
VOIR DIRE FOR MURDER

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Recently, I had the amazing opportunity to try a murder case with one of this nation's finest trial attorneys—our own John Zelbst. Last June at TLC I spent many hours listening to John talk about a murder case he was preparing for trial. I do not know what intrigued me more, the facts or just listening to John tell the story. Which do you suppose is more interesting? Eventually, I asked John if he wanted some help and, to my great pleasure, he took me up on it. When he was a week out, I boarded a plane in California and flew out to Oklahoma City and began preparing for trial. At first, the case sounded as though there was actually a chance to win. After I met the witnesses, however, I knew we were in for the fight of our lives. It was as if Hollywood had cast the perfect characters for a new movie titled *The Beverly Hillbillies Are Addicted to Crystal Meth*.

The facts were simple but unfortunately, our witnesses' intelligence was even simpler. Our client was accused of shooting an 18-year-old boy at a 1999 Halloween party after a fight broke out. The prosecution's main witness, a childhood family friend of our client's, would testify that our client told the deceased to leave the party. The deceased was standing outside the entry door unarmed when the witness saw our client draw down on him with a Glock 9mm, shooting him clean through the heart and killing him instantly. Our client then ran out of the house, climbed into his truck and quickly drove off ramming his truck into another fleeing partier and forcing them into a ditch.

As you can imagine, voir dire would be enormously important. We had many issues to address including several about the gun itself. How would the jurors feel about a gun being pulled out at a party where young people were drinking, many of who were already drunk? How would they feel about the fact that the gun, for intimidation, had been brought out several times before the fatal shooting? What would they think about testimony that, at one point, the gun had even been fired in the air 5 or 6 times to get the attention of the party goers? In addition to these troubling issues, we were worried about the effect on the jury of the presence of the family of the deceased, some 15 to 20 people, including his grandmother, at the trial.

We were also concerned about the fact that our client had given 4 different statements to the police and if he were to testify at trial he would have to give yet a fifth. We were concerned that people on the jury would think that the attorneys were ma-

nipulative because John had sent several of the witnesses back to the police to tell different stories. Many of our witnesses had originally lied to the police and at the trial they were going to have to start off their testimony by admitting they lied. One of the strongest facts for the prosecution was the missing murder weapon, slug and shell casing, which would make the defense of accidental shooting tough to sell. We also had the usual issues of burden of proof, presumption of innocence, circumstantial evidence, and whether our client would testify.

Jury selection took two full days. John handled the general voir dire of the first twelve jurors selected and I questioned the ten jurors who were selected after each of the ten preemptory strikes. John's first question to the jury was for permission to ask them personal questions about their life experience. He explained that he felt it was necessary for him to ask such questions because he wanted to be a really good friend to Chris, our client. John asked, "Given the seriousness of the charges would it be OK with y'all if I visit with you?"

They all nodded at the same time. The feeling in the room was that they were nodding in approval of John's compassion for Chris, and that he wanted to do a really good job for his friend's life (not the defendant). The jury seemed to acknowledge the seriousness of the charges and agreed that they were going to have to help him.

John spoke to the jury about justice. He said that to him it was the single most important issue. He told them that he needs to trust that they will seek the truth and that the truth demands justice. He confided in them that he was concerned that since there was a tragic death that people would want to help. He shared a deeply personal story about his father's accident that left him paralyzed. John became noticeably emotional when he admitted "for the longest time he looked for a villain to blame for his father's accident, including God." It was not until he was older that he accepted the reality that there was no villain. "It was just an accident."

John asked the jury not to look for a villain if, after hearing all the evidence, they agreed with him that the shooting was just an accident. He asked them to listen and to be fair, to be just. John then told them that he trusted them to make the right decision even if it was not what he wanted, "no matter what the outcome, as long as it is right, as long as it is fair and as long as it is justice." He asked them if they felt the same way. They all agreed. He

asked if anyone disagreed. Who would? He then asked them if it would be all right with them if we all became the justice family in search of perfect justice. Once again they all nodded their heads, however this time with an expression that appeared to indicate that they were empowered to save a life. The feeling in the room was awesome.

John told the jury up front about all of the lies told by our witnesses to the police. He also told them that we were going to embrace the truth, all of the truth of the story. We were going to hold nothing back. He explained that no case is perfect and this case was no exception. John shared with the jurors that it was important to him that we be open and honest, which would mean that we would not hide a single bad fact from them.

John then leveled the room with his next statement. He said that he was concerned that some people would consider him an actor or a fake. "It happens too often on TV," he commented. John said in a booming voice, "I want to make a bargain with you, if you find that Joey or me are acting at any time, I want you to convict Chris and throw away the key." A powerful silence gripped the room. The client turned white. The prosecutor was in disbelief. Still silence in the room. Then the gravity of what John had just said began to make sense. It was a bold statement made by a man who absolutely believed in himself, his cause and his willingness to embrace the truth of his case. He was pure in his pursuit and his bargain was for real. Never before have the words "Know thy self" seemed truer.

John then went into his "let's sit and visit" routine that engaged the jury and slowly allowed them to start contributing. John has a style or personality that during voir dire makes you feel as though you are sitting down for coffee and cake in his living room. He allows you to feel safe and has an amazing ability to distract you from your own fears of sharing personal experiences in front of strangers.

Several jurors called us after the trial and I asked one of them how he felt during the voir dire. He said that he had initially felt really uncomfortable and that he does not like to talk in public or to draw attention to himself. I asked him if that had changed at some point and he said it did but that he cannot even remember why or when. He was intrigued by the question and through his answer had realized that at some point he was drawn into freely sharing and contributing and he did not even know it.

John also used a technique that I plan to use in the rest of my cases. The prosecutor had to prove intent for first-degree murder. John said that there would be no evidence of intent and wanted to know how the jury would try to look for intent. No one had an answer. John suggested that we just can't crack open someone's head and look inside and see intent. The tone of his voice and his body language were key here so as not to look ridiculous, sarcastic or phony. He asked a ridiculous question in a way that caused everyone to seriously reflect.

Of course the jury could not crack open the skull of our cli-

ent and see intent. John asked them what they would want to see before they felt safe and secure about concluding that they had seen intent. Several jurors said that they would want to see a confession, or a writing or some act that would conclusively show our client must have intended the act. John's idea was that if he locked them into this level of proof, anything short of that would be insufficient. His idea worked. The jury never found intent.

Another very strong theme that John used throughout the voir dire, case in chief and especially in his closing was the idea that the jury should not "guess him into the penitentiary." This came from John's voir dire on circumstantial evidence. He "visited" with one juror about it and what ended up coming out was that when we review circumstantial evidence we are ultimately forced to make a guess as to what it means. What made John's discussion so brilliant is that he did not give the jury his answer, or his agenda, (how many times have we seen even the most experienced trial attorneys try to force their agenda on jurors?). John just kept asking jurors the question "why." It took 2 or 3 jurors until one of them finally said, "I guess it would force me to guess." Then John asked, "Well is it OK for us to just guess Chris into the penitentiary?" Once again, the entire jury shook

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their head in disapproval. John asked, "Why?" One juror said it would not be fair. John said he agreed and asked who else felt it was unfair. Another juror said that to send a person to prison for the rest of his life on a guess would not be justice. John's response, "And you are not going

to let that happen here in our justice family are you?" "No way," was the response.

Towards the end, John asked the jurors how they felt about lawyers. He said that lawyer jokes hurt him because he has a need to feel proud about what he does. He agreed that there are a lot of bad ones out there, but asked if the jury had room in their hearts for the idea that there are at least a few good ones. He asked them to open their hearts to us, if they found us to be good honest lawyers, and that we would keep up the bargain we had made with them earlier. Again, they all agreed.

We then began to voir dire the replacement jurors from the preemptive strikes. I had not prepared a voir dire because it had been the plan to have John do it. After a day of intense listening, however, I felt that I had a pretty good sense of where the jury was. John agreed and turned the jury over to me. He had done all of the heavy lifting, and the jury was warmed up, which is the most critical aspect of getting a jury to share. I decided to come at them from a different angle, so my questions were more psychological and probing. The difficulty that I faced was trying to unite the entire group while only being allowed to speak to one person at a time. In this situation it was important to stay on topics that I anticipated would ring true in all people, and to continue to establish eye contact and speak to all of the jurors rather than just the one answering the questions.

I wanted to find some aspect in each of the jurors that made them feel powerful, happy, and important. I asked one after the other questions that were intended to cause them to reflect on an experience or aspect of their life that made them feel good. I asked them to place themselves in the scene, briefly describe it for us and then I would ask them to put words to the feeling they were left with. (Yes, this was a quick, down and dirty psychodrama.) While they were describing the scene and their feelings I did a quick role reversal with them so that I could get some insight into their experiences. Often, what you get from jurors are conclusionary statements such as “it was great, it felt good, it was wonderful, etc.” A follow up question, however, such as “why” will reveal the real gold about what the person really took away from their experience.

After I listened to their feelings I racked my brain to find a theme in our case that paralleled their feelings. The idea was to link their feelings from their personal experience to the various themes of our case. When we got negative feelings or experiences I associated those to the weaknesses in the prosecution’s case. Sometimes these points were obvious, sometimes they were not.

For example, one juror was a janitor. The prosecutor made her feel stupid when he asked her what books she frequently reads. None. What community organizations she belonged to. None. Could she be fair despite not having any experience with guns? Yes.

I asked her if she had ever been falsely accused or if she knew of someone that had. After she shared her experiences involving the power of a false accusation, I asked her how it felt. The answer was revealing as to her emotional dissatisfaction. False accusations were clearly a theme in our case. Now that she is set up to feel bad when she sees the prosecutor point his finger at the accused during opening (they love to do this), I wanted to find a way to get her to associate a good feeling when she thinks about our case. I asked her if she agreed that her job required her to have a well-developed attention to detail, and an ability to focus her attention for long periods of time on what many others view as trivial tasks. She agreed.

I asked if this skill requires a lot of experience to develop, and that as a result she must have seen a lot of people come and go who could not develop her skill. She became enthusiastic and agreed once again. Then I asked her if she would use this skill while listening to boring, mundane, repetitive, trivial testimony. I asked if she could focus for several weeks and pick up facts that others may throw away or miss completely. Her face lit up and she agreed that she would be very good at doing just that. Another theme was to provide many different facts that could produce a variety of different possibilities and stories that we needed the jury to invent for us. Whom do you think she will be working for now? In addition, once the rest of the jurors heard us, the attorneys, say that that was a valuable skill to have, they made a mental note of it as well.

The last point that I hit on was the idea of proof and innocence. I asked a juror if he had heard of innocent people being convicted. I looked at the entire jury when I asked this question and they nodded their heads. I asked them how could an in-

nocent person be convicted? I mean how does it happen? Most people have no idea. I wanted the jurors to focus on the question how innocent people are convicted.

I believe that a human brain is much like a computer. If you ask it a question, it will not quit until it comes up with an answer. The answers may differ among individuals, but they all search for an answer. Many jurors give answers like, “bad defense lawyer, bad evidence, mistaken evidence, etc.” Each one of these answers set you up for some beautiful follow-up questions and conversations. I believe that their answers, however, will not truly satisfy them because these answers are all guesses. Generally, when people guess they want to know if they have guessed correctly. If there is no confirmation then they are left feeling uneasy. If this concept is used with a properly developed voir dire of circumstantial evidence, burden of proof and innocence, the jury will be left with the fear that they may wrongfully convict someone because they have to guess.

The idea is to increase the level of proof each person needs in order to satisfy reasonable doubt. This worked so well that the prosecutor in his closing argument said that I tried to trick the jury into being so afraid that they would freeze up and not be able to do the job that they swore they would do. He said that they had nothing to be afraid of and that to even suggest that they should be concerned about making the wrong decision was ridiculous. I can tell you that the feeling in the court room when he said that was one of ridicule and disbelief that a prosecutor would sound so desperate and would generalize their freedom.

I spoke with four jurors after the case that said that within five minutes after entering the deliberation room they had all voted NOT GUILTY. They felt, however, that they would get into trouble if they did not stay in the jury room longer than 5 minutes. So, they simply went over all of the admitted evidence, voted again, took a 15 minute break that turned into 25 minute smoke break and then returned to the courtroom with their verdict.

The voir dire techniques we learned at TLC truly work, but they are not silver bullets. There is no substitution for hard work and thorough preparation. These techniques will only ensure that the amount of time that you put into the case is not wasted. The techniques help the attorney see the big picture after they have become immersed in the minutia. The belief that these techniques will allow one to read the file on the way to court and win the case is exaggerated and misleading. If an attorney does take this short cut and can incorporate TLC techniques well, then I would agree that the attorney stands a better chance of representing his or her clients than without these techniques. The prosecutor in our case called around asking about John and those prosecutors that knew him or of him said that when you are sleeping, John will be working on the case. There is no substitute for hard work and thorough preparation. The techniques taught at TLC are designed to make us better communicators, which we cannot do if we have not prepared our cases. ☹