

# Walking into the Unknown



## Jury Selection

Wisconsin Trial Skills 2019

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# INITIAL THOUGHTS

- CRITICAL PART OF TRIAL
- SCARIEST PART OF TRIAL

# The Right to a Jury

In all criminal prosecutions, the accused shall **enjoy** the right to a speedy and public trial, by an **impartial jury....**

**LOCK HIM UP! LOCK HIM UP!**



# YOUR CLIENT'S THOUGHTS ON JURY TRIAL



What is Voir Dire all about?

Not about who you want



IT'S ABOUT NOT GETTING  
WHAT YOU DON'T WANT

Jury (DE)selection

A meme featuring Ice Cube with a shocked expression, hands raised, and the text "MIND BLOWN" overlaid in large, green, stylized letters. The background is a light yellow wall with two circular holes and a horizontal line on the right side.

**MIND BLOWN**

# THINGS TO REMEMBER WHEN YOU VOIR DIRE

- PROCESS BEGINS WHEN YOU WALK TO THE BUILDING
  - DID YOU SLAM THE DOOR IN THE FOREPERSON'S FACE?
  - DID YOU NOT HOLD THE ELEVATOR DOOR FOR YOUR LONE HOLD-OUT?
- YOU GO LAST---LISTEN TO JURY RESPONSES TO PROSECUTOR
- LISTEN FOR MATERIAL TO USE IN CLOSING

Your Audience?



I am in  
so much  
trouble

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Your client?



# JURY DESELECTION

## DESELECTION

- THE PROCESS IDENTIFYING JURORS WHOSE STRONGLY HELD PERSONAL BELIEFS RENDER THEM UNABLE TO ACCEPT YOUR THEORY OF INNOCENCE THEREBY MAKING THEM INCAPABLE OF MEETING THE CONSTITUTIONAL REQUIREMENT OF PROVIDING YOUR CLIENT WITH A FAIR TRIAL.

# DESELECTION PROCESS

- . WHAT IS YOUR THEORY
- . WHAT MUST A JURY ACCEPT TO BELIEVE YOUR THEORY
- . GET RID OF PEOPLE WHO WILL NOT ACCEPT YOUR THEORY

GETTING RID OF PEOPLE YOU DON'T  
WANT

## Traditional Jury Selection

- Identify jurors who agree with you
- Get those people talking in an effort to educate the others so that you can....
- Convince the others to change their core beliefs



I am filled with Christ's love!



# STOP IT!

- YOU  
CANNOT  
CHANGE  
THEIR  
MINDS!



**REMEMBER YOUR  
AUDIENCE**



Create an Atmosphere of  
Trust

There is no wrong answer



There are only honest answers







Kind  
Respectful  
Non-judgmental

Accusatory  
Defensive  
Dismissive



# GET JURY TALKING

- BE VULNERABLE
- ASK OPEN-ENDED QUESTIONS
- LISTEN
- HAVE JURORS RESPOND TO OTHER JUROR STATEMENTS

BE COMFORTABLE WITH BEING  
UNCOMFORTABLE



# BE COMFORTABLE WITH BEING UNCOMFORTABLE

- DO NOT RUN TO 'SAFE' HAVENS
- WANT TO HEAR FROM ALL JURORS—BUT ESPECIALLY THE ONES WHO DO NOT ACCEPT YOUR THEORY

## SAFE JURORS VS. UNSAFE JURORS

- WE WANT TO TALK TO JURORS WHO AGREE WITH US
  - ONLY ID'S PEOPLE FOR THE STATE TO STRIKE
- WE NEED TO ID PEOPLE FOR US TO STRIKE

# STOCK PROSECUTOR QUESTIONS

- CAN YOU BE FAIR AND IMPARTIAL?
- CAN YOU SET THAT ASIDE?
- WILL YOU FOLLOW THE LAW?



SUPPOSE RACE IS AN  
ISSUE

# Breaking the Ice

Look around yourselves for a moment.

Look at my client.

What do you see?

Let's talk about that.



# TYPES OF QUESTION

- SOME PEOPLE...OTHER PEOPLE
- WHO HAS A DIFFERENT/SIMILAR OPINION?
- TELL ME MORE ABOUT THAT
- SOME PEOPLE THINK THAT PRESIDENT OBAMA'S ELECTION SIGNALLED AN END TO RACIAL PREJUDICE, OTHERS THINK THAT RACIAL PREJUDICE STILL EXISTS. WHAT DO YOU THINK?



**Vulnerability**  
Just Ahead

# Be Vulnerable

Client and I are afraid that someone on this panel might decide this case based on client's race. By a show of hands, who can understand why we might have that fear?

Tell me about that.

I was walking down a dark street and I saw a group of Black teenagers. I felt myself get nervous and crossed the street. When I got home I thought about, and I realized that I had never done that when I saw a group of White teenagers. I was bothered that i did that. Does anyone know of someone who has had that reaction?

Tell me about that.

PAY ATTENTION TO THE ROOM

- JUROR #3, I NOTICED THAT WHEN JUROR 8 SAID X, YOU HAD A REACTION. TELL ME ABOUT YOUR EXPERIENCE ON THAT TOPIC?

# Be Comfortable Being Uncomfortable



Has anyone ever heard the phrase  
“The Race Card?”

What does that mean to you?

If I ask questions about race, could  
that be considered playing the race  
card?

Tell me about that.

RARELY WILL SOMEONE ADMIT RACIAL BIAS

- EXPLORE ATTITUDES ABOUT RACE
  - TELL ME ABOUT A TIME YOU SAW SOMEONE GET TREATED DIFFERENTLY BECAUSE OF THEIR RACE.
  - YOU WILL GET STUFF YOU WANT TO HEAR

# YOU WANT STUFF YOU DON'T WANT TO HEAR

- DO YOU THINK THERE MUST BE SOMETHING TO THE FACT THAT MOST CRIME STORIES SHOW PEOPLE OF COLOR COMMITTING CRIMES?
  - ARE YOU COMFORTABLE ASKING THAT QUESTION?
  - DON'T YOU WANT TO KNOW WHAT PEOPLE THINK ABOUT THAT?

# SEXUAL ASSAULT CASE

- DO YOU THINK THAT IN THE ERA OF #METOO SOCIETY NEEDS TO START BELIEVING WOMEN WHEN THEY SAY THEY WERE SEXUALLY ASSAULTED?

# CAN OPENER QUESTIONS

- QUESTIONS ASKED THAT CALL FOR A YES, NO OR MAYBE
- PHRASED IN A WAY THAT NORMALIZES BAD BEHAVIOR
- CRAFTED TO A CONSTITUTIONAL IMPAIRMENT

# SCALE QUESTIONS

- HELPFUL WHEN THERE ARE TIME CONSTRAINTS
- USE AN EVEN-NUMBERED SCALE: 1-10
- 1: STRONGLY AGREE, 10 STRONGLY DISAGREE WITH THE FOLLOWING;      THE TERM WHITE PRIVILEGE IS JUST AN EXCUSE FOR SOMEONE'S OWN SHORT-COMINGS
- MAKE A NOTE OF WHERE PEOPLE RATE THEMSELVES

# SCALE QUESTIONS

- SUPPOSE CASE INVOLVES CHILD SEXUAL ASSAULT
- ON A SCALE OF 1-10, 1: STRONGLY AGREE, 10 STRONGLY DISAGREE:
- A 13 YEAR OLD GIRL WOULD NOT LIE ABOUT BEING SEXUALLY ASSAULTED
  - WHAT IF A JUROR WANTS A CLARIFICATION?
  - TELL THEM TO JUST ANSWER AS BEST AND HONESTLY AS THEY CAN
  - REMEMBER: GOAL IS TO FIND OUT WHERE THEY PUT THEMSELVES

# WHAT ARE YOU MORE CONCERNED ABOUT?

- ACQUITTING A CHILD MOLESTER?
- CONVICTING AN INNOCENT MAN?

## CONFRONT THE OBVIOUS

- WHEN YOU HEARD THAT MY CLIENT WAS ACCUSED OF RAPING A 12 YEAR OLD CHILD, TELL ME WHAT THOUGHT WENT THROUGH YOUR MIND?

**STRIKE!**

TWO TYPES:

- FOR CAUSE
- PEREMPTORY

## STRIKES FOR CAUSE

- CHALLENGES FOR CAUSE PERMIT REJECTION OF JURORS ON A NARROWLY SPECIFIED, PROVABLE AND LEGALLY COGNIZABLE BASIS OF PARTIALITY.

*Swain v. Alabama*, 380 US 202 at 220

# THE PATH TO STRIKE FOR CAUSE

- CONNECT THE BIAS TO A CONSTITUTIONAL IMPAIRMENT
- CONNECT THE BIAS TO A LIFE EVENT
- SHOP THE BIAS AROUND TO OTHER JURORS

# NEED TO CONNECT A BIAS TO A CONSTITUTIONAL ISSUE

- PRESUMPTION OF INNOCENCE
- FAIR AND IMPARTIAL JURY
- BURDEN OF PROOF?

## CONNECT TO LIFE EVENT

- MAKE IT OK FOR THEM TO HAVE THE BELIEF
- MAKE IT A BELIEF THEY HAVE HAD FOR A LONG TIME
- MAKE IT A BELIEF THAT NO ONE HAS BEEN ABLE TO CHANGE

# SHOP BIAS TO OTHER JURORS

- WHO ELSE SHARES THAT OPINION
  - IDENTIFY OTHERS WHO SHARE –YOU WILL WANT TO SHOW THEY ARE IMPAIRED TOO
  - WHEN YOU FIND ‘SAFE HAVENS’—LEAVE ALONE
  - PEOPLE WHO ARE A MAYBE—PERHAPS PEREMPTORY STRIKE

# HOW?

- USE CLOSED QUESTIONS

## EXAMPLE:

- JUROR HAS EXPRESSED OPINION THAT BASED ON THEIR EXPERIENCE, A CHILD OF 12 WOULD NEVER LIE ABOUT A SEXUAL ASSAULT.

## CONFIRM THE OPINION

- MR. SMITH, DO I UNDERSTAND YOUR OPINION TO BE THAT A 12 YEAR OLD CHILD WOULD NEVER LIE ABOUT SEXUAL ASSAULT?

## ANCHOR THEM TO THAT OPINION

- HOW STRONGLY DO YOU HOLD THAT OPINION
- HOW LONG HAVE YOU HELD THAT OPINION

# SHOP IT AROUND

- WHO ELSE HAS THAT OPINION?
- ALWAYS REMEMBER TO REWARD 'BAD' OPINIONS
  - THANK YOU FOR SHARING THAT
  - I APPRECIATE YOUR HONESTY IN SAYING THAT
  - I CAN UNDERSTAND HOW YOU MIGHT THINK THAT

# CLOSE THE DOOR TO REHABILITATION

- THIS OPINION IS BASED ON YOUR PERSONAL EXPERIENCES.
- YOU HAVE EXPRESSED THIS OPINION TO OTHER PEOPLE CLOSE TO YOU
- NO ONE HAS EVER BEEN ABLE TO CHANGE YOUR MIND FROM THIS OPINION.
- YOU HAVE COME TO THIS OPINION AFTER LOTS OF THOUGHT

## CLOSE THE DOOR TO REHABILITATION

- NOTHING I SAY WILL CAUSE YOU TO SET ASIDE THAT BELIEF.
- NOTHING THE JUDGE SAYS WILL CAUSE YOU SET ASIDE THAT BELIEF

# MAYBE THEY CAN REMOVE THEMSELVES

- JUROR HAS HAD A PARTICULARLY NEGATIVE EXPERIENCE WITH A PERSON OF CLIENT'S RACE:
  - EVEN THOUGH MY CLIENT WAS NOT INVOLVED IN YOUR INCIDENT, YOU ARE GOING TO BE THINKING ABOUT WHAT HAPPENED TO YOU?
  - THAT AWFUL THING IS GOING TO BE IN YOUR MIND THROUGHTOUT THE TRIAL

# MAYBE THEY CAN REMOVE THEMSELVES

- JUROR HAS HAD A PARTICULARLY NEGATIVE EXPERIENCE WITH A PERSON OF CLIENT'S RACE:
  - EVEN THOUGH YOU WILL TRY YOUR HARDEST NOT TO, YOU WON'T BE ABLE TO SEPARATE YOUR EXPERIENCE FROM THIS CASE
  - IT WOULD NOT BE FAIR TO YOU OR MY CLIENT FOR YOU TO BE ON THIS PARTICULAR JURY

# PEREMPTORY STRIKES

- STRIKES FOR ANY REASON OR NO REASON
  - BUT *BATSON*
- ONLY HAVE A LIMITED NUMBER
  - Wis. Stat 972.03
- USE FOR THOSE FOLKS YOU COULD NOT GET STRICKEN FOR CAUSE

# HOW WILL (YOU) KNOW (WHO TO STRIKE)?

- You have been paying attention to the jury
- You have kept notes on the bad ones
- Consulted with client
- Rate the jurors
  - Based on how they answer questions



A woman with dark hair and bangs, wearing a gold lace dress, is shown from the chest up. Her eyes are closed and her mouth is slightly open as if she is speaking or singing. Her right hand is raised, palm facing forward, with fingers spread. She is wearing several rings on her fingers and a gold watch on her wrist. The background is dark and out of focus, showing other people in a social setting. The overall lighting is warm and dim.

*Ain't nobody got time for that.*

## TIME CONSTRAINTS

- Dual purpose of voir dire: *Mu'Min v. Virginia*, 500 US 415 at 431
  - Provide enough information to exercise for cause challenges
  - Provide enough information to exercise peremptory challenges

## TIME CONSTRAINTS

- PEREMPTORY STRIKES ONLY SERVE PURPOSE IF THERE'S SUFFICIENT INFORMATION UPON WHICH TO BASE CHALLENGES. *See Art Press, LDT v. Western Printing Machinery Co.* 791 F.2d 616 (7<sup>th</sup> Cir. 1986)

## TIME CONSTRAINTS

- *US v. Ledee*, 549 F.2d 990, 993 (5<sup>th</sup> Cir.), *cert. denied*:
  - “Peremptory challenges are worthless if trial counsel is not afforded an opportunity to gain the necessary information upon which to base such strikes”
  - case is about court vs. attorney-lead voir dire, but principle is the same

## FINAL POINTS

- LISTEN
- BE COMFORTABLE WITH BEING UNCOMFORTABLE
- DO NOT TRY TO CHANGE MINDS AND HEARTS
- REWARD THE BAD OPINIONS
- LISTEN
- LISTEN