reality prosecutors commonly face is that the only way to know what happened inside the snake den is to talk to some snakes. Often, the only witnesses to crimes will be criminals. By addressing the issue with jurors in voir dire, the prosecutor not only prepares the jury to receive evidence from difficult witnesses but also sets up the closing argument that the law's protection blankets the *entire* community and everyone in it. After all, for the law to protect *anyone*, the law must protect *everyone*.

One-witness cases

To prepare jurors to evaluate child sexual assault cases, an effective tactic is to get jurors' permission to present a case based upon one person's testimony: that of the victim. Consider the following example:

"Juror No. 10, does child sexual abuse happen out in the open or behind closed doors?"
"Behind closed doors."
"Juror No. 11, do you think most children who have been sexually abused immediately report it?"
"No."
"Juror No. 12, if sexual abuse happens behind closed doors, do you expect to have eyewitnesses to it?"
"No."
"Juror No. 13, if sexual abuse is not reported for months or years, are we going to have any physical evidence like DNA?"
"No."
"Juror No. 14, if we don't have eyewitnesses and we don't have physical evidence, how do we prove sexual abuse?"
"The word of the victim."
"Juror No. 15, should we prosecute sexual abuse cases if all we have is the word of a victim?"
"Yes."
"Why?"
"Because every victim has a right to be heard."
"Juror No. 1, what do you think about that? Juror No. 2, how about you?"

Again, by looping jurors' answers to numerous other members of the panel and asking for their thoughts on the subject, the prosecutor fosters a discussion that will reveal jurors who might struggle with that specific case, while simultaneously providing the prosecutor with material to incorporate into closing argument. When the defense lawyer later argues that the imperfect word of the victim is not enough to convict the defendant, the prosecutor can feed the jurors' own words back to them about how the victim, who had so many reasons to remain silent about the abuse, finally found her voice, and that jurors promised in voir dire that they would hear it.

When can we challenge for cause?

In my previous voir dire article ("Always Be Closing"; read it at www.tdcaa.com/journal/always-be-closing-using-voir-dire-to-argue-misdemean or-cases), I discussed the difference between these two questions:

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

Remember that if a juror needs more than one witness to believe guilt beyond a reasonable doubt, that juror is *not* challengeable for cause. Texas courts have consistently held that a juror is not disqualified merely because he would need more than the minimum threshold of evidence required by law. If, however, a juror *believes each element of the crime beyond a reasonable doubt* from one witness's testimony but still cannot convict, then prosecutors *can* strike that juror for cause.[3]

During voir dire, prosecutors must openly call for jurors whose consciences will not allow them to convict based on the word of only one person, even if the case is proven to them beyond a reasonable doubt. Welcome those jurors. Validate them. In so doing, the prosecutor flushes out others who feel similarly. These members of the panel must not serve on that jury. If they cannot commit to convicting a defendant after believing each element of the crime beyond a reasonable doubt, they can be struck for cause. Even those jurors who hesitate on this issue, though, should likely be struck with peremptory challenges.

Protecting State's jurors

In the "Always Be Closing," article, I discussed identifying and eliminating defense jurors during voir dire. An equally important yet often overlooked role of the prosecutor in voir dire is protecting State's jurors from being struck for cause by the defense.

Speaking first during voir dire gives prosecutors a significant advantage. In addition to proactively establishing our own themes, addressing potential weaknesses in a case, and preempting likely defense arguments, prosecutors can use that first contact with jurors to protect those who may otherwise be vulnerable to defense challenges for cause.

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- presumption of innocence,
- burden of proof,
- the Fifth Amendment,
- police testimony, and
- jurisdictional prior convictions.

Within those topics, a good defense lawyer will attempt to identify strong State's jurors and commit them to positions contrary to the law so they can be struck for cause. The defense lawyer's job is made far easier when the prosecutor fails to address these issues first.

Fifth Amendment. If the State fails to discuss the Fifth Amendment, for example, then the defense is free to address the topic however it wants. Consider the following example of how a defense lawyer might seek to strike jurors on the topic of the Fifth Amendment:

"Juror No. 1, if I told everyone here that you stole money from Juror No. 2's purse, what would you say?"

"I would say you're wrong."

"Juror No. 2, if I accused Juror No. 1 of stealing and, instead of denying it, his response to being accused was just to quietly sit there, his silence would say something to you, wouldn't it?

"Yes."

"On some level, you would think, 'He must have done it,' wouldn't you?"

"I think probably so, yes."

"So, if you're really being honest, if a person is accused of a crime, and they don't speak up to defend themselves, that's something you wouldn't be able to just completely ignore, is it?"

"No."

"Who else agrees with that?"

Jurors raise their hands.

Those jurors are now vulnerable to challenges for cause by the defense. But consider how that exchange would be different if, during the State's voir dire—before the defense attorney had a chance to address potential jurors—the prosecutor had the following discussion with the panel:

"Let's go back to high-school social studies class. Who can tell me what the Fifth Amendment is?"

Jurors: "Right not to incriminate yourself."

"Exactly. We see this on TV every time we watch police shows when we hear officers arrest people and say, 'You have the ...?"

Jurors: "Right to remain silent."

"That's right. In every criminal case, the defendant has an absolute right not to testify. And if the defendant chooses not to testify, the judge will instruct you that you cannot, under any circumstances, consider that choice as evidence of guilt. And if you think about that, it makes sense. Juror No. 1, who has the burden of proof in a criminal case, me or the defense?"

"You do."

"That's exactly right. The burden of proof is always with us as the State. It never shifts to the defense. Does everyone agree that it should *be that way?"*

Jurors agree.

"That's what 'innocent until proven guilty' means, isn't it, Juror No. 2? That the State has to prove you're guilty before you can be convicted?"

"Yes."

"Juror No. 3, do you see how if you held it against a defendant if he chooses not to testify, you're actually shifting that burden of proof over to the defense by requiring the defendant to provide evidence about why he should not be convicted?"

"Yes."

"Now, would you be curious about what a defendant might say?"

"Yes."

"Wouldn't everyone?"

Jurors agree.

"I want to make clear that it's OK to be curious. It is human nature to wonder about it or even to wish a defendant had testified. What is not OK, though, is to consider a defendant's choice to remain silent as some evidence that he must be guilty or hiding something. Juror No. 4, does that make sense?"

"It does."

"So, to the first row of jurors, can all of you promise the defendant that, if he chooses not to testify, you will follow the law and not consider that fact for any reason at all?"

Jurors promise.

"Second row?"

Jurors promise.

"Third row?"

Jurors promise.

This discussion, which takes no more than a couple of minutes, normally neutralizes any attempts by the defense to eliminate jurors on this issue.

Police testimony. Prosecutors can similarly inoculate jurors from being struck for cause on the issue of police testimony. Many potential jurors have great respect for law enforcement and might tend to believe police are likely to tell the truth. Defense attorneys frequently use that fact to attempt to strike pro-law enforcement jurors for cause. In a case that is heavily dependent on police credibility, prosecutors should address this issue during voir dire.

Consider the following discussion:

"The law says jurors cannot pre-judge witness credibility, regardless of whether the witness is a police officer, a pastor, or a prisoner. Only after you hear from a witness can you decide his credibility. Juror No. 3, is that fair?"

"Yes, it is."

"Juror No. 4, if you take the uniform off a police officer, what do you have?"

"A person."

"Well, you have a naked person, but a person nonetheless. So, can you promise the court that you will follow the law and not pre-judge the credibility of any witness, including police officers?"

"Yes."

By committing jurors to following the law, the prosecutor shields them from defense challenges for cause. The prosecutor might further shield them by making clear that the law *allows* jurors to assign greater credibility to witnesses like police or medical professionals, *if that assessment is based upon what jurors learn about the witness's knowledge, training, or experience*. Believing a witness's testimony about a topic in which he has training and experience is completely appropriate, provided that jurors don't automatically assume the witness is telling the truth merely because of his profession. Additionally, the prosecutor should point out that the only way jurors will know the extent of a witness's training or experience is if the witness testifies about it.

The Texas Court of Criminal Appeals addressed this very issue in *Ladd v. State*,[4] stating:

> A venireman is challengeable for cause under [Code of Criminal Procedure] Art. 35.16(a)(9) if he cannot impartially judge the credibility of witnesses. ... However, this means only that jurors must be open-minded and persuadable, with no *extreme* or *absolute* positions regarding the credibility of any witness. ... Veniremen are not challengeable for cause simply because they would give certain classes of witnesses a slight edge in terms of credibility, because complete impartiality cannot be realized as long as human beings are called upon to be jurors. Thus, [a juror] is not challengeable for cause because he would tend to believe policemen and doctors slightly more than others.

By addressing this topic head-on during voir dire, the prosecutor controls both the conversation and the extent to which jurors are vulnerable to being struck for cause by the defense. Oh, and always have a few copies of *Ladd v. State* with you during voir dire.

Jurisdictional prior convictions. During the guilt phase of certain felony offenses, prosecutors must show that a defendant has prior convictions. Such cases present defense lawyers with a great opportunity to strike pro-State jurors for cause. Consider the following exchange between a defense lawyer and a jury panel:

"Juror No. 1, we are here in this district court on a felony DWI case. That means that we could not even be in this courtroom unless my client had already been convicted of DWI at least two times before. Many people believe that if a defendant has already been convicted of DWI twice before, he is probably guilty the third time, just based on that history. Is that how you feel?"

"Yes."

"Sure. I know a lot of people here agree with you. How many of you here will tend to believe a defendant is guilty once you learn he's been convicted of the same crime multiple times before?"

Numerous jurors raise their hands.

With just two questions, the defense lawyer has gone a long way toward striking for cause a huge swath of the jury panel—and very likely busting the panel altogether. Was it great advocacy or skill on the part of the defense lawyer that resulted in the destruction of the jury panel? No. The person most responsible for this particular disaster is the prosecutor.

DWI, assault family violence, theft, burglary of a motor vehicle, unlawful possession of a firearm by a felon, and failure to register as a sex offender are among the offenses that require prosecutors to present evidence of a defendant's criminal history during the guilt phase of trial. In those trials, the judge will instruct jurors that

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By addressing the issue first, however, an effective prosecutor can immunize jurors from being struck for cause. To do so, the prosecutor must educate jurors on how the law requires them to consider the evidence. For as much as jurors believe past behavior predicts future behavior, they equally understand and accept that fairness requires each case to be proven on its own merits and that defendants should never be convicted of crimes merely because of past conduct.

they cannot consider prior convictions as evidence of guilt in the new charge. Rather, the jury gets to learn about those priors only to establish that the new crime is a felony.

As human beings, however, most jurors will naturally tend to believe that evidence of past criminal behavior suggests that someone is likely guilty of present crimes, particularly when the prior crimes are the same as the one currently charged. In seeking to challenge jurors for cause, a good defense lawyer will simply ask jurors to acknowledge and accept that common-sense principle without any explanation of what *the law* requires jurors to do with evidence of prior convictions.

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Consider the following example where a prosecutor protects jurors on this issue:

"Juror No. 1, suppose on Monday I get a speeding ticket that I completely deserved. The same thing happens on Tuesday, Wednesday, and Thursday. On Friday, however, I get a ticket that I did not deserve. I was not speeding, but the officer got my car confused with a nearby car that looked like mine. Now, imagine I plead 'not guilty' to Friday's ticket and take the case to trial. During the trial, the prosecutor tells the jury, 'Folks, you know *he's guilty because he did the same thing four previous times.' Is that fair?"*

"No."

"Why not?"

"Just because you have done something before doesn't mean you did it again."

"Juror No. 2, do you agree with your neighbor that that the State should have to prove each case on its own merits?"

"Yes."

"Why?"

"Because people shouldn't be convicted just because of their past."

"The law agrees with you. To show that this case should be a felony, I have to prove that this defendant has been convicted twice before. But the judge will instruct you that you cannot *consider those prior convictions as any evidence that the defendant is guilty of this current charge. Juror No. 4, can you promise the court that you will follow that law?"*

"Yes."

By committing all of the jurors to this basic principle of fairness, the prosecutor accomplishes two things. First, jurors are protected from challenges for cause because they now understand what the law requires with respect to evidence of prior convictions. Second, the prosecutor establishes her own credibility and fairness by soliciting a promise from jurors that they will convict only if the evidence from the current case proves the defendant's guilt.

Note that some jurors may interpret this principle to mean that prior convictions don't matter *at all*. Such jurors often feel that completely disregarding a defendant's past crimes is unreasonable in a criminal trial. However, if the prosecutor makes clear that prior convictions can be considered for all purposes during the *punishment* phase of trial, those jurors who feel that prior conduct should count for *something* will frequently be satisfied. As a result, those jurors are less likely to fall prey to defense challenges for cause.

Protecting jurors you *want* from defense challenges for cause is as important to success in voir dire as eliminating jurors you *don't want*. In nearly every trial, defense lawyers use the same issues to attempt to eliminate strong State's jurors. "State's" jurors, however, tend to have a common trait: They respect *the law*. Thus, by informing jurors of the law and then committing them to follow it, prosecutors significantly diminish a defense lawyer's ability to eliminate State's jurors without using peremptory strikes.

Why it matters

Following trial losses, prosecutors frequently lament that juries "just didn't understand the law," "didn't care," or "hated the victim." Other times prosecutors simply complain that a "bad jury" was to blame for the defeat. These are mere excuses. Defeat is a far better teacher than victory will ever be. Each loss is an opportunity to learn.

Rather than making excuses and shifting blame for poor results, good prosecutors consider what *they* might have done differently to change the result. Rather than complaining that jurors didn't understand the law, good prosecutors ask, "How could I have explained it better?" Instead of focusing on a jury's dislike for a victim or witness, good prosecutors evaluate how they could have better prepared the jury for the witnesses in that case. Where some might blame a "bad jury," good prosecutors look for how they could have seated a *better* jury.

The answers to these questions begin in voir dire because jurors view everything that happens in a trial through the lens of voir dire. By crafting jury selection to address the specific issues of the case being tried, prosecutors create the best chance to win. Justice in our communities depends on our ability to identify issues before trial and overcome them during trial. A tailored and effective voir dire is often the difference between justice and another excuse. ❇

Endnotes

[1] Tex. Penal Code §7.02.

[2] Such questions are permissible under *Standefer v. State*, provided they go to a legitimate challenge for cause and contain no unnecessary facts.

[3] See *Castillo v. State*, 913 S.W.2d 529 (Tex. Crim. App. 1995).

[4] 3 S.W.3d 547 (Tex. Crim. App. 1999).

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