

VOIR DIRE IN DOMESTIC VIOLENCE CASES

Tom Steele
Tom.Steele@ventura.org
(805) 654-2500



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VOIR DIRE

- Goals of Voir Dire
- How to prepare
- Addressing legal principles
- Addressing weaknesses
- Intangibles

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VOIR DIRE

Purpose of jury selection:

1. Ingratiate → win them over to you and your case
2. Indoctrinate → educate about unfamiliar legal concepts
3. Inoculate → Prepare them for weaknesses in your case
4. Ditch the crazies

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BEFORE THE VENIRE ARRIVES.....

- Create an outline
 - Evaluate the weaknesses of your case
 - Legal principles you will rely on or that are unfamiliar:

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TYPICAL DOMESTIC VIOLENCE ISSUES

- What are the typical issues we see?

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TYPICAL DOMESTIC VIOLENCE ISSUES

- Victim issues
 - Recanting
 - Uncooperative v. overly cooperative
 - Unsympathetic or unlikable
 - No victim at all
- He said/she said
- Male victim
- No visible injuries
- Self-defense or mutual combat
- Kids testifying

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BEFORE THE VENIRE ARRIVES.....

- Once you've identified the issues
 - Think about the type of people you want*

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JURORS TO AVOID

- Batterers
- People who've been accused of it
- Former Victims
 - Can be very critical
 - I got out, why can't she?
 - My situation was worse.
 - Still caught in cycle.
 - Emotional Response
- Jurors who won't get along
 - Overbearing, obnoxious, etc.

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JURORS - CAREFUL

- Lived in abusive homes
- Cynical about DV / Stalking
- Messy Divorces / Custody
- Law Enforcement / Relatives
- Participants in court system
- Teachers, Social Workers, Therapists
- Lawyers
- Bad prior jury experience?
- Engineers??

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JURORS YOU WANT
<ul style="list-style-type: none"> • No DV history • Life Experience • Personable • Reasonable • Leaders and Followers

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THE VENIRE ARRIVES.....
<ul style="list-style-type: none"> • Observe the jurors <ul style="list-style-type: none"> • Special needs, odd behaviors, clothing, loner, reading materials, inconsiderate behavior, socks with sandals! • Listen to the defense <ul style="list-style-type: none"> • Watch jurors' reactions & responses • 7-38-55 Percent Rule • Note taking/Scoring system

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HOW TO WIN OVER THE JURORS
<p>Command the courtroom</p> <p>Learn their names</p> <ul style="list-style-type: none"> • This can create a small sense of familiarity <p>Be yourself:</p> <ul style="list-style-type: none"> • If you're funny, then be funny • Know your counterpart • Not everyone will like your style...so kick them

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IT'S FINALLY YOUR TURN...

- Where do you start?
 - Primacy: how will you accomplish your goals?
- Who do I represent?

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IT'S FINALLY YOUR TURN...

- Be their guide: explain the why
 - Reason for burden
 - Take away their candy
 - Fifth amendment
 - Right to a jury trial
- What is the purpose of a trial?

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IT'S FINALLY YOUR TURN...

- Get them talking about themselves
 - Follow-up with biographical stuff (career, etc.)
 - Group questions won't get them talking
- Listen and watch

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IT'S FINALLY YOUR TURN...

- Ask open ended questions
 - You are trying to see how they think & process information
- Reassure them it is OK to be forthright
- Does anyone else feel the same way?

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DOMESTIC VIOLENCE – STARTING THE DISCUSSION

- What do you think of when you hear the words “Domestic Violence?”
 - Gender(s)
 - Parties
 - Offender
 - Relationship
 - Type of abuse
 - Results

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CONTINUE THE DISCUSSION – DV

1. Repeat their exact words. *“There was violence in my house, it was horrible.”*
2. Open-ended questions. *“What kind of violence occurred? What do you think it stemmed from? What would happen?”*
 - How recent
 - Relationship
 - Reported
 - How they reacted
 - Resumed Relationship
 - Impact / Effect on life
 - Law Enforcement Involvement
 - Judicial Involvement

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CONTINUE THE DISCUSSION – DV

3. Acknowledge validity and compare. *“Thank you for your honesty and sharing your personal experience. It is understandable that you feel the way you do. Has anyone else had violence in their home?”*
4. Compare and contrast: *“Mr. Smith, how was your experience similar or dissimilar to that of Mr. Jones?”*

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ACCUSED OF DV

Has anyone here been *accused* of Domestic Violence or know someone else who has?

- “Mr. Smith, you said that your ex-wife accused you once.”
 - What happened
 - How recent
 - Relationship
 - Reported
 - Resumed Relationship
 - Law Enforcement Involvement
 - Judicial Involvement
 - Were you treated fairly

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ADDITIONAL QUESTIONS / ISSUES

- Does anyone think that Domestic Violence is a personal family issue that the Government should stay out of?
- Uncomfortable Nature of Topic – Getting Involved

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DISCUSS LEGAL CONCEPTS

- Introduce them to specific legal principles
 - Often the law is counterintuitive
 - E.g., "child molest", false imprisonment, or Taken

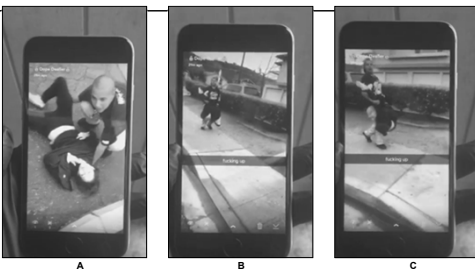
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KIDNAP EXAMPLE



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People v. Gabriel Munoz-Hernandez



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A



B

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DISCUSS LEGAL CONCEPTS

- Always discuss circumstantial evidence
 - This can help you find the crazies
- Use hypos
 - E.g., Cake and the dog or raining

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DISCUSS LEGAL CONCEPTS

- Circumstantial evidence and specific intent
 - 422, DV rape, etc.
- Use hypos: Show them how they use it everyday
 - E.g., blinker or sandwich
- Follow-up questions
 - Are you reasonable? can you reject unreasonable?
 - Easily fooled?
 - Over analyze things?

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DISCUSS LEGAL CONCEPTS

- Testimony of one witness
 - This can also help you find the crazies
 - Goal here is to diminish expectations
- CALCRIM 1190
- What do you think about that?
 - Unfair?
- Why?

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PRIOR DV- EVIDENCE CODE 1109

- By Defendant (and/or Victim)
- Pre-trial ruling
- *You may receive evidence that you can consider in your deliberation, but only for specific or limited purposes. You will get instructions from the judge on how to do that.*
- *Will you agree to consider all of the evidence you are allowed to?*
- *Will you follow the judge's instructions?*

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PREVIEWING WEAKNESSES/ISSUES

- See jurors' reactions
- "Bad" facts become old news

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PREVIEWING WEAKNESSES/ISSUES

- Conflicts in the evidence
 - Wedding hypo
- Inconsistent statements
 - Vacation hypo

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PREVIEWING WEAKNESSES/ISSUES

- If officer plays a key role
 - Jury allowed to consider training
- Incomplete/sloppy investigation
 - Work hypo
 - No need to prove peripheral facts, just elements

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PREVIEWING WEAKNESSES/ISSUES

- When there are no injuries
 - PC 243(e)(1) or child endangerment
 - Explain how the law doesn't require a visible injury
- When there are injuries
 - Lower expectations

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COUNTERINTUITIVE VICTIM BEHAVIORS

- Do you have expectations for how a victim of domestic violence should act?
- What if they didn't report right away? Returned to the abuser? Still love the abuser?
- Victim's behavior while testifying

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UNCOOPERATIVE VICTIM

- *Not all crime victims are happy about coming to court. In fact, some want nothing to do with it.*
- *Do you think Domestic Violence cases should be prosecuted even if the victim does not want it prosecuted?*
- *Can you think of reasons why a victim might not want the case prosecuted?*

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UNCOOPERATIVE VICTIM

- *Do you think that a person could get on the stand and lie?*
- *How do you determine if someone is lying?*
- *The court will give you instructions as to how to evaluate testimony, will you use those as you reflect back on the testimony of witnesses?*
- *Listen to all of the evidence*

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UNLIKEABLE VICTIM

- Drug use
- Bad choices
- Bad parent
- Comes across emotionless

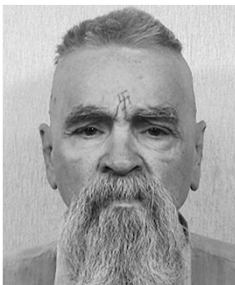
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UNLIKEABLE VICTIM

- *Some witnesses in cases are not very likeable for a whole host of reasons.*
- *If you don't like the victim how will that affect your ability to evaluate the evidence?*
- *Can you set that aside as you look at the evidence in the case?*

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CHARLES MANSON SUCKS!



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COOPERATIVE / BIASED / MOTIVATED VICTIM

- Preview the issue
- You may hear that there is an ongoing custody issue in this case.
- Would it influence you in a manner such that you would give less weight to the testimony based on that alone?

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NO VICTIM

- In some cases, victims never testify. In this case, I do not expect that we will hear from/meet the victim during the trial.
- Do you think it is fair that a trial can proceed without the victim?
- Can you think of a reason why?
- Can you look at the evidence that is presented and render a verdict?

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SYMPATHETIC DEFENDANT

- Elderly, young, good looking, in a sweater vest, etc.

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THE DEFENDANT

- *In this case the defendant is _____.*
 - *Female, Elderly, Young, Disabled*
 - *Military (Uniform)*
- *Were you surprised when you heard the charges read?*
- *Why do you think that surprised you?*
- *Do you have any automatic assumptions about the defendant?*

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SYMPATHETIC DEFENDANT

- Confront the defense tricks and inoculate them.
- *During trial you may see defendant stand, say hello, opening doors, acting nicely, talking to his/her significant other, etc.*
- *How will that affect you? Consider it?*
- *At the end of this trial, I'm going to ask you to say he's/she's guilty of _____. Can you do that?*

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INTANGIBLES

- Conspiracy theorists – walking on the moon
- Different lifestyles
- Children as witnesses

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CHILDREN AS WITNESSES / VICTIMS

- Would you automatically distrust testimony from a child?
- Do you think it is fair to ask a child to testify?
- What if it is about something that involves their parents?
- Would you hold it against the party who called the child?

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INTANGIBLES

- #MeToo
- Kavanaugh
- Strong Opinions
- Social Media / Comments

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SECOND WAVE OF JURORS

- Do not simply ask if anyone has different answers!
- Don't shortchange yourself on time!
- Still ask direct questions and general questions

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DON'TS

- Abbreviate your voir dire as selection goes on (and on).
- Argue with a juror.
- Discuss information subject to privacy request.
- Use legalese.

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USING THE INFORMATION

- Challenges for cause
- Peremptory Challenges

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FINAL ADVICE

- Win them over and be their guide
- Be yourself
- Let the jury do most of the talking
- Go with your gut!

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THE LAW

Voir Dire in California is governed by:

1. California Rules of Court
2. California Code of Civil Procedure
3. Case law

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CALIFORNIA RULE OF COURT § 4.200(a)

Court must discuss the following with counsel:

- Brief outline of case
- Names of witnesses
- Theory of culpability
- Defense theory (may decline)
- Procedures for hardships/challenges for cause
- Areas of inquiry by court and counsel
 - Anything off-limits?
- Time limits
- Schedule of trial and predicted length
- Number of alternates and method of selection
- Procedure for *Wheeler/Batson*

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CALIFORNIA CODE OF CIVIL PROCEDURE § 223

- Judge's discretion viewed in light of:
 - Amount of time requested
 - Unique/complex law or facts
 - Length of trial
 - Number of parties
 - Number of witnesses (CCP § 223(c)(1-5))

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CCP § 223 & RULE OF COURT § 4.201

- Examination may be conducted:
 - Orally
 - Written questionnaire; or
 - Both methods

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PURPOSE OF VOIR DIRE

- Only in aid of the exercise of challenges for cause. (CCP § 223(d))
- Improper question:
 - A question that, as its dominant purpose, attempts to precondition the prospective jurors to a particular result or indoctrinate the jury. (CCP § 223(d))

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CALIFORNIA CODE OF CIVIL PROCEDURE § 223

- Judge shall conduct initial questioning.
 - Attorneys may submit questions for consideration (CCP § 223(a))
- Attorneys shall have right to conduct oral questioning.
 - *"Shall permit liberal and probing examination calculated to discover bias or prejudice."*

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CALIFORNIA CODE OF CIVIL PROCEDURE § 223

- Follow-up permitted to Judge's questions. (CCP § 223(b)(1))
- Not required to submit questions in advance. (CCP § 223(b)(1))
- No specific/unreasonable/arbitrary time limits or inflexible time policy.
 - Judge shall permit supplemental time based on individual responses or conduct of jurors that may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case. (CCP § 223(b)(2))

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CALIFORNIA CODE OF CIVIL PROCEDURE § 223

- Judge shall consider use of questionnaires. (CCP § 223(e))
 - Copies of questionnaires available upon request.
- List of jurors' random order to attorneys. (CCP § 223(f))

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QUESTIONING A JUROR IN PRIVATE

- Preference is for non-sequestered voir dire.
 - *People v. Roldan* (2005) 35 Cal.4th 646, 691; CCP § 223(d))
- May conduct sequestered voir dire on media reports and other issues.
 - (Advisory Committee Notes, CCP § 223)
- Judge should consider the charges, the nature of the evidence, and other relevant factors.

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QUESTIONING A JUROR IN PRIVATE

- Must inform jurors of possibility of sequestered voir dire if questioning likely to elicit answers a juror may feel are sensitive in nature.
- Jurors must be advised of right to request a hearing in chambers to answer sensitive questions before writing them in questionnaire.
 - (Copley Press Inc. v. Superior Court (1991) 228 Cal. App. 3d 77, 78).

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GROUND TO CHALLENGE A JUROR

- General Disqualification (CCP § 225 (b)(1)(A))
- Implied Bias (CCP § 225 (b)(1)(B) & 229(f))
 - Relationship to parties, knows a witness, etc.
- Actual Bias (CCP § 225 (b)(1)(C))
 - I cannot be fair

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JURORS - CAREFUL

- Primacy and recency
- Know the issues of your case
 - Have an outline
- Be seen as the source of reason, truth, and clarity
- Be yourself
- Put the jurors at ease
- Let jurors do most of the talking
- 7-38-55 rule
- Actually listen when they do
- Have a system

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JURORS - CAREFUL

- Asking about specific legal principles
 - This is OK, but...
 - [People v. Pinholster \(1992\) 4 Cal.Rptr.2d 765](#)
 - Make sure you get it right (remember the goal is to be seen as the source of the truth and provide clarity)
 - E.g., defense ploy to only cite to a portion of the circumstantial evidence instruction
- Using hypotheticals?
 - Cases are mixed about case specific hypos
- Asking about how they assess credibility
 - Making a mistake = you are a liar/can't be trusted or the whole report is not reliable?

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