

VOIR DIRE TRAINING

January 15, 2015

By

Michael Bardeen

BASICS

1. The paperwork
 - a. Juror selection sheet
 - i. How to keep track
 - ii. What to write down
 - b. Juror information sheets
 - i. Give these back to the clerk!
2. Preemptory Challenges
 - a. Number of challenges
 - i. One defendant- 10 per side
 - ii. Co-defendants
 1. E.g.- 2 defendants: Prosecution = 20/ Defense = 10 joint & 5 ea. D
 2. E.g.- 3 defendants: Prosecution = 25/ Defense 10 & 5 ea. D
 - iii. Alternate jurors (CCP 234)
 1. Number equal to the number of alternates selected
 - iv. Life case: 20 per side
3. Challenges for Cause
 - a. Acquaintance with parties, witnesses, or attorneys (Implied Bias) **CCP 225(b), 229**
 - b. Prejudice
 - i. Religion
 - ii. Race
 - c. Bias against a party or witness
 - d. Refusal to follow law

OBJECTIVE

1. What are you trying to accomplish?

You may have heard, “Try not to lose the trial in voir dire.” I say to you, “you can win the trial in voir dire!”

- a. Trying to get “normal” looking people? No
- b. Trying to find and remove the “nuts”? Possibly
- c. Trying to get a fair jury? Fair to you
- d. You want to pick 12 people who will vote guilty

Your objective is to win the trial in voir dire!

Voir dire is an art, not a science

1. I disagree in part

i. Voir dire CAN be conducted in a formulaic way. If you use and follow the formula, you increase odds of winning. If you don’t follow the formula, you increase odds of losing!

2. What is the formula?

i. Be alert and attentive

a. Must be able to read people

- How are they dressed?
- How do they speak?
- What are they reading?
- Do they make eye contact with you?
- How do they look? E.g. tattoos, purple hair, nose piercing

b. Look for these to get rid of your nuts/outliers/rebels/non-conformists/STUPID

ii. Address your weaknesses

iii. LISTEN

a. Listen to what they say AND how they say it.

- i. Hesitation- unsure or lying
- ii. Assertive/loud- Stubborn, unchangeable opinion

- iii. Body language- Making faces, sighing, rolling eyes vs. smiling, laughing
- b. How do they interact with other jurors?
 - i. Are they rude? Are they pleasant? Are they annoying? Are they courteous?
 - ii. Are they non-social? Don't talk or interact with others? Don't let other people pass by first? Don't hold doors for people?
- c. Do they respond better to defense counsel?
- d. Are they trying to get out of jury service?
 - i. If the reason they give does not rise to level of cause, (ex. no daycare), pay careful attention to how they react when judge tells them they have to stay.
 - ii. Anger vs. acceptance- Kick the angry person, keep the person who's ok.

Where to Begin?

1. Use voir dire to set the table for your closing argument. The themes you develop in voir dire should be the themes you argue in closing.

- a. Knowing the jury instructions is **ESSENTIAL** to good voir dire
 - i. Ex. You only have one witness in your case that proves the elements of the offense. You better know the single witness Calcrim and use it in voir dire
 - ii. Ex. Defendant is sympathetic. You better know which jury instruction says don't let sympathy influence your decision and reference it in your voir dire.

2. KNOW YOUR WEAKNESSES

- a. Voir dire is your time to get ahead of defenses arguments
- b. Address your weaknesses and get the jury to vote guilty despite them
- c. Address your weaknesses without letting the jury know it's a weakness
- d. Various weaknesses
 - i. single witness
 - ii. de minimus conduct. "Who cares"
 - iii. battle of experts

- iv. circumstantial evidence
 - v. poor police work
 - vi. sympathetic defendant/ unsympathetic victim
 - vii. Proof beyond a reasonable doubt
 - e. Properly addressing weaknesses requires knowing the Calcrims
3. Use Jury instructions to ensure jury will follow the law
- a. Get them to say it
 - i. Ex. "If I called 1 witness to the stand and you believed him and his testimony proved all the elements in this case, would that be enough evidence for you to convict?" YES
 - ii. If they say "NO" ask what else they would want. Then inform them the law says the testimony of 1 witness can prove any fact and ask them again if they could follow that law.
4. Conduct your voir dire in a conversational style. **Don't Lecture.** You want them to speak.
5. Try not to read from notes or write notes during your voir dire. This can eat away at precious little time, get boring, and lose the jurors attention.
6. Smile and be friendly. Be positive in your questioning.
7. Don't ask questions that have no purpose. Ex. "Does everyone here have common sense?" No one is going to say no and the problem is, everyone has different "common sense." You want people who will vote guilty. This question doesn't help you determine who will vote guilty. Flesh out their common sense through other questions and hypotheticals.

Reasonable vs. Possible

1. Have you ever talked to jurors after a hang or NG and heard them say something like, "We thought it was possible..." Have you heard jurors in voir dire say our burden is to convince them beyond all *possible* doubt?

A. Cite the Calcrims

- i. Everything in life is open to some possible doubt! CALCRIM 220
2. The correct question is whether or not it's **REASONABLE**

i. Ex. A mom bakes some chocolate chip cookies and leaves them out to cool off. She then leaves the kitchen. Mom has a son and daughter. She comes back to the kitchen 10 minutes later and sees one of the cookies is gone. She confronts her two kids who are both playing in the living room. The boy has chocolate and crumbs on his mouth. The girl has clean hands and mouth.

Is it **POSSIBLE** the daughter ate the cookie? YES

Is it **REASONABLE** based on the evidence the daughter ate the cookie? NO

ii. Get multiple jurors to tell you the boy ate the cookie. Then have all jurors raise hands they think the boy ate the cookie.

If a juror argues with you on this hypo, KICK THEM!

3. This hypo also illustrates circumstantial evidence!

4. Two stories \neq reasonable doubt.

i. Tell jurors that in every trial there are two stories. One side says he did it, the other side says he didn't do it. We wouldn't be here if People said he did it and defendant also said he did it. Does knowing there are two stories automatically create reasonable doubt for you? Will this prevent you from being able to consider the evidence and decide which story is true?

DEFENSE VOIR DIRE

1. YOU MUST LISTEN CAREFULLY!

A. Defense will often give away their strategy in voir dire

i. You can begin to rebut the defense case in YOUR voir dire

B. Defense may misstate the law

i. You should consider correcting any misstatements of law in your voir dire. Does the misstatement hurt you or is it irrelevant? Ex. Misstate what BRD means

ii. You can begin to build credibility with jury if you accurately state the law and highlight the misstatement.

C. Defense will try to confuse/mislead

i. Defense loves to confuse and mislead re: BRD

ii. Defense tries to tear down credibility of officers

a. Ex. Officers make mistakes, sometimes lie. Are you going to believe someone just because they're an officer? Anyone here automatically going to believe the officer?

b. Counter with "By a show of hands, is there anyone here who dislikes police officers? Anyone here think police officers, generally speaking, are liars? Anyone here have a negative view of police?" If no one raises their hand, you know you have 12 people that like police.

- Also counter with reasons why they should believe officer. Ex. Specialized training; no motive or reason to lie.

iii. Defense tries to get a hung jury

a. "Can you stick to your gut and not be swayed?" "What if you were the only person voting a certain way? Could you stand up to the group?"

b. Counter with CalCrim 3550. Explain to them what it means to deliberate. Talk it out with other jurors. Maybe someone caught something you didn't. Keep an open mind. We don't want people who have made up their minds before deliberating and then refuse to be open to what others may say. In fact, if anyone refuses to deliberate, you should report that to the bailiff.

Utilize Hypotheticals That Touch on More than One Concept

1. Master Hypo

A. Red Light

i. Imagine this is a trial where a defendant is charged with running a red light. I call 1 police officer to the stand and he tells you that he was stopped at the limit line of an intersection. There was a red light. The light for the other street was green. The officer testifies that all of a sudden, the car next to him drove through the intersection on the red light. The officer testifies that he pulled this car over and the driver of the car is the defendant in our hypothetical trial. How would you vote? Guilty or not guilty?

This is a great hypo because it tests multiple concepts.

1. De minimus conduct (Who cares, it's just a red light!)
2. Do they trust and believe police officers
3. Single witness testimony
4. No corroboration

B. Add to the hypo (Part 1)

i. Add to the facts that I just gave you, after pulling the car over, officer approached the defendant and asked, "Do you know why I pulled you over?" Defendant said, "Because I ran the red light." Now how would you vote?

1. Add this if you have jurors that would vote not guilty on the first part of the hypo. This is testing whether or not your jurors want to hear an admission before they convict.

2. If your case involves an admission (ex. I drank before I drove) this is a great hypo because now you will argue in closing, the similarities between your facts and the hypo and say, in voir dire, you would vote guilty based on these facts, therefore your verdict shouldn't change now.

3. If your case does NOT involve any kind of admission and if a juror changes their vote now, ask, why would they now convict after hearing the person admitted the crime? You understand many criminals don't admit their crimes. Can you only convict if someone confesses? You would probably want to kick this juror.

C. Add to the Hypo (Part 2)

i. Adding to the same hypo, when the defendant said he ran the red light, he told the officer he ran the light because he was late for work and that his boss told him if he is late 1 more time, he will be fired. Defendant has a wife and two small children. He is the only one that works. He's already behind on the mortgage and if he loses his job he will lose the house and they have nowhere to go. Now how would you vote?

1. This tests whether or not they will allow sympathy and emotion, potential punishment to affect their decision.

D. Add to the Hypo (Part 3)

i. Now add that this intersection has a video camera. But footage from the video camera was never introduced into evidence. Now how would you vote?

1. Single witness testimony

2. Sufficiency of the evidence/ All available evidence (CalCrim 300)

3. CSI effect

- This should not change their vote. If someone does change their vote, ask them, if the officer's word was good enough for you to convict earlier, why is it not good enough now? They might respond with something like, "I want all the evidence." You should say, the evidence in this case is the testimony from the witness stand or any exhibits. You

have to make your decision based on the evidence that is presented. The evidence in the hypo that I gave you had an officer tell you he witnessed a crime. There might be 10 other witnesses who saw it. The question is, if I only call the officer and don't bring in a video or 10 witnesses, can you convict?

E. Add to the Hypo (Part 4)

1. Any other facts that are similar to your case

i. Ex. Officer was wearing an audio recording device but he did not use it or turn it on. Does this change your vote?

COMMON TOPICS TO COVER

1. Defendant's credibility

A. If you think defendant may testify, talk about this. "You heard defense or the judge say that you must judge the credibility of the witnesses the same, meaning no one gets an advantage or disadvantage based on who they are. If the defendant chooses to testify, will you agree to judge his credibility the same way as you do all the other witnesses? If he chooses to testify, are you automatically going to believe everything he says? Would it surprise you to learn that criminal defendants don't always tell the truth? He doesn't get a bonus point just because he decides to take the stand.

2. Right to Trial

A. Did you know that the US Constitution guarantees everyone the right to a jury trial in a criminal case? No one can take this right away from a person. Not the judge, not the DA, not a defense attorney. We are here today because defendant has chosen to exercise his right to a jury trial. A person can choose to go to trial on their case no matter how strong the evidence may be. Imagine a case where someone committed a murder. There are 10 witnesses. The crime is caught on tape. He left his fingerprints and DNA at the crime scene. He confessed to the crime. That person has a right to a trial. The point is, you may at the end of this case think, "Why are we here? Why did this go to trial? It seems so obvious. Am I missing something?" Again, no matter how strong the evidence may be, every defendant can choose to take his case to trial.

DUI VOIR DIRE

1. What do most DUI trials come down to? Battle of the experts. One expert says everything consistent with impairment. The other expert says everything consistent with a .05 and rising. But does a jury really need an expert to tell them when someone can't safely drive a car? NO!

A. "Has anyone here ever seen someone you thought had too much to drink? Seen anyone you thought should not get behind the wheel of a car? Describe what you saw. (Have multiple people answer) When you saw this person and their speech was slurred, did you know what their exact BAC was? Did you have some breath instrument on you to test their BAC?"

- Come back to the signs people give that tip them off to impairment in your case and compare those signs to the ones present in your case. Ex. "In voir dire, most of you said slurred speech, unsteady balance are signs to you that a person is impaired. This defendant had those same signs. Why would you think he wasn't impaired?"

B. "You're not a trained police officer are you? You're not a DUI expert are you? You're not a doctor are you? Yet despite having no expertise or training as to DUI, you can still tell when someone has had too much to drink right?" Use this to highlight in the end it doesn't require an expert opinion to know when someone is impaired. We all make that judgment call based on what we see, not a blood or breath test, or what an expert says. Use that same common sense and judgment here.

C. "Have you ever consumed alcohol at a party, restaurant, house, or sporting event, and then driven a car? Yes. Do you have a limit as to how many drinks you'll have before you decide you can't drive? Would you drive after having 2 drinks? 3 drinks? 4 drinks?"

D. "Would you be the passenger in a car if you knew the driver had recently consumed 2 drinks? 3 drinks? 4 drinks? 5 drinks?"

Most people will say they will not drive after 3 drinks nor get into a car if the person has had 3 drinks. Why? Because they know after 3 drinks people are likely impaired and it's not safe. If your defendant has a .08, they most likely have consumed at least 3-4 beers. You don't need an expert to tell people that a person is impaired after 3-4 drinks. These questions get you a G on the A count. These are also good questions to use on DUID!