

# Analytical Advocacy

KCDAA Trial Advocacy School

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# Overview

The goal of this presentation is to review considerations involved in initial case analysis and trial prep.

## Topics:

1. Developing themes (legal and factual) for your case
2. Assessing strengths and weaknesses in your case;
3. Building rebuttal into your case in chief;

The idea is to make you more consciously aware of what you do to prepare a case, why you do it, and how to do it better.

- This presentation borrowed from the "Analytical Advocacy" method developed by the National College of District Attorneys.

# Case Theory

The prosecutor's job is to present a few days/hours worth of facts to jurors who know nothing about the facts, know none of the witnesses, and convince them beyond a reasonable doubt that the defendant committed the acts that define some crime they've never thought much about.

It helps to have a case theory or "theme."

In other words – "this is a story about . . ."

# Theory – based on facts and law

1. Legal theory – ex: rape under theory of “force or fear” vs “incapable of giving consent.”
2. Factual theory – “there is a difference between submission and consent” or “they chose a woman no one cared about” etc. . .

# Fact pattern

Woman (known for her crack addiction) is raped by three men, two of whom—Randy “Fat Cat” Shoats and Gary Nuss work in law enforcement.

Other patrons of the crack house – “Shorty Dog” and “Frog” describe hearing her screams & protests.

Third suspect never identified.

# Possible factual theories based on fact pattern

- Options

(1) Emphasize the difference between submission and consent. When no one came to help her – despite her screams –she submitted to the sex acts to avoid more violence. Doesn't make it consensual.

(2) Two LEOs saw her in jail, chose her, figured out where she'd be and then went to get what they wanted from her in place where only witnesses would have no credibility.

Issue: can't stack inferences. Do you have sufficient facts to make this claim?

# Factual Theories cont . . .

(3) 509 N. Crack Street is a well known crack house. What were two detention deputies employed by the Sheriff's office doing there? (good rhetorical question)

Collateral benefits to emphasizing #3:

- a. You get to explain to the jury the difference between non-commissioned "jailers" and commissioned law enforcement officers. i.e., they would not have been there to arrest anyone on a warrant (no arrest authority); weren't making some undercover hand-to-hand buy. So no law enforcement reason to be there.

# Factual Theories continued

b. Other common sense issues – map of your town, showing where the crack house is compared to the residence(s) of the two suspects. On their way home?

c. Get to show/emphasize photos of the crack house/ room where the assault occurred to set up argument – why would these two guys risk getting caught in that (very likely filthy) house, in that room, doing what they were doing?

Questions to ask before trial:

1. Had she ever listed the crack house as her residence when booked?
2. Were the two defendants working when she was booked/ detained in the past?



# Consequences of factual theory

These can help drive the following aspects of your case:

1. What kind of jurors do you want?
2. Voir Dire questions
3. Tone of opening statements
4. Order of witnesses
5. Motions – do you want or need KSA 60-455? Motion in Limine?
6. Exhibits: what should, or shouldn't, I use?
7. How to approach defense witnesses
8. Tone of closing arguments

# Remember

- As you are thinking about your case theme, strengths and weaknesses -- so is the defense.
- The defense theory may include such things as reasonable doubt, consent, self-defense, etc. You should anticipate the defense's legal theory when formulating your own legal theory.
- Is defense going to wrap these guys in the flag? The victim will be attacked. How do you protect her? Can you?

# Factual Weaknesses

Alcohol or drugs often plays role. Victim has history of drugs but is there any indication that she was intoxicated (per responding officers/ nurses)?

Note: does this make it a better “incapable of giving consent” case or is “force or fear” the legal theory you go with?

Considerations to resolve that question: are any facts show suspects knew how intoxicated she was? Vomit? Crying? Defensive injuries? Texts the next day?

# Weaknesses (or potential strengths)

## 1. Forensic results?

- Are you charging this before or after DNA has been tested?
  - Do you have text messages downloaded?
  - Social media collected?
  - Cross referenced phone calls made or received by any of the parties before, during or after the alleged act?
  - GPS for phones?
- If not – is it possible the legal theory would/could change based on results?

# Factual Weaknesses

2. Victim: her rough exterior – cussing/ rough language throughout her statement to law enforcement. Can you adequately prepare the jury for her? Does she have criminal history? Does she have crimes of dishonesty. Will she admit this if she does?

- What's her Ouiji board?

3. Defendant(s) – they are “cops.” Do you try to keep that out?

# Legal issues that effect your theory

1. Do you try the two defendants together? Two defense attorneys, but if neither one made a statement (no *Bruton* issues) and no antagonistic defenses, would it be better?
2. Rape shield? Do you want to file motion in limine to try to keep out her past? Lots of practical considerations to address before answering that question.
3. Hearsay – how likely are Frog and Shorty Dog to show up at trial? How likely is victim? Suggestion: get them all on the stand at prelim. Don't waive prelim.
4. Immunity issues? Was she using/selling/buying drugs at the time? Will defense attorney(s) subtly suggest that she needs a lawyer – try to get her to invoke the 5<sup>th</sup> amendment?
  - \* come to court prepared with citation to *State v. Pearson*

When you know your theory, and have identified weaknesses and likely defense theories – don't overlook two opportunities

1. Voir Dire – get this jury ready for this victim
2. Building rebuttal into your case.

# Voir Dire

Voir Dire is to identify jurors with issues (prior bad experience with law enforcement etc) but also to get the jury ready for this victim in this case.

- Examples – ask about their own expectations? “how does a sexual assault victim act? Have you ever thought about that? Does she cry? Cry too much? Not enough? Speak clearly? Mumble? Look each of you in the eye? Look down?”
- Ask how important it is to them that she is consistent? Then ask, when does a consistent story sound rehearsed?
- Ask the jurors these questions and listen to their answers.



# Voir Dire

- When trying a sex crime, you want to know who thinks women make up false allegations, who thinks that cops are all corrupt, etc . . .
- But more than that, you want the jurors to go back into deliberations asking themselves what it would be like to be sitting in that chair.
- Example: “anyone here want to talk about their last sexual experience?” “What about a nonconsensual experience?”

# Voir Dire

Defendants – they work in law enforcement. Do you in limine this out? Do they?

- I'd leave it in. And I'd talk about it in voir dire.

Ex: If I prove the facts of this case to you Mr. Smith, if I present facts to you from witnesses and you are convinced beyond a reasonable doubt that the crimes were committed -- are you going to let other considerations weigh in? That their careers will be ruined by this? that it will send the wrong message to others in law enforcement? Would it matter if they worked at the COOP? At the School? At the plant?

# Building rebuttal into case-in-chief

- Defense theory – consent.
- Implicit in the defense theory: she lied; because she's a liar; or because its easy to lie; or she had a motive to lie.
- Rebuttal opportunities during case in chief:
  1. Describe in detail the process: give statement to responding beat cop (axon video?); follow up recorded interview. Friends/ family interviewed.
  2. SANE exam – how long does that take (hours)? During presentation, emphasize the details of the exam: history; head to toe exam; speculum; stirrups; swabs of genitalia (elsewhere); pubic hair combings; injuries noted (photographed); prophylactic meds given; antibiotics; etc . . .

# Building rebuttal into case-in-chief

Cont . . .

3. Point out what is not in her allegation? Did she say the defendant(s) pointed a gun? Threatened to hurt her family? Threatened to use their law enforcement ties to arrest her? Harass her?
4. Does her story include embarrassing/ unflattering details about her? Course language? Acknowledge her drug history? Prostitution history? Consensual nature of ANY of the acts?
5. Wild card issues: Has she sued anyone? Has she blogged/ social media posts etc . . . – if not, is that relevant to introduce?

# Why build-in rebuttal

You are littering the case with facts that you can refer to (facts in evidence) to augment your closing argument.

Set yourself up to argue: if she is fabricating these allegations, then she's not bound by any facts. She could have said they put guns to her head, threatened to arrest her family, plant drugs on her – but she did not. She could have made every effort to paint herself in only a good light. But she didn't. She uses the course words of her experience to describe herself and what she went through. Does it seem reasonable that she would engage in consensual behavior, then go to all the trouble to fabricate these allegations for some unknown reason and then include facts that make her look bad?

# Other considerations

1. Opening statements – include Frog and Shorty Dog? Are they in the court's library? Have you seen the whites of their eyes? Did they show up sober? With new Giglio issues since the crime?
2. Order of witnesses
  - Stick weak witnesses between strong (law enforcement witnesses);
  - Deal with unpleasant issues or wait for the defense to bring them up? (usually best to be the one to deal with the issue);
3. Recordings – *Elnicki* issues?
4. Closing arguments – have I put myself in solid position.

# Finally

Before you decide to charge a case, move forward with a charged case or take it to trial, ask yourself: how can I prove this and under what legal theory?

Identify strengths and weaknesses.

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