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Criminal Law in Practice Series: Jury Selection

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CRIMINAL LAW IN PRACTICE SERIES: JURY SELECTION

ROB MCGUIRE*

Moderator. It is my pleasure to get to introduce Rob McGuire who is a graduate of Northwestern University and Vanderbilt University Law School. He worked for thirteen years at Davidson County District Attorney General's Office where he started the Monday after he graduated from law school. So, trying to study for the bar exam while working as an assistant at the DA's office. That's pretty challenging. Mr. McGuire is one of the most respected trial attorneys in Middle Tennessee and one of the most experienced trial attorneys in Middle Tennessee. Since he left the DA's office he has been handling things from the other side of the aisle. He has been handling criminal defense matters in state and federal courts. He has also brought his skills and knowledge here to Belmont law where he serves as an adjunct working with trial advocacy and next semester he is going to be teaching advanced trial advocacy, which I imagine is a subject of some interest a fair number of people in this room. Please join me in giving a warm welcome.

Rob McGuire. Thank you all very much, I appreciate the introduction and the welcome. I tried almost one-hundred jury trials when I was at the DA's office. Thirty of those were first degree murder cases and handle a lot more. Even the cases that didn't go to trial, we were constantly evaluating those cases for how they will be tried and your relevant chances at success. I want to talk about jury selection today and really talk about blending jury selection with the rest of your case. I would submit that jury selection is the most, one of the most if not the most important part of the trial. Opening statements are important, closing arguments are important. Obviously, the admission of exhibits and the introduction of evidence is important, but unless you have fertile ground for the seeds that you are going to try to plant, it is meaningless

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how good your presentation is. If you are not able to get twelve or fourteen people depending on the way your jury is selected, to be able to listen and to really hear your case and your case theory, whatever you're doing is sort of whistling past the graveyard at that point.

So, what are the goals of jury selection? We are trying to advance our case theory; we are educating the jury on the important concepts; we are weeding out jurors who would not be appropriate jurors for our case, it doesn't mean they are bad people, ok; and we are trying to empower jurors who may later be advocates for our case. So, a lot more than just asking people where they're from and can they be fair and impartial. When I say advance your case theory, what I really mean is the overarching narrative of your case. Who are the players, we'll talk about it here in a little bit, and what are your facts, and what are your non-factual, for lack of a better term, emotional connections that your case can have?

Education is a word that I use very specifically, that we want to educate the jury part of jury selection is a forum very similar to what we're doing right now. Is that you, as the attorney, as the person who has the knowledge about the legal aspects of your case are going to teach jurors about the legal aspects of the case in a way that hopefully is compelling to them and persuasive about the way that they should view the law.

Weeding out jurors is really what jury selection is all about. And we'll talk about that more later on in the presentation when we talk about strikes. But what we're really looking for is who do we not want? And when I use the term "empower the jurors," what I really mean is, who is going to be the juror or jurors who are going to be back in the jury room advocating your side of the case? Because what will happen is they will go back into the jury room and they will pick a foreperson and then they'll start debating whether or not they think, in a criminal case, the defendant is guilty or not guilty of a crime and if he or she is guilty of a crime, what crime they are guilty of. And like any debate anywhere on the planet, there will be people who are for your side and people who are against it. Who are the people who you are going to equip to be advocates of your side in the jury room? Can you figure out who they are before you start pitching your case, and can you do things, then, during the course of the trial, that will give them the issues they need to make your case when you can't go in the room.

That is something that I think gets short shrift when a lot of attorneys think about jury selection. They go through and they want to ask, "Can you going to be fair and impartial and are you going to follow the law," which doesn't help accomplish any of your real goals. Why are we having a jury trial in the first place?

Audience. Well, the defendant pled not guilty, or doesn't think he's guilty, so he is wanting somebody else to basically make that determination.

Audience. We believe the adversarial system is the best way to find out the truth.

Audience. We couldn't reach a decision upon sentencing.

Audience. We want to win.

Rob McGuire. Yes. The purpose of a jury trial is to win the jury trial. If you can't win it, you settle it! Right? So, I appreciate the very erudite, theoretical, quasi theological answers to that question, because it is law school and those are the things you are supposed to think about.

My job, and especially as an adjunct, is to encourage you to think about the practical. And the reason to have a jury trial is to win a jury trial. Now, not win at all costs, not win in spite of someone's rights, not win in spite of the evidence or try to do things that are outside of the rules, but to win the jury trial, because you, as the advocate, standing in the well, believe in your case. You feel that this person should be held accountable for this crime. Or you feel that this person is factually innocent or at least not guilty of the crime that the government says that they are charged with. And that's why you're there. If you're not interested in that, then pack it up. Practice tax law, or plan estates or something. But, if you want to try a jury trial, the key is to try to put yourself in a position to win.

The final thing you want to do is to get the jury to like you. If you can. Now some of you are probably pretty unlikeable, OK? I'm just kidding. I'm kidding! And that's not necessarily the most important part of jury selection, but in any endeavor, anywhere in the world, people naturally gravitate toward those people that they like, or that they respect, or that they feel are good at what they are doing. And that natural attraction is a powerful force, because it allows you to teach in a more compelling way.

So, let's talk about some teaching. What are we teaching the jury about? We're teaching the jury about the players. Who is the defendant? Who is the alleged victim? Who are the witnesses? Now, to some extent, we are not going to be able to give biographical sketches of each of the participants, but there may be important ways that you can set the table for the jury understanding who these people are.

For example, if I described a hypothetical situation as follows: "You are going to hear from Elsie Watson, who is a nine-year-old little girl, and it's going to describe to you, interactions she had with her uncle." Tell me what

everybody's feeling just based on that description. Yes, the lady in the front row said "creepy," which is accurate. What else do we feel?

Audience. It's like a book; you want to know what happens.

Rob McGuire. So, it's that, certainly, you have everybody wanting more.

Audience. Sympathy for the little girl.

Rob McGuire. Right? Sympathy for the little girl. We have an instinctive protection ethos toward children, and that will not be lost on your jurors. So that was a very accurate, short description of the player, but it was packed with a narrative and an appeal. That's what we're talking about. Let's talk to the jury about the facts of this case. This is what the case is about. "You will hear testimony that . . . thus and such."

Now, what if you were, as a prosecutor, prosecuting the murder of a person who had been involved in the sale of illegal narcotics? And they were robbed by the defendant that is now on trial, and during the course of that robbery, that person was murdered. So, they are a player, but there are also some facts that you're going to need to educate the jury with, regarding, for instance, the idea that just because you have broken the law does not mean you deserve to be murdered.

Is that a proposition that everyone can get behind? Just as a basic human walking around. That simply because you have made bad decision or are a bad person doesn't allow somebody to take your life. The law is also what we are teaching the jury about. And we are going to talk specifically about dealing with legal concepts in a way that is approachable to the jury. That allows them to understand the concept, but also does it in a persuasive way. Because we are not just teaching a seminar on the felony murder rule. We are teaching the felony murder rule as it is to be applied in this case, to these facts, for this defendant. And with that in mind, we have to teach it in a way that advocates. We are going to teach the jury about concepts of justice.

A question that I ask very regularly in jury selection is if I describe a legal concept, I will ask all of the jurors, "Is there anything about that concept that strikes you as unfair?" And if the answer is, "Yes," I want to know more about that. It doesn't necessarily mean that I will strike them, although that's not a good sign, depending on what the concept is. But I want to test their attitudes about the fairness of the judicial system, of police involvement, the role of the prosecutor, the role of the defense attorney- test their attitudes about whether or not they think a defendant should testify, now as a prosecutor I'm probably not going to do that, because I'm going to avoid that whole construct, but as a defense attorney, I'm certainly going to ask those

questions. Because I want to test those attitudes. I want to understand what their concepts of justice are, and to the extent that I could help be formative in them. Specifically, on the idea of a defendant's right not to testify. Now we all know that, certainly everyone in this room knows that. And that is something that is generally accepted as an article of faith in American culture. We are sort of generally aware of that fifth amendment right. But how a person feels about it, and then how they feel about it when they really stop to think about it, are two totally different things. Generally, jurors want to hear both sides of an argument. They generally want to hear both sides of the story. But the idea that a person may not testify for a reason that doesn't have anything to do with their guilt of the crime. So, we are able to do that in meaningful ways.

How is it best to teach the jurors? Jurors by nature are uncomfortable with this process. They, for the most part, will do their civic duty in a generally grudging fashion. They have to take off work. They will do it. They may be sort of interested in it, but at the end of the day they would rather be doing something else. Also, too, most jurors don't like public speaking. They don't like to be asked questions and they don't like to talk in front of people they don't know. Now, I say all that and tell you that jurors, in my opinion, are some of the finest citizens that we have. Because they come into court and they are asked to decide major questions affecting multiple lives, for no money. And they do it with a real seriousness of purpose, for the most part. So, you have to respect that. In other words, you have to treat them like the judges of facts and the law, that they are.

When you try to approach a person that you were interested in romantically for the evening, you would not just walk up to them and say, "Yeah, so afterwards, let's go out for some chicken, what do you think?" Right? You are not going to approach anyone like that with any chance of success. Well, attorneys often make the mistake of approaching jurors with that sort of blunt force to try to get answers so that they can check their box and sit down. That is, I think, really unfortunate for them because they are missing an opportunity and what are they also doing? They are alienating the jury. Remember, we want them to like us if possible.

They will listen to your case theory only if it's presented attractively. And what I mean by that is you have to tack your case theory to an overarching narrative that's anchored in an unassailable value. For those of you who are either taking my trial ad course now or have taken it in the past, you know that's familiar rhetoric to you. The test that I like to use is, can you anchor your case to something that if I went out into the quad and asked one-hundred people, "Do they agree with this value?" The answer would be, "yes." An example would be that people shouldn't profit from their ill-gotten gains. If

the jury is attracted to your case theory based on this value, they're more likely to go in your direction.

Another concept that I like a lot is that people like their own ideas. To the extent that you can get the jury to hook into an idea that you are going to pitch on their own, the better. And what I mean by that is if you think that a witness is lying, simply asking them in multiple different ways at different volumes whether they are lying, is not going to get the jury to appreciate that they are lying. You have to lay your questions out so that it is obvious to the jury that they are lying. Well that starts in jury selection. You need to get them thinking about, as Paul described, what comes next. When I gave you my description of the nine-year old girl and her uncle what kind of case do you automatically assume that it is?

Audience. Child rape.

Rob McGuire. Okay, some kind of child abuse, either sexual or potentially physical. And what do you feel about the child and the uncle?

Audience. Compassion for the child and immediate distrust for the uncle.

Rob McGuire. And creepiness towards the uncle. People like their own ideas. I didn't tell you, "The uncle is weird. And he's got a lot of weird stuff on his computer that you're going to hear about and it's weird." Or, "this little girl is cute as a button and she's going to remind you of your granddaughter." Right? I didn't say any of those things. But I phrased my introduction in a way that naturally pulls out those attitudes, because people like their own ideas. Now I am starting from a position of strength because the juror has already decided that this child is worthy of protection and that this uncle is somebody that I should be suspicious of. Mission accomplished. Value based jury selection is sort of what I've just described to you. It's this idea that you are asking the jury attitudinally about values that you are anchoring your case to and are also difficult to attack.

In that description of the child and her uncle, what would be a couple of values that you would think are anchored in that question? Or, in that statement, excuse me. Yes ma'am?

Audience. Children should be protected.

Rob McGuire. Children should be protected. What's another one? What about the adult? Adults shouldn't be allowed to do anything inappropriate to children. Those are values that are going to be unassailed by other people in the quad. So, by asking those, or making those statements, asking those kind of questions, you are anchoring your case to those values.

Let's talk a little bit about individual jury selection versus group selection, there are positives and negatives. The positives I think are you get to talk to each individual juror. The negatives are primarily it takes a long time and sometimes the judge may not like it, but I would really encourage you to do individual voir dire as much as possible. Speak specifically to every individual juror.

If you are going to do individual voir dire, you have to start with someone who is going to be able to play along. Who in here has played catch? Alright. Who in here has played catch with a two-year old? Is it more challenging to play catch with a two year-old or a twelve year-old?

Audience. Two year-old.

Rob McGuire. Why is that? Because the two year-old can't catch and they certainly can't throw back. Right? You can't play a good game of catch with somebody who's not able to do it. So, you have to find a juror that you're going to start with that is going to be able to play catch. If you are going to describe legal concepts, you have to look carefully at your juror, and you are going to have to make some assumptions. You may want to talk to the juror who has professional training, as an architect or a physician or an accountant, about legal concepts rather than someone who has lesser education. It does not mean that the lesser-education person can't handle it. They may be able to play a great game of catch. But you can't start with them and then have a terrible game of catch and then go to somebody else because the game of catch over here is awful. Because that's going to make this guy feel like he's a moron, and everybody's going to see that. You do have to make some assumptions, but I would submit they are reasonable assumptions and eventually you're going to talk to every single member of the jury.

Make it as easy as possible. Don't ask the jury, "What are your thoughts on the felony murder rule?" They don't know what that is. "How do you feel about criminal responsibility for the conduct of another?" They don't know what you're talking about. Try to explain your positions as succinctly as you can.

I always ask a catchall question to every single juror I talk to. And a catchall question goes something like this: "Is there anything that I haven't asked you that you think I ought to know?" Because if there's something that they are dying to tell you, you want to know about it. It might be something silly. It might be something that doesn't matter. But it's something that if they want to tell you, you want to know. This is your only chance to talk to them. You don't have another opportunity.

We're going to build rapport using words thoughtfully. Jurors are going to decide very quickly whether they like you. Now, if they don't like you, that's okay. Don't fret; there's still an opportunity for you to be successful. But what are ways to do that? You can align yourself with the jurors to the extent it's possible. And what that means is, who in here sees water on the council table? Or not in here, I'm sorry. Who in this room has seen water on the council table? Has anybody, for those of you who have been able to practice as 3rd years, have you used the water in a jury trial? Anybody have a jury trial? Anybody who's been in a jury trial? Okay, great. Did you drink the water?

Audience. No.

Rob McGuire. Why not?

Audience. Because jurors don't have water.

Rob McGuire. Exactly. We all get water, or we don't get water. We're all on the bus together. Make sure you think about who needs a bathroom break. Make sure you feel like the jurors are comfortable. If you see somebody who's stressing out, man, you know, don't leave them on the hook. If a person who has a problem or has an issue, they need a tissue, give it to them. Hey, we're all in this together. To the extent that that means you can do that, the better it'll be for you.

So, I would advise you to be yourself because you don't want to pretend to be something that you aren't. I have a very specific style. I've been practicing law for almost twenty years. The way I do it's the way I do it. The way I do it may not be the way that you do it, and you shouldn't try to be somebody that you aren't.

It is really important for you to always project authenticity to your jury. Because if they think you are selling snake oil, they will not go with you. If they think you believe in your case, and are sincere in your arguments, that is a big deal. Because any human endeavor that we ever witness, we pick sides. Who in here likes sports? Think about your favorite sport, baseball, football, volleyball, whatever it is, and think about if you watched a sporting event that did not involve one of your favorite teams. I really like college football. I'm a big Northwestern fan. But I like college football, so I'll watch East Directional State versus Southern Tech All-Stars. But if I'm sitting there and it's a decent game, I will naturally start to pull for one side or the other. I don't know anybody at these schools, I have no dog in this hunt, I have no money on the game, but I'll naturally start kind of pulling for one side or the other. We can't help it. And jurors are the same way. They will naturally start when you sit down, be like, "Oh, honey, that was a good cross-exam. My girl

did it that time.” They don’t even know you. They will start to do that. Or, “Man that guy needs to shut up, he’s terrible.” Right? They will start, they will start to gravitate towards a side and, ideally, you’d like them to gravitate towards your side. And some of the ways you do that are to project that authenticity.

Try to have a sense of humor. Funny stuff is going to happen. Right? I was very early into my career. I was talking to a jury and I recognized one of the jurors from church services that I was attending. And I thought, relatively early in my career, I’m going to acknowledge this. That will show how fair I am, that I am acknowledging that this person and I know each other. I also thought I could potentially work in that I go to church, that’s not going to hurt in the Bible Belt, right? I asked this woman once, “Ms. So and So, you and I know each other, because we attend the same church.” And she says, “Yes, and you don’t go very often.” So, I got up, everybody laughed like you all did, and I kind of shook it off and then I went to the next person and said, “Mr. So and So, do you and I know each other from church? Not that I would know.” And tried to kind of use some humor. But it is funny. I think it’s fair to laugh. You know I didn’t get all discombobulated. That was a funny moment. I didn’t keep her as a juror, obviously. But it was funny, and I think you can laugh when stuff like that happens.

Now, let’s be really clear. We don’t laugh at other jurors unless they are trying to be funny. Now if somebody says something that is funny but it is also sort of mean to laugh at, we are not doing that. And we’re not encouraging other jurors to be mean girls to them. The idea is that self-deprecating humor always is okay. Anytime you can make fun of yourself in a reasonable way is positive. And anytime the jurors make fun of you, that’s probably okay too because in a nervous situation, jurors aren’t going to make fun of you unless they think you can take it and if they think you can take it, it means they probably like you and you’re okay.

Jurors sense your judgment. If you ask a question, for example, a female juror says, “I have two children.” And you say, “So, what does your husband do?” What does that connote? Is she married and, if she’s not, she should be. She could be divorced. She could have had a child without a husband. We don’t know anything about this guy. He could be a huge jerk and we would tell her not to marry him if we knew. But, that conveys that judgment and how do you think that woman feels now? Because it’s not just you, it’s everybody else looking at her. Right?

My favorite that I see often is, “Do you have a job or do you stay at home?” Don’t do that. You know a good way to phrase that is, “Do you work outside the home?” And I almost always say, “Because if you’re inside the home, you’re working way too much for too little pay.” Usually, the ladies in the

jury say, “You know that’s right.” Try to understand and be thoughtful before you ask the questions.

I would invite candor and I would respect it when it occurs. If you ask somebody how they feel about a proposition, and they come back with something like, “Well, when I was reviewing *Mein Kampf* last night and thought that, you know, the minorities have too much power in the universe, I was really reminded of why I wanted to be a juror.” Alright, so that is one of the more repellant answers that anybody could possibly get. Your job at that point is to say, “Thank you very much sir, appreciate your candor.” And move on. The person’s gone. You’re obviously not going to strike that. But if they lay that big of a bombshell on the table and you don’t react to it, then it makes everybody else feel better. For example, “Well, I guess I can talk about the fact that I got arrested for a DUI a couple years ago because at least I’m not a Nazi.” But if you get that candor you have to respect it because the jury is worried that you or other people are going to think that they’re bad people. You need that candor. You need them to talk about bad experiences with the police, for example, so that you can understand it. You need them to talk about their child who was arrested for a crime because you need to use that to decide if they’re an appropriate juror or not. They will not tell you if they think you’re going to judge them. They just won’t. They’ll still have that experience, and then they’ll stick you in the jury room.

Let’s talk about case theory. We’re going to kind of flip through the rest of these relatively quickly. So, how you win is less important than why you should win. And what I mean by that is under the elements of the law, two plus two equals four. If you prove A, B, and C, it means “guilty.” But the world as we know is not that formulaic. We need to not just convict the jury that you’re right on the law, but you also need to convict them that you’re right on justice, that this is fair. So, to that end, what can you insert in your questions and make your side look sympathetic? What can you insert in your questions and make your opponent look less sympathetic?

Remember my rollout of the little girl and her uncle. Are there any bad facts that you need to inoculate the jury from? What I mean by that is, let’s say that you are calling a codefendant right? This is a person who has been charged with a crime, along with the defendant you’re trying, ok? And they have a criminal record, and they’ve been charged with murder or whatever, and they’re going to get some kind of break, those are bad facts. So, let’s talk to the jury about them. Not specifically, necessarily, but hypothetically. Something that I use in that instance is I talk about the movie called *Conspiracy*.¹ The movie was about the people who tried to bomb and kill Hitler at the end of World War II. The idea is I describe that as a jumping off

1. *Conspiracy* (HBO Films 2001).

point to say, “Sometimes if we wanted the best history of what happened, we are going to have to talk to one of the conspirators.” They are going to have to tell us what they did because the nature of conspiracy is to keep it secret. That’s why it’s conspiracy! And to try to get the jury to understand that we are doing that in an effort to provide them the best possible evidence of what happened. Not because we’re just in the business of cutting somebody a break. But if you do that in jury selection, then when a defense lawyer goes after that co-defendant, it has less effect because the jury is already thinking, “Well you know what else are we going to do right? How else are we going to find out what happened?”

I would encourage you not to defend bad behavior on your side. If a guy has 26 convictions for felony theft, don’t say, “Those were all big misunderstandings,” or, “26 isn’t as bad as 50.” Instead say, “This man has made terrible choices in his life.” He’s made bad decisions, he’s been accountable for his crimes. Does that mean that he’s not telling the truth about what happened? And most of your jurors are going to concede, “no.”

Let’s talk about legal theory. When we deal with challenging legal concepts I want you to consider using a hypothetical that embraces the hardest possible application of the rule. You are well prepared to do this because in a Socratic method scenario, a professor will take a legal concept and push it to absurd lengths, right? Think about that. For example, the way that I describe it is pregnant girlfriend agrees to drive her ne’er-do-well boyfriend to a convenience store, where he is going to take money from the clerk. She doesn’t know he has a gun, she doesn’t want anyone to get hurt, but she agrees to participate in that part of the crime, but then the guy goes in and kills the clerk. The question becomes, “Should she be convicted of murder?” Everyone is thinking, “Well, that seems pretty harsh. I mean she’s pregnant, so that’s bad.” If each juror says, “Well I’ll follow the law,” and you know that your facts don’t look anything like that—that you’ve got a statement from the guy saying, “I was in for that robbery, I went in holding a shotgun! I was ready for somebody to get robbed,” and somebody gets killed, those aren’t the pregnant girlfriend’s facts. Those are far more inculpatory facts, and the jury is way more likely to say, “Well gosh, I was ready to burn down this pregnant girlfriend, but this guy’s got a shotgun in there.”

Don’t feel the need to explain every legal concept. Focus your teaching on the most important ones. You don’t need to spend time talking about venue, or potential alternative defenses. Just focus on the ones you think are going to be the most important. Jurors will not have sat in felony murder trials more than once or twice. In most cases it’s never, but sometimes you have jurors who have served before, although it’s limited experience. But jurors make difficult decisions about their lives all day long. What decision processes do they use? And it’s generally the ones we ask them to use as jurors.

Assemble all the information, decide whether it makes sense, who is telling you the information, do they seem reliable, and trustworthy, and what's the best course of action from here? Well that's what we want them to do as a juror. Take in all the evidence. So, if I'm defending a case I'm going to say, "you know you would do that, but if you later found out that the doctor who advised you to have this surgery had a wicked cocaine and gambling problem, you'd probably get a second opinion. Fair?" People would be like, "Yeah, fair." Well that allows me to then tee off on the codefendant and say, "Ladies and gentlemen, this is just like the doctor you that wanted a second opinion. You rejected his advice or his statements because he did not seem credible. That's the way you order your own affairs in your life, that's all that we're asking you to do in this case. Reject that testimony just as you rejected the advice of the doctor who had some problems."

So jury selection is a misnomer. We don't pick the jury, we pick who aren't the jury. So let's talk about strikes, and then we'll be wrapping up here. The threshold question is, "Can a juror be struck for cause? Do you have to use a strike?" You have limited strikes, so you always want to consider, "Did this person say something that would allow them to be struck for cause? Or can I get them to say something?" "Sounds like you couldn't be fair and impartial." And the person says, "Yeah, I don't think I can be." Bye! Great, I don't have to put a strike on that person. Your instinct is important, so I would encourage you to resist being like, "Well, I know . . . —I'm the prosecutor okay?—" I know this person is really super liberal, and came in here with their Birkenstocks and their handmade clothes, but I feel confident that I can get them to convict on a felony murder case." No, you can't! Do not talk yourself into your own ability or the strength of your case to try to pitch to a juror who is not going to be listening to what you have to say.

Understand the process regarding back striking. What I mean by that is, once a round is finished and you go and you strike a juror, and then they go to the next round, can you then go back to strike a juror that was in the first round? Most courts allow you to do that. But some don't, and that's really important. Because if you can't back strike, then you've got to strike the people in the round that you just had or you lose the chance to strike them at all. Again, most courts allow back striking, just check. If you've never tried a case in front of that judge, just get some intel, because that is critical to your strategy. Know how the alternates are selected. In some courtrooms in Davidson County, the alternates are selected specifically. They put twelve in the box, those are going to be your jurors and then they pick two alternates. So the alternates know who they are, and you know who they are. Alright? In some courts in Davidson County, they put fourteen in the box, everybody is qualified as a juror, and at the end they do a lottery to decide who the alternates are. Okay? Again, just basic stuff. You would not play any kind of competition without knowing the basic rules. Know the basic rules. If you

can back strike, consider not striking immediately after your decision. It keeps everybody sort of guessing. You have an interaction with a juror that everybody in the courtroom knows you're going to strike based on their answers, and you don't strike them for a round or two. Well then when they get struck everybody is like, "Well I wonder, why did they get struck then?" It's just a little bit of subterfuge because it's difficult to basically tell somebody they are not wanted. And it's difficult for other jurors to see someone who is voted off the island. So to the extent that you can put a cloak around that, I think it's worth doing. If you strike first, if you're the prosecution or the plaintiff, prepare your strikes while your opponent is presenting. You know who you're going to strike when you sit down generally.

Sometimes something changes, if you're the prosecutor, in the defense questioning, but I just like it because what you can do is, when, you know the court officer will come and take your slips, and you can hand the slip right away. And then everybody in the courtroom is watching the defense decide who they're going to strike. And they're like, "Okay, any time now would be great guys!" And I, see ladies and gentlemen, I had no problems with you, that's why I already turned in my slip. It's a small thing, but I really like doing it because again, I'm aligning myself with the jury. I want them to think that I'm someone who they can relate to, and that I like them and that they like me. It also is a little psychological warfare on the defense, my opponent, because the idea is, they know that everybody is looking at them so maybe they'll make a quicker and potentially poorer decision. Because remember, what are we having a jury trial for? To win.

Write a shorthand reason for the strike. And what I mean by that is: especially if you're the prosecution and there is a Batson issue, or just an issue about any kind of impropriety in your jury selection, if you write a shorthand note to why you're striking them—presuming of course it is not a prohibited reason—which you know, not only don't write it down, but don't practice law.² If you write that down, it sort of makes it, because sometimes the transcripts don't necessarily pick up the fact that you know someone gave you an eye roll when you talked about a legal concept. And even if you put, "juror rolled their eyes when I talked about criminal responsibility" Maybe two years later or three years later when you're on a federal habeas petition, you'll remember "Oh yeah that person did roll their eyes and I'm glad I wrote that down." Because it just helps you remember it later.

Let's talk about responding to opposing counsel. Remember, jury selection is still part of the trial, right? It's still a competition. So if they make a good point, you have to respond to it. You can't just be like, "Well gosh they really

2. *Batson v. Kentucky*, 476 U.S. 79 (1986).

did a nice job on jury selection so I'm just going to get up, ask everybody if they can be fair and impartial, and sit down." You have to respond to whatever their good statement or good jury selection piece is. So, in multiple rounds, jury selection gets long. It gets tedious. It gets tiresome. Everybody knows the questions that you're going to ask. Stay vigilant. Consider asking some summary questions. You know, "do you understand the rules of criminal responsibility that I talked about with other jurors?" And consider asking summary questions that allow for different responses. One that I like to use is: "Have I or the other attorney asked anyone else, any questions that you would've answered differently or had more to say?" Because the idea is if you talked about felony murder and somebody really has a problem with felony murder, that's an invitation for them to say, "You know, I really got a problem with felony murder. I don't really like it." Okay great, let's talk about it. I mean for the last few moments while you're with us, because I'm going to strike you, but let's talk about it. And I would just say, you know what let's just get a jury, it's 4:30 I'm ready to get this thing on the road. I got three strikes left, I'm not crazy about juror number six, but let's just go to the house. Don't do it. I mean do it if you want to try the case again I guess. Or you want to get a bad result. But don't do that. A jury consists of twelve persons chosen to decide who has a better lawyer. I always like that. You want to be the better lawyer. So that is my presentation. It went a little bit long, but we do have some time for questions I think, if people have questions. And I'm willing to stay for as long as people have questions.

Moderator. What questions do you guys have about the jury selection process?

Audience. What are your opinions on someone who already has a legal background, like a law student, a lawyer, or a former police officer?

Rob McGuire. Former police officers are generally going to be struck by the defense. If I was trying a case and I had a former police officer, I would probably strike them. Only because a lot of times a police officer's worldview is fixed, and it has very defined, decided thought processes on the criminal justice system that I'm not comfortable with. That said, you have to be careful. I don't mind people with legal backgrounds, particularly if they don't practice criminal law. I like smart jurors, generally. I want people who are thoughtful. I want people who if the dots are close together, they can connect them. I want people that make rational and logical inferences. Which generally means I want smart people. Now I don't want people who are so smart that they will overthink a relatively straightforward concept. So Ph.D.'s? I'm a little out on, generally just because I think sometimes the theoretical makes perfect the enemy of the good.

And that's a problem. But I don't have a problem with attorneys, and I actually tried a case where an attorney I knew, and we just closed it to the court. It was a double homicide case. We were closing the court, we had been in a Bar, you know, one of those Bar leadership things together, and he had been a former public defender. But I knew that since his time in the public defender's office, he had been at the right of Attila the Hun on criminal justice issues, so I was like this guy is an awesome juror. There's no way they're going to keep—I know him. But the fact that he had been a public defender made the defense feel like he's going to be sympathetic to our side. That did not work out. So, be careful. Assumptions are decent, but don't be like, I think it's a lot of pernicious assumptions that unfortunately a lot of prosecutors' offices around the United States have said, "Don't try cases with black jurors." Every case I had, just about, and if I did have a black juror on my case, it was not by design, I remember specifically there were several alternate strikes that made it interesting. But in my experience, people are people, and if they're outraged by this person getting gunned down in the street, it doesn't matter really, you know? Now, you have to present a case that's compelling and that's just and that's based on facts and the law, right? But I don't get the sense that one particular male, female, Hispanic, Asian American are predisposed to one another. I think that people's life experiences generally affect how they view the world in the case, but I don't know that is necessarily all-consuming.

Audience. Just a quick clarification on a practical matter on the process of back-striking and whether it's the full group all at once or twelve at a time. Is that jurisdiction based?

Rob McGuire. Both. In federal court versus state court, a lot of times there's specific differences. Like in federal court, the judge usually asks all the jury selection questions. In state court, there still may be little differences. Like I said, even in Davidson County Criminal Courts, we pick the alternates and we know who they are, and the alternates don't know who they are until the end. That's why I really encourage you, if you're not sure, get some intel. Find out somebody who's tried a case in that court and just ask, and they'll tell you. Or, worst case scenario, ask the court reporter and they'll tell you. Or the clerk, you know? Man, I always suck up to the clerks. Because the courts will tell you what's going on.

Audience. What are some common mistakes you see other attorneys make?

Rob McGuire. Talking down to the jurors. Not letting the jurors be interactive. Basically, asking a really long question that requires a yes or no answer—you don't get any information from that. Running through their case and not having any more information about who you're going to strike when they sit down. Jury selection should be about jurors talking to a large

degree. It starts with you making your presentation, but it ends with you having more of an interaction with the jury. Those are the big mistakes—the extent that it's less of an interactive process.

Audience. Just two quick issues. First, is it acceptable when I'm working on a jury trial, I just kind of went by numbers. Should I be a little bit more personal? Do you have any tips?

Rob McGuire. Yeah, don't call them "Juror Number 6." Don't do that. But I think it's reasonable to take a cheat up to the podium. I mean, I do. I've got Joe Smith, Mary Jones, whatever their names are. And just keep track of it, so that I can, and sometimes you're going to mess up, and that's ok. Just own it. You know, if you call Juror number 6 by Juror number 5's name, you're like, "I'm really sorry. I apologize." Generally, if you do it in a sincere way, people are going to give you the benefit of the doubt. But you don't have to necessarily remember all of their names, but you want to make sure that you check and call them by their correct names before you address them.

Audience. And the second thing: if you see a jury nullification issue coming, is there a way to kind of hand off, so I did a couple of misdemeanor DUI trials, and drug/DUI trials, people don't like to convict them.

Rob McGuire. What would be ways that we could help him in those trials? What do you think based on the things that we've talked about so far, what would be things we could use?

Audience. I don't know what exact terms you're using, but using a more dramatic hypothetical or an analogy for the situation - Like what our professors do in class.

Rob McGuire. Sure. Just describe a scenario where a person is killed by Dr. Hubbard. That's the reason that we have these laws. Well, what are other ways? Do you think jurors come and do not want to follow the law? [Pause.] No, they do want to follow the law. What's hard is when they have to follow the law on facts they don't like, right? So are there ways that we can inoculate the jury on following the law even if they don't love the outcome? And I think the answer is yes, but we have to be thoughtful about it. To try and answer the specific question you asked, what I can really focus on is why do I think they're going to nullify? Is the person a 95-year-old guy? First of all, why am I trying the case in the first place? Is the person sympathetic? Do they have a disability? Do they have—do they just seem like a nice person? Do they have a quarter that they're going to lose? What is it about that person that makes the jury feel like how you're going to want to drop the hammer on that person. And can we lean into those thoughts? Because if, for example, they are a profession with a career they don't want to lose, doesn't it make it

more likely they would exercise better judgment? It's not our fault that you have to hold them accountable. It's their fault that they made poor decisions, and that sucks, right? I've said that to juries before that simply because of the age of the defendant, a person who is a very young person is not reasonable doubt. It is terrible, it is tragic. We can curse that tragedy, but we can't not do our jobs because it's unpleasant. There's a very specific jury instruction that reasonable doubt is not the avoidance of an unpleasant duty, and I think there's something there. If you feel like that going, it's in the jury instructions. That might be useful.

Audience. You mentioned talking about don't give up your strikes because you want to go home or because you want to see, but have you ever experienced kind of the other side of that coin where you think this jury is good enough and you look at the remaining pool and you don't like what you see.

Rob McGuire. I have, and to me, that's a completely different strategy decision. If the jurors that are sitting in the gallery look like the bar scene from *Star Wars*, and you go, "Oh, well let's go with these because the ones behind them are no good, I think that's a strategy decision. That's why, ok, we're done because what's coming behind them is so bad. What I'm talking about is don't be like, "You know what? We've got strikes and it doesn't look like "Mutant Central" behind us, but I'm ready to do my opening statement! I'm ready to talk about my theme, and raise my arms, and be objected to! Get this show on the road!" That's not a good decision to just quit picking the jury. But no, I agree. That's a strategic decision. I've done that and I think that that's sometimes appropriate. And just cut your losses. I love the jury I've got, but man, we've got some real winners behind them.

Audience. Say you have an unfortunate circumstance where you have a cold jury box and you've got your whole introductions of I what's your name, what's your occupation, are you married, and they are just really quiet? What is a good—I don't want to say "icebreaker," but a way to kind of get them focused on the topic at hand and get conversation going?

Rob McGuire. I think that sometimes the individual voir dire helps with that. But, if you start talking to one juror, they are necessarily going to have to answer. That's why I talked about making assumptions— choosing whoever the first person you're going to talk to is important because if they interact, it makes it easier for everyone to interact. I think that asking a group voir dire, and just being like, "Hey, so who in here likes the idea of proof beyond a reasonable doubt?" and it's like crickets because no one really knows how to answer that Audience. Nobody wants to be wrong, but if you kind of put somebody on the spot that you think can handle it, it opens it up for everybody else, and then what you'll find is you're interacting with a juror

over here and then another juror raises their hand. Man, that's good news right there because then you're like, "Yes, ma'am, what do you have to say about that?" and then somebody else says and then all of a sudden, it's Rob McGuire's altar call. And it's true because once you get one or two people talking, everybody else—now that doesn't mean everyone is going to volunteer something, ok? But it just means that it's more likely that they are seeing this interaction and it's not terrible, it's not scary. Nobody is "zinging" them or making them feel stupid, and they're more likely to talk. So that's why I really encourage the individual voir dire—one of the many reasons.

Audience. As a way to encourage discussion, have you ever had a juror comment on what another juror said?

Rob McGuire. I have, but only to the extent of, "Does anybody disagree with that?" I don't generally pit jurors against each other, you know, Thunderdome style. "Do you think that's stupid or what?" [laughter] "Does anybody have a different view? Does everybody agree with Mr. So-and-so? Does everybody disagree?" And that's tough because people aren't going to step out and be like, "Well, that's a dumb idea." It's pretty rare, so it doesn't really tell me a whole lot. I mean doing that—I'm going to ask jurors pretty much the same question, and I will get their response, and if it's different, that'll tell me kind of how it's headed. But I've done, "Does anybody have a different view?" Especially if it's really bizarre. If they're like, "Well, I'm saying such-and-such," and people are like, "Woah." That may be when I do it.

Audience. What do you do when a juror goes on and on with an answer and gets to the point where it's irrelevant, do you just cut them off or just let it go?

Rob McGuire. No. The reason for that is that is because if you cut somebody off, you're going to disincentivize the other jurors from speaking. Everybody knows what's going on because some jurors are like—this is the changing day in their life, they're like, "I have waited for so many days to come and serve my country on a jury, and I watched *Dateline* every Friday, and I know all there is to know about CSI," and you think, "Oh, help me." Everybody in the room knows that, right? Thus, cutting that person off and picking a fight isn't helping anybody. Remember, you're aligning yourself with the jury. If you're voting somebody off the island and it's almost like, "Hey, girl, right? What?" You're trying to align yourself with the rest of the folks, but if you basically shut her down then it's you against them. You don't want it to be you against them.

Audience. You mentioned earlier the practice of accommodating the jury and making sure they're comfortable. How would you go about doing that?

For example, you recognize someone needs a tissue without singling them out and making them uncomfortable.

Rob McGuire. Yeah, you can be talking to somebody else like I'm talking to her and I just go, "Here's a wipe." You don't have to make a big deal out of it. If there are elderly folks, they're generally not shy about telling you what they need and when they need it because most of them don't care anymore. But for example, "So, Ms. Johnson, how are we doing up there? We good?" She'd be like, "Honey, I'm fine." "Great, you tell me if you need a break." See what I did there? You tell me if you need a break because I'm in charge. This guy in the robe? It's me. I'll take a break when you're ready to take a break, Ms. Johnson, because I got you girl! That's what we are trying to accomplish. We're trying to align ourselves. That's what we're trying to do. What else? I know, we're probably over on time here. I got to go back to the office and write a federal sentencing memorandum, so I'm not even in a hurry.

Audience. So with the uncle and the child, how would you flip that for the other side?

Rob McGuire. Tom Johnson is a father who is active with his church, and he is a longtime employee of the particular business. He really cares about his niece. He's been very active in her life. So now, what does that sound like?

Audience. He's a great guy.

Rob McGuire. And what else does it sound like? Yeah?

Audience. He's active in his niece's life, and she has a positive association with him.

Rob McGuire. What else could it possibly mean?

Audience. She comes from a negative family.

Rob McGuire. She made it up, right? He's active in her life, and something bad is happening and she's lashing out. And that's with no real thought. I mean those are fake facts, fake news. But it would really have to be thoughtful. You'd have to basically—what can I do to rule out somebody who's falsely accused of sexual assault? Can you imagine a worse thing to be accused of if you didn't do it?

So, fake news, but you would really have to be thoughtful, you would have to basically what would I have to do to rule out somebody who is falsely

accused of sexual assault. Could you imagine a worse thing to be accused of it you didn't do it? And then how do you prove a negative, right? How do you prove you didn't do something? It's really hard which is why that's not the standard and that's what we talk about I jury selection. If I go to a juror and say I know that you took my cell phone. What's your response to that? Did you take my cell phone?

Audience. Oh, no.

Rob McGuire. So, to prove it, what do you do? And I ask jurors just like that, what do you do? And they say, "Well I guess I establish where I was, perfect alibi, we got one." You know, that's not what I do. Perfect. We got character witnesses. So, get the jurors thinking about it to that extent. I'll give you a quick other example. Sexual assault cases. A major fact in virtually all adult sexual assault cases unless they are strangers, rape by strangers which is an infinitesimal number of sexual assault cases that happen in this country, there's a delay in reporting.

Usually the way it happens is a person is sexually assaulted by somebody that they know, they have conflicted feelings about what happened, they're concerned by their own conduct and how it will be viewed by the criminal justice system and they need some time to process. Sometimes that can be as short as 24 hours, sometimes it can be as long as months and then they come forward and they make a statement. And so the defense obviously is well if she was raped why didn't she come forward the next day and that's something that jurors have really strong attitudes about. So I ask whether anybody feel like this woman did anything wrong by not reporting and inevitably somebody will say yes and it's almost always a man and then I ask him to tell us about his last sexual experience. I do. And then he kind of looks at me like, what? In response, I say, you know what Mr. Johnson, don't do that but can you imagine how you felt in that moment. Having to describe your sexual experience to a room full of people that you don't know. Well that's what we're going to ask the victim in the case today. She doesn't know any of you all and she will be asked to come in here and talk to you about possibly the worst thing that has ever happened to her and you're going to worse, you're going to judge whether you think she's telling the truth. Can you imagine why it might be difficult for somebody to sign up for that? Right, because you are aligning yourself with the jury, you're teaching them about the way sexual assault gets reported in the United States. And you are reinforcing a narrative that a person should be believed even if they don't do everything the way you would want them to be done. What else can we talk about?

Audience. We just studied *Batson*. Have you ever had to deal with, have you ever seen a *Batson* issue coming and had to deal with it?

Rob McGuire. I've been "Batson-ed" not successfully, you know I think that's sort of one of the things people do.³ And I don't mean that negatively I think it's just sort of, I've reverse "Batson-ed" before.⁴ Where I felt like opposing counsel was striking jurors based on race that they felt to be advantageous to their side, but that's one of the reasons that I have those, that I write on the slips, this is why I'm striking that person. And that's why also I have good reasons for striking the person, it has nothing to do with race or a prohibitive reason. You know, it might be that we had a bad interaction on criminal responsibility, it might be that they have a child who was arrested for a crime that is substantially similar to the one I'm trying. You know, it doesn't mean there a bad person that's just a lot to set aside, they're looking across the defense table and they're seeing their own child. I mean I don't begrudge them for being biased about that, I just don't know that they're the right person for this jury. So, I would basically handle it like that so that way if you get "Batson-ed" you go up to the bench and you say this is why I struck this person, this is why I struck this person, this is why I struck this person, and again they have to be sincere reasons, you can't just sort of dress it up and be like well they had a bad interaction but really they're black.⁵ You can't do that. So, don't do that. You know make the reason be rational, you know. Make it be based on something that's defensible because we did have a bad interaction. I am concerned about the fact they have a child that is charged with the same offense as the defendant. Those are reasonable concerns.

Audience. We talked a little about introducing the players to the facts of the case. What are the boundaries of that, how much can you say?

Rob McGuire. Sure, that's a good audience. I think the answer is you do have to be circumspect. You can't give the biographical sketch. You are able to do some basic introduction to the basic facts of the case and to give the jury context about some of the law. That's going to be judge specific too. Some judges really want to be able to confine your ability to ask questions and those are the rules and we're just going to live with them. But to the extent you have a more freehand you have the ability to make an introduction. You may not be able to do more, but if you give a thoughtful introduction that's really all you need to do. You have the ability to ask the jurors questions concerning evidence that you have a good faith belief will be admitted in the trial, so don't ask them about how they would perceive 404(b) evidence or whether they would give this person the death penalty. They really can't be asked those kinds of questions. But attitudinal questions can be asked, such as: How do they feel about the death penalty? What if they learned that a person had done this before? Would that impact their thinking?

3. *Batson v. Kentucky*, 476 U.S. 79 (1986).

4. *Id.*

5. *Id.*

That may be a question you don't want to ask as a prosecutor because you don't want to get a bunch of cause strikes, but you could.

Audience. When you're dealing with jury from like another community and it's sequestered is there a different approach you would have to that versus a regular jury?

Rob McGuire. Not necessarily. People are people, I don't think that there's anything that is so endemic. You may have different attitudes, for example, in a smaller more conservative potentially more religious community than you would in say metropolitan Nashville. The kinds of jurors you get may be different. You know, so I would say urban versus rural is probably more of a divide than just if it's a different jurisdiction. But, I think it's worth if you're picking a jury from another jurisdiction that's not your own base is to call attorneys who practice in that jurisdiction to see what their experiences are and learn some basics. You know, if you're picking a jury from a county you've never heard of, Wikipedia. How many people live there? What do they do? How many churches? How many schools? Do they have a minor league baseball team? What's that community all about? Thankfully, that doesn't happen a bunch.

Audience. Going off of that comment, do you ever do more extensive research on the jury pool?

Rob McGuire. So, as a prosecutor I didn't really have the resources to do that and as a defense attorney I don't really have the resources to do that. Generally, I mean jury consultants, if money is no object you can obviously have those. I think there's a lot that's said about if that's a good use of resources or not. So, to me I don't really need the deep dive because I intend to ask them questions that I think will tell me a lot about them and their attitudes. Because I want to know their general family situation, are they married, do they have any children, how long have they worked at a particular job, do they have any military experience, do they have to solve problems and work in groups? Those questions right there are really going to tell me a lot about sort who they are in the universe and then I'm going to ask the specific attitudinal questions about facts or case theory or legal theory in my case. That will also tell me a lot. So, where they went to elementary school may or may not tell me anything. You know, it's just something I would say I probably get 80-90% of what I need just asking the jurors.

Audience. How do you feel about the judge asking questions and getting involved?

Rob McGuire. I hate, I hate it, I hate it. Because I don't get to do the Rob McGuire show, I don't get to do any of the stuff I like to do, which is to try

to get the jury to think about the case the way I want to try to roll it out. To get them to hopefully like me and like my side. I don't get to do any of those things, so I hate it. You know, I think too it doesn't tell me a lot. It's difficult, that sort of questioning often I find is very perfunctory, whereas like Cheryl Blackburn with the Davidson County Criminal Court is a fantastic judge and I've been in front of her multiple times, tried a lot of cases in front of her. She would just as soon pick the first twelve that showed up in the box and roll and that is antithetical to me. So, she doesn't really care for jury selection. She would assume to ask all the questions herself. I don't know if that would tell me enough that I would be able to make good decisions, so I hate it. But you know you can't, in federal court, you don't really have much of a choice.

Audience. So, what do you do to mitigate when you find yourself in a position where you are with the jury and you don't have that opportunity. Where do you make up for it?

Rob McGuire. You have to try to make up for it in your statements in your direct. You're not going to have visceral connection, or it's going to be harder to achieve. You're going to have to be really thoughtful to block the trial out. What I mean by that is the way you ask questions. If you have a compelling witness, then you're going to have to do some more stage craft to have those moments because you're making up for the fact the jury doesn't have or has not had the opportunity to feel that empathy. Your cross examination might be different. So, there are ways to do it, but not as good because you don't have that interaction coming back. You don't know how it's being received or you don't have as much information. People will sit, slump their shoulders, roll their eyes, laugh, or they'll cross their arms. They do all of the natural body language stuff that people do.

For example, Sarah Davis, who is now the Assistant District Attorney in Rutherford County, and I tried ten murder cases together and we were undefeated. We tried a case one time and there was a guy, an African American juror. He was about sixty-five years old. He just said he was in military service. I asked where he was stationed, and he said Fort Jackson. I know that Fort Jackson is a basic training center, so this guy was a drill instructor. So, Sarah was like, "Man, I can't remember his name." Mr. Johnson was just not paying attention to our closing argument and I'm really worried about him. I said, sister he was through on Wednesday. This guy was guilty after the victim testified, the end. He was like, "Get us out of here." He was done, he was clicked off. He had made a decision because he was a military guy, he had taken in all the information, he had made an assessment, he made a decision, the end. Check the box, when's lunch? So, sometimes that body language can be deceiving if you're not really contextualizing it with the rest of the information you have.