

# VOIR DIRE



## FELONY PANEL TRAINING Attorney Training- March 2019

Heather Brown  
Senior Deputy District Attorney



# THIS IS THEE MOST IMPORTANT PART OF TRIAL

Don't let anyone tell you otherwise..  
You can have all the facts in the world,  
but if you've got a whacko on there it  
doesn't mean a thing..

# PURPOSE OF JURY SELECTION

WIN EM OVER TO YOU & YOUR CASE!

PREPARE THEM FOR WEAKNESSES

WEED OUT THE WHACKOS

**WIN THEM OVER!**

THIS IS YOUR OPPORTUNITY TO  
SHINE!!!! SOMETIMES ON YOUR  
GAME.. SOMETIMES NOT...

**USE PENCIL!!!!**

BEST ADVICE I CAN GIVE YOU

# YOU'VE GOT A FEW MINUTES TO:

1. COMMAND THE COURTROOM
2. GET THEM TALKING
3. GET THEM TO LIKE YOU
4. GET THEM TO LIKE YOUR CASE
5. (and want to convict!!!)



**WALK TO THE DOOR WITH  
YOUR HANDS FULL...**

DROP SOMETHING! SEE WHO  
PICKS IT UP... WHO OPENS DOOR  
FOR YOU...



**BE YOURSELF!!!!**

IF YOU'RE FUNNY... BE FUNNY

IF YOU'RE SMART.... BE SMART

IF YOU'RE A BORING DORK...

# WHERE DO YOU START?

Hammer out a clever question that can lead you into your questioning that you can use in all cases

**\*\* never the same jurors twice\*\***

No one will know you used the same schtick in the last trial!!!

# HAVE YOUR OPENING LINE..

WHEN YOU STAND UP... YOU  
SHOULD HAVE YOUR OPENING  
ZINGER... SO THEY'LL LISTEN TO  
YOU.... THIS IS WHERE YOU WIN  
THEM OVER...

IF YOU DON'T HAVE A  
ZINGER.....

GO AND POACH ONE!!!!

**DO NOT ASK GROUP  
QUESTIONS AND EXPECT TO  
GET PEOPLE TALKING**

ASK INDIVIDUAL QUESTIONS....

NOT YES OR NO Q'S.....

HEAR THEM SPEAK!!!!!!

# EVERYONE LOVES TO TALK ABOUT THEMSELVES.....

GET THEM TALKING!!! (I ALWAYS HAVE  
JURORS SAY “WHY DID YOU PICK ME?  
WHY DIDN’T DEFENSE ASK ME ANY  
QUESTIONS?” . ETC.

\*\* they rarely even mention the evidence\*\*

# USE HYPOS!!!!!!

It's the most effective way of demonstrating legal concepts AND it gets people talking... and thinking..



IF THEY ANSWER YOU...  
LISTEN TO WHAT THEY ARE  
SAYING...

ASK A FOLLOW UP QUESTION!

# INTRODUCE JURY TO UNFAMILIAR LEGAL CONCEPTS

“WHEN WE THINK OF CHILD  
MOLEST... WE THINK OF \_\_\_\_  
ACTUALLY LEWD ACT ON  
MINOR.. “





# YOU HAVE READ YOUR CASE OVER AND OVER...

They hear it once with the evidence,  
and in piecemeal bits and pieces....

What seems obvious to us- isn't  
obvious to them!!!

**THE LAW SEEMS OBVIOUS  
TO US!!!**

But it's not to them!!!!





# ALWAYS TALK ABOUT CIRCUMSTANTIAL EVIDENCE

ALWAYS!!!! ALWAYS!!!!  
ALWAYS!!!!



**THIS IS THE SINGLE MOST  
IMPORTANT THING YOU CAN  
TALK ABOUT!!!!!!!**

Every piece of evidence/ every case/  
every everything comes down to this  
one legal concept

EVERY SINGLE PIECE OF  
EVIDENCE HAS CIRC EV  
LINKED TO IT!!!

NATURE OF WITS RELATIONSHIP  
BIAS, MOTIVE TO LIE  
WEARING GLASSES, FEAR, DRUNK

# CIRCUMSTANTIAL EVIDENCE...

HYPO: BANK ROBBERY  
COOKIES, RAINING, ETC...

# SPECIFIC INTENT??

USING CIRCUMSTANTIAL  
EVIDENCE... USE A HYPO!!!  
MAN IN NORDSTROM...

# THIS IS ALSO A WAY OF WEEDING OUT THE WHACKOS!!!

ASK THEM POINT BLANK IN YOUR  
HYPO: CAN YOU DETERMINE WHAT'S IN  
THEIR MIND?? I.E. DRIVING DOWN  
STREET.. BLINKER (DON'T HAVE TO YELL  
OUT WINDOW)

# WOULDN'T YOU AGREE #7 THE ONLY WAY TO DETERMINE WHAT'S IN SOMEONE'S MIND. IS CIRCUMSTANTIAL EVIDENCE?

MAN SAYS HIS WIFE ACCIDENTALLY  
FELL OVERBOARD..... YET SHE'S GOT  
CEMENT BLOCKS AROUND HER  
ANKLES, TRACES OF SEDATIVE IN  
HER DRINK, AND GUESS WHO  
BOUGHT CEMENT FROM HOME  
DEPOT A WEEK PRIOR?



# TV SHOWS?

CSI?? Law and Order, Perry Mason, Dexter,  
Crimetime, Diagnosis Murder, Blind Justice,  
FBI Untold Stories, etc..

659 TOTAL ACCORDING TO WIKIPEDIA



# ADDRESS IT!!!!!!

MOCK THE SHOWS!

JUST REAL PEOPLE IN REAL LIFE..

MAKE A JOKE OUT OF IT.. "THEY DON'T SHOW  
YOU THIS PART ON LAW AND ORDER DO THEY?"

USE A HYPO

**BUT, USE THOSE SHOWS  
TO YOUR ADVANTAGE...**

JURORS WANT LAW AND ORDER,  
THEY WANT TO DELVE INTO THE  
MIND OF THE PERPETRATOR...

# BRING THE IDEA OF CIRCUMSTANTIAL EVIDENCE BACK AROUND IN CLOSING ARGUMENT

Reasonable vs. Unreasonable

2 rx = tie goes to runner

Unrx = MUST ADOPT RX  
INTERPRETATION

**“DON'T TOUCH ME LIKE  
LALO DOES..”**

# YOU WOULD HAVE TO BELIEVE:

LIST EVERY MOVE THE PERSON WOULD HAVE  
TO MAKE FOR THEM TO BELIEVE THE WITNESS IS  
LYING.. (IF INCONSISTENCIES, THIS IS PERFECT!!)  
THEY MASTERMINDED THEIR STORY- YET  
THREW IN SOME INCONSISTENCIES TO BE  
REALLY CONVINCING...

# TALK ABOUT THE WEAKNESSES!

- Defendant is good-looking; looks innocent, although she's not.
- Recanting victims (DV) (address in voir dire)
- Unsavory witnesses (address in voir dire)
- Unsympathetic victim (address in voir dire)
- Incomplete investigation (voir dire )
- “Technical” violations of the law (should be dealt with in Voir Dire)

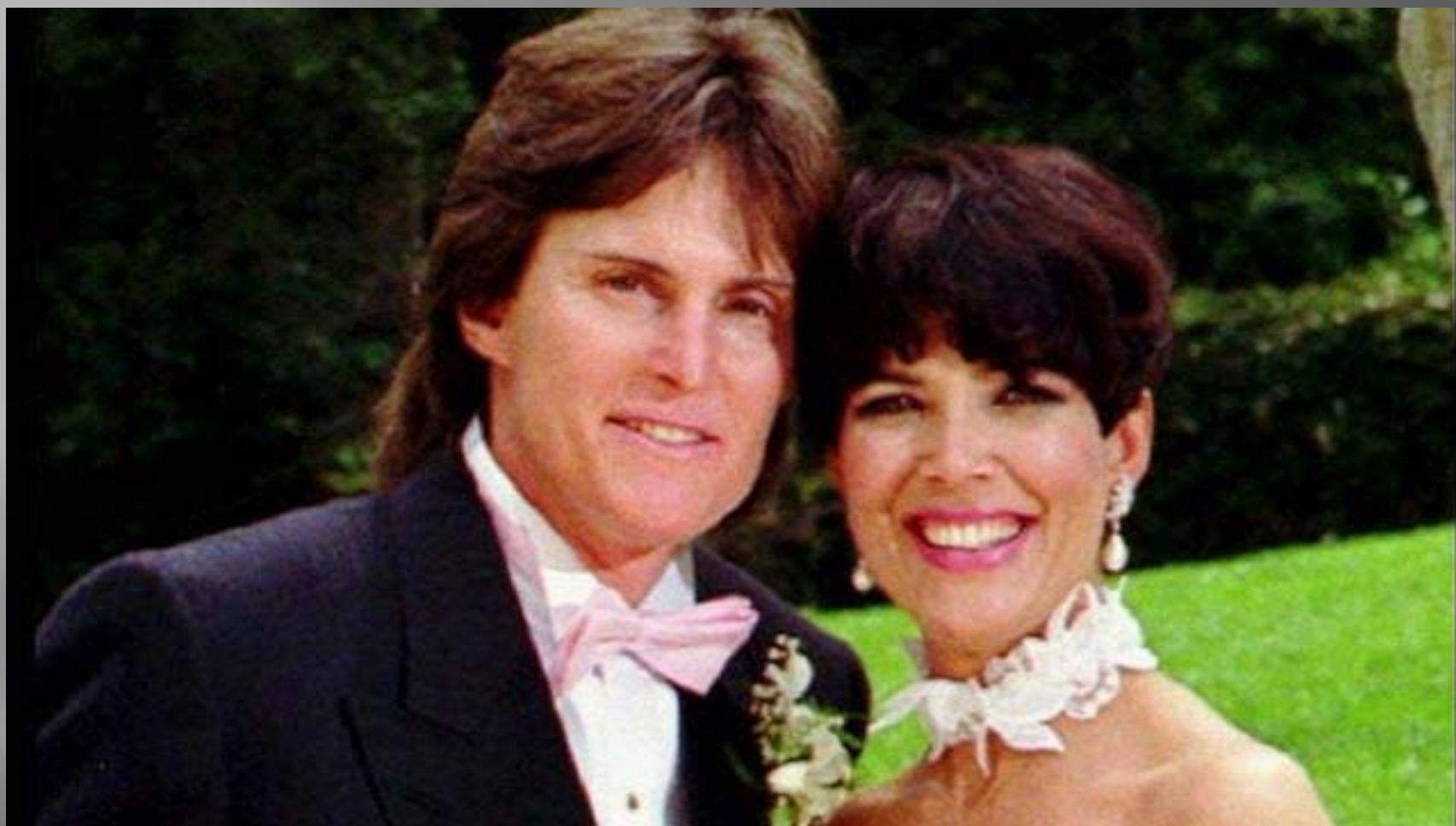
# SWEATER VESTS....

DEFENSE LOVES THEM!!!! ASK THEM "IF  
HE'S DRESSED IN A SWEATER VEST EVERY  
SINGLE DAY.. ARE YOU AUTOMATICALLY  
GOING TO FIND HIM NOT GUILTY...  
BECAUSE HE LOOKS ALL NICE HERE IN  
COURT???



# IF YOU KNOW A DEFENSE ATTNY HAS CERTAIN TRICKS OF THE TRADE...

EXPOPSE THEM IN YOUR JURY  
SELECTION ! ..... LET THE JURY  
KNOW IT'S COMING....







# SPECIFIC WEAKNESSES

- Unsavory witnesses.
  - Co-defendants, wits with raps
    - Corroborating Evidence
  - Your jury selection should address every single weakness in your case... and bring it back home in opening and closing argument... “Remember we talked about this in jury selection.. And you agreed to follow the law
  - HAMMER this in closing argument





# SPECIFIC WEAKNESSES

- Unsympathetic Victim
  - Voir Dire is very important- point out concept of society as the victim
  - Use voir dire to prepare them for it and let them know you can prove your case anyway!!!



# SPECIFIC WEAKNESSES

- Incomplete Investigation
  - Address issue in Voir Dire: ask potential jurors if they would vote NOT GUILTY solely because the investigation wasn't as thorough as "CSI."
  - Agree the length of time it took to get this case to trial shouldn't determine guilt or innocence... Certainly whether witnesses memories fade, etc. can be considered...

# EXPERT WITNESSES

ADDRESS IT!!!!

WILL YOU AUTOMATICALLY BELIEVE AN  
EXPERT JUST BECAUSE HE IS AN EXPERT...  
GARBAGE IN.. GARBAGE OUT... OPINION IS  
ONLY AS GOOD AS THE FACTS IT IS BASED ON..



# NATURE OF YOUR CASE

SEX CASES, 647.6, 220, ETC. BE SURE TO ASK THEM  
ABOUT 1190

(B/C NATURE OF CHARGES... WILL YOU HOLD  
ME TO A HIGHER BURDEN ON PROOF????))  
NEED DNA? NEED CORROBORATION?

# IF YOU HAVE GOOD EVIDENCE...

MAKE THEM THINK YOU ONLY HAVE  
ONE WITNESS!!!

ONE WITNESS IF YOU BELIEVE...(1190)  
CAN YOU CONVICT?

# CHILD WITNESSES

WOULD YOU AUTOMATICALLY  
BELIEVE AN ADULT OVER A  
CHILD?

KICK THEM!!!!

**NO CHILDREN? OR  
EXPOSURE TO CHILDREN**

**KICK THEM!!!**

**YOU CAN LET THEM KNOW  
YOU DON'T WANT ANY  
DUMMIES ON YOUR JURY**

YOU WANT JURORS WHO CAN  
CALL A SPADE A SPADE...  
KICK ALL THE OTHERS.. THE ONES  
YOU KEEP WILL BE FLATTERED!!!

**DON'T BE AFRAID TO ASK  
THEM POINT BLANK...**

“ARE YOU GULLIBLE?” EASILY  
FOOLED OR MANIPULATED???

1,2,3 EXAMPLE...

HAVE YOU EVER BEEN TO  
JAPAN???



# RESPOND TO DEFENSE INQUIRIES

BE CREATIVE... PBJ EXAMPLE..

“PBJ BANDIT” - LAW SAYS  
CONSIDER IT.. YOU’LL CONSIDER  
IT RIGHT???

# PRESUMPTION OF INNOCENCE...

NOT EVIDENCE OF HIS  
INNOCENCE... JUST TELLING YOU  
IT'S MY BURDEN..

# MULTIPLE VICTIMS

MAKE THEM THINK THE REAL  
ISSUE IS THE 3<sup>RD</sup> VICTIM.. OR THE  
WEAKEST ONE...

1'S, 2,'S AND 3'S

CAN'T HAVE ALL 1'S  
THEY LOVE TO BE FUNNY WITH  
THIS ONE..

# WEEDING OUT THE WHACKOS

ETHICALLY!

# HOW DO YOU KNOW THEY ARE WHACKOS??

- ▣ 1. WATCH THEM!
- ▣ 2. LOOK AT WHAT THEY ARE WEARING, READING, CARRYING, DOING, SAYING
- ▣ 3. DO THEY CHALLENGE YOU?
- ▣ 4. WATCH THEIR DEemeanOR WITH DEFENSE ATTNY
- ▣ 5. THEIR DEemeanOR WITH YOU! CROSSED ARMS, WON'T SMILE
- ▣ 6. TAKE NOTES OF ALL OF IT – ON THE STICKY!!!!

# DON'T KICK PEOPLE OFF YOUR JURY JUST BECAUSE...

THEY ARE IN A SPECIFIC GROUP OR  
CLASS OF PEOPLE..

BUT..... KNOW YOUR CASE AND WHAT  
LIFE EXPERIENCE THOSE PEOPLE MAY  
HAVE FOR YOUR FACTS...



# *People v. Wheeler*

(1978) 22 Cal.3d 258

“The use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution”

# *Batson v. Kentucky*

(1986) 476 U.S. 79

“The Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State’s case against a black defendant.”



# BEWARE OF:

- ▣ ANYONE DISINTERESTED
- ▣ ANYONE TOO INTERESTED
- ▣ ANYONE WHO LEANS FORWARD AND LOVINGLY LOOKS AT THE DEFENSE ATTNY
- ▣ ANYONE WHO'S FAMILY MEMBER IS IN CUSTODY FOR A SIMILAR CRIME
- ▣ ANYONE WHO'S ANYONE HAS BEEN WRONGFULLY ACCUSED OF A CRIME
- ▣ LOOKS SLOVENLY AND NOT RESPECTFUL OF COURT..

# Peremptory Challenge

## CCP §§ 225(b)(2) / 231

- ▣ Limited number
  - Generally 10 per side for Felonies
  - 6 on some misdemeanors
  - 20 if life or DP case
- ▣ Alternates
  - Same number as alternative jurors called (CCP § 234)
- ▣ Multiple defendant cases
  - Defense gets 6, 10 or 20 challenges jointly (per above guidelines)
  - Each defendant gets 5 individual challenges
  - DA gets same amount as total defense challenges
  - E.g., 3 co-D non-life case
    - Each side gets 25 challenges (10+5+5+5)
- ▣ Can be used for any reason
  - Can be based on instinct or gut feeling
- ▣ Well, sort of....Can't be used for an unlawful purpose
  - May not exclude members of a cognizable group based on group bias

**SEE HANDOUT**

ALL THE LAW ON ONE SHEET!  
COMPLIMENTS OF  
ROBERT MESTMAN

# Race Neutral Reasons

- ▣ Could be combination of factors
- ▣ Change in dynamics of jury
- ▣ **Change in mix of jurors -**
- ▣ Number of peremptory challenges remaining



# Avoid Wheeler Objections

- ▣ Might look bad to jury
- ▣ Throws you off
- ▣ If sustained, you're in trouble
- ▣ If not sustained, need to worry about appeal
- ▣ May be reported to State Bar

# Remedy on Appeal

## Limited Remand

- ▣ Appellate court returns case to trial court for DA to state justifications on the record
- ▣ Allows DA to explain justification(s) during appeal process
- ▣ Could be years later
- ▣ Take & preserve notes!



# For Cause Challenge

## CCP § 225(b)(1)

- ▣ Unlimited number (each side)
- ▣ General disqualification
  - Lack of any qualification prescribed by law
  - Doesn't speak/understand English, convicted felon, non-resident, etc.
- ▣ Implied bias
  - Blood relation to any party, victim, witness, etc.
  - Involvement in prior case
  - Any interest in outcome
- ▣ Actual bias
  - State of mind preventing impartiality
  - Focus of voir dire questioning

# “I CAN'T BE FAIR”

- ▣ \* I HATE COPS, ALL COPS LIE... HAD BAD
- ▣ \* MY DAUGHTER WAS RAPED, I SEE HIM\*
- ▣ I HATE ALL CHILD MOLESTERS
- ▣ IF IT'S A GANG CASE, I CAN'T BE FAIR

# WHAT DO YOU DO WITH THAT JUROR????

- ▣ IF YOU LIKE THEM – REHABILITATE THEM
- ▣ “ M’AAM, YOU HAVEN’T HEARD ANY OF THE EVIDENCE... AND YOU HAVE NO IDEA WHAT HAPPENED... IF ALL MY WITS COME IN AND LIE..(NOT SUGGESTING THIS WILL HAPPEN) YOU’RE NOT GOING TO CONVICT HIM JUST BECAUSE YOU DON’T LIKE GANG MEMBERS?” YOU HAVE NO IDEA IF HE IS OR ISN’T... IF HE COMMITTED THIS CRIME..



**DEFENSE WILL KICK  
THEM!**

IF YOU DON'T LIKE THEM..

EITHER IGNORE THEM IF YOU  
THINK THEY'LL TAINT YOUR JURY  
POOL AND KICK THEM 1<sup>ST</sup> THING!!!

OR IF TOTALLY  
RIDICULOUS.... MAKE AN  
EXAMPLE OUT OF THEM...

SHOW THE JURY JUST HOW  
RIDICULOUS THEY ARE..

**“I WOULD NEVER BE A  
DISTRICT ATTORNEY”**

“touche”

**TRUST YOUR GUT**

LISTEN TO JEN CONTINI!!!!

THEY ONLY NEED 1