

NUTS & BOLTS

4th Annual

San Antonio Criminal Defense Lawyers Association
Bear County Justice Center
Central Jury Room
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Mark Stevens
310 S. St. Mary's, Suite 1505
San Antonio, TX 78205
(210) 226-1433
mark@markstevenslaw.com

Argumentation

I.
Opening Statements

If you only remember one
thing from this lecture . . .

80%

Your mission is simple.

To convince the jury,
before it has heard a single
witness, that you should
win.



The First Rule

- The most important rule.
- Do not waive your opening.
- Ever.

80%

Tell a good story

- Tell the jury your story.
- The question and answer format is the worst way to tell your story.
- The narrative format is better.
- There are two basic narratives:
 1. The defendant is good.

The defendant is good . . .

- First offense DWI, with no breath test and a good video.
- She looks just like my _____.
 - Mother
 - Sister
 - Wife
 - Daughter
- Congratulations. Don't do it again.

Tell a good story

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- The narrative format is better.
- There are two basic narratives:
 1. The defendant is good.
 2. The government is bad.

The government is bad . . .

- He deserved to die.
- There is no . . .
 - video
 - breath test
 - fingerprint
 - DNA
 - whatever
- The crime scene was contaminated.
- The police are racists.

Or both

Jury Clears Ex-Detective In Shooting Of Vandals

San Antonio Express-News
May 13, 1996

Readers say ex-detective justified in shooting

Jury clears ex-detective in shootings of vandals

Metrc

Readers say ex-detective justified in shooting

"Almost 93 percent of callers responding to a weekend telephone Expressline survey supported jurors who found former San Antonio police officer Steve Espinosa not guilty of aggravated assault charges Friday."

The theme

- What is your theme?
- "This is a case about . . ."
 - "That is exactly what this case is all about: People who don't act within the confines of the law."
 - This "man of the law."
 - Those "outlaws."
- Themes are good.
- Don't be consumed by the need to come up with a theme.

Promises, promises

- Don't make things up.
- Your story is a narrative, but not a work of fiction.
- Don't promise more than you can deliver.

What's so hard about openings?

- Openings are hard.
 - They must be based on the evidence, but there hasn't been any evidence yet.
 - Compare to closing arguments.
 - You hate to give away too much of your case to the state.
 - An opening that gives away nothing is worthless.

So, be specific

- Specificity is compelling
- Specificity is memorable
- As specific as you can.
- Mostly with the facts.
- Talk about a little law.
 - from the defendant's standpoint.
 - apparent danger.

Integrate

- Integrate your opening statement with the rest of your case.
 - Lay your foundations in voir dire.
 - Remind them in your opening.
 - Return during witness examinations.
 - Finish it off in closing.

A little law

Tex. Code Crim. Proc. Ann. art. 36.01(5)

- "The nature of the defenses relied upon and the facts expected to be proved in their support."
- May be made immediately after the state's opening, or after the state rests.

The mantra

- “The evidence will show”
- Contrary to much teaching, you don’t have to start every sentence with this mantra.
- Occasionally, though, it’s useful.

Objections

- “Argumentative.”
- “Outside the record.”
- “Irrelevant.”

Prosecutors object most when they are hurt.

Handling objections

- “The evidence will show”
 - “Ladies and gentlemen, I’m entitled to talk about what the evidence will show, and I promise you, the evidence will show”

What tone will you use?

- Perhaps a little less passionate than your closing.
- “Ladies and gentlemen, I will try to speak loud enough so that you can hear me, but I won’t scream at you and I won’t pound on the table.”

Gizmos

- Demonstrative evidence?
 - Powerpoint?
 - Exhibits?

Motions in limine

- Expect the worst from your opponent.
- Be specific.

Deal with the bad stuff

- If you can't limine it out, deal with it.
 - He shot 10 times.
 - It was a 14 shot gun; he had 4 shots left.
 - Sleeping bags and hamburgers; he laid in wait.
 - No, the thugs drove him and his family out of their home.

Listen

- Listen to the other side.
 - If they say something stupid, make them pay.
 - "that group of kids, as she calls them"
 - and their "drinking club"
 - It's almost as good as real discovery.

Time flies

- Unlike your closing, it will probably be unrestricted.
- Don't abuse the freedom.
- 28 pages, 30 minutes, is long

What the defense never gets

The last word.

Important, but

- Opening statements are extremely important.
- Extremely.
- But you can't win your case by an opening statement alone.
- You still have to pay attention to the fundamentals.

II.
Summation

Every trial lawyer's dream

- It is Monroeville, Alabama, 1935.
- You represent an innocent man charged with a capital crime.
- You rise to address the jury.
- "I am confident that you gentlemen will review without passion the evidence you have heard, come to a decision, and restore this defendant to his family. In the name of God, do your duty. In the name of God."

To Kill A Mockingbird

- Harper Lee, 1960
 - Pulitzer Prize for Fiction, 1961
- Gregory Peck, 1962
 - Best Actor in a Leading Role, 1963

Final arguments are . . .

- Not easy.
- Not unimportant.
- They are just easier, and less important, than many of the other skills and sub-skills that a criminal defense lawyer must master.

Why final arguments might be (relatively) unimportant

- Most people make up their minds right after opening statement.
- Almost everyone has made up their minds before closing.
- But . . .
 - Style and pride are worth a lot.
 - Sometime arguments do matter.
 - What if they matter more than we think?

But . . .

The New York Times



"The eight jurors, who agreed to be interviewed by reporters inside the courtroom, said Mr. Belnap's closing statement was crucial in giving them a roadmap of the law."

"It was the closing statement that did it," said Rachel Karimi, the alternate juror who joined the panel Tuesday morning."

Why final arguments are (relatively) easy

1. They must be based on evidence actually admitted.
 - a. Unlike openings, there is no need to predict the future
 - b. Unlike openings, there is no concern over showing your hand
 - c. By the time you get there, the closing has virtually written itself
1. There is little need to think on your feet.
 - a. Heavily scripted is good
 - b. Contrast voir dire and cross-examination
 - c. But be prepared to go off script and respond

At the very least your argument must . . .

. . . make the jury feel good - or
at least comfortable - about
reaching the result you want it to
reach.

Organize!

1. Avoid the "yellow pad" method.
2. The trial notebook method is better.
 - a. red line -- organize as you go
 - b. outline
 - c. write it out
 - d. outline it again

Adopt a familiar structure

1. My fear; the jury's oath; reason, not lawyer talk
2. The law
 - a. presumption of innocence
 - b. proof beyond a reasonable doubt
 - c. defenses
 - d. lessers
3. The evidence
 - a. reasons to doubt
 - b. with specific references to the evidence
4. An ending

Integrate your summation
with the rest of the case

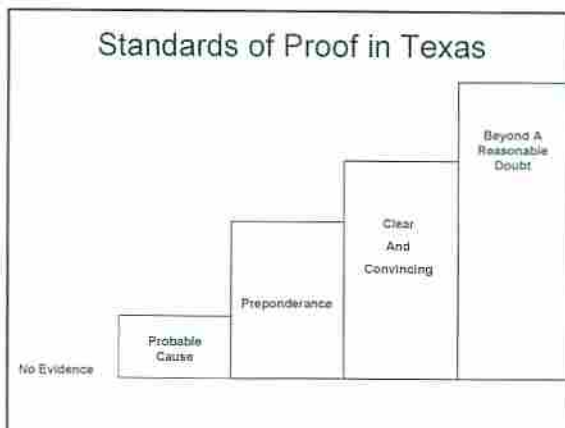
- Voir dire
- Opening
- Cross-examination
- Summation

"Common Sense"

- The prosecutor has no more right to rely on common sense than you do.
- Never make an argument in which "common sense" is not expressly mentioned, at least once.
- Never.
- Seize "common sense" early on, and talk about it often.

"Reasonable Doubt"

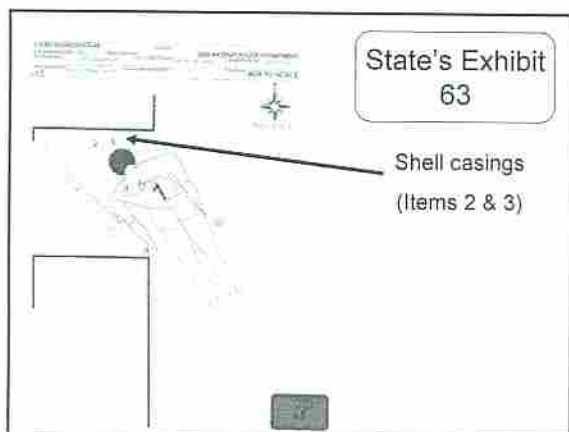
- What is it?
 - More than enough to take children away



"Reasonable Doubt"

- What is it?
 - More than enough to take children away
- What it is not.
 - Possibly
 - Probably
 - Maybe
 - Might

Be Specific




Make the jury feel good

1. Juries are not instruments of law enforcement.
2. The system works anytime jurors do the right thing.
3. Don't:
 - a. thank jurors insincerely.
 - b. apologize for being a lawyer, or doing those things lawyers are supposed to do.
 - c. put the jury to sleep in the beginning of your argument.
4. Avoid slang.
 - a. "cut him loose"
 - b. "walk him"
 - c. cussing

Litigation Psychosis

- People hate to be conned.
- If you don't believe in your argument, why would a jury?



The Most Unfair Rule in Texas Criminal Law

- Tex. Code Crim. Proc. Ann. 36.07

"The order of argument may be regulated by the presiding judge; but the State's counsel shall have the right to make the concluding address to the jury."

- Explain it to the jury (and your client)
- Make objections
- Anticipate

Anticipate

1. The prosecutor opens.
2. The prosecutor closes.
3. The bouncing red ball.
4. The charts.
5. Shifting the burden.

Charge Of The Court

"The law does not require a defendant to prove her innocence or produce any evidence at all."



Showtime

1. Where do you stand?
2. Where do you put your hands?
3. How do you dress?
4. How loud do you speak?
5. Who do you look at?

Humor?

Yes.

But be careful.

When in doubt,
don't do it.



Humor?



Using The Jury Charge In Argument

"This is what Judge Harle tells you in his instructions. I'm not making this up.

- The burden of proof
- The presumption of innocence
- Lesser included offenses
- Defenses

Charge Of The Court

"The law does not require a defendant to prove her innocence or produce any evidence at all."

"The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case."

Charge Of The Court

"It is a defense to this prosecution if the defendant's conduct was justified by law."

Save the ultimate points for argument



Time is always a problem

1. Time to prepare.
2. Time to deliver.
 - a. It is never enough
 - b. Know how much time you need and ask for it
 - c. Do not take more time than you need
 - d. Ask for a 5 minute, or a 2 minute warning
3. To share or not?

It ain't over til it's over

- Save some time, and some energy, for the jury charge.
- Be prepared to object to impermissible argument from the prosecutor.

The Law

Herring v. New York, 422 U.S. 853, 865 (1975)

- The complete denial of the right to make a closing argument in a criminal case violates the defendant's right to effective assistance of counsel under the Sixth Amendment.
- *Dang v. State*, 154 S.W. 3d 616, 620 (Tex. Crim. App. 2005) (the right to argue is "hollow" unless the time allotted for argument is reasonable)

Alejandro v. State, 493 S.W. 2d 230, 231 (Tex. Crim. App. 1973)

- Jury arguments need to be in the areas of:
 - summation of the evidence
 - reasonable deduction from the evidence
 - plea for law enforcement
 - answer to argument of opposing counsel

Cockrell v. State,
933 S.W. 2d 73
(Tex. Crim. App. 1996)

- Waiver: No objection, no reversal.
- The proper way to object.
- No frivolous objections.

Jury Argument
State Bar of Texas
Advanced Criminal Law Course
Jack Strickland

Powerpoint

- Prosecutors have it.
- It's time you do too.

Meredith,
June 6, 2005



Defendant's Exhibits 1 & 2



Possession of Cocaine, 4-200 grams



Theft

Roberts: "I told you you didn't have to come.

Maze: "I know but I want to do the right thing."

Roberts: "This is the right thing. It's better to come out with the truth now than a year from now and people would say, ah, she's had all this time to make all this shit up."

Detective Raymond Roberts
June 6, 2005

"And the truth is the truth. So,
you know, the truth shall set
you free, they say."

To Kill A Mockingbird

- "Miss Jean Louise, stand
up. Your father's passing."
