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The Texas Prosecutor

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"It shall be the primary duty of all prosecuting attorneys ... not to convict, but to see that justice is done."
Art. 2.01, Texas Code of Criminal Procedure

An AI primer for prosecutors on its peril and potential

Los Angeles County is big. Really big. More people live in Los Angeles County than in 40 of the 50 states.

The Los Angeles County Public Defender's Office (LACPD) is also big, consisting of 1,200 employees, including over 700 attorneys.[1] These 700 attorneys receive reports from 99 law enforcement agencies. These 99 agencies use various formats for reports, including handwritten documents. To digitize those incoming documents and videos, LACPD would need to hire a substantial number of data entry staff.

Instead, LACPD began using an artificial intelligence (AI) system to assist with this process. Under the supervision of Mr. Mohammed Al Rawi, the office's gifted Chief Information Officer, LACPD developed a system to format the reports in a manner most helpful to the attorneys for bond hearings, docket, trial prep, etc. The AI system quickly identifies information useful to the attorneys by recognizing which arresting agency submitted the report and "understanding" the pattern of each agency. The system extracts relevant information accurately and efficiently, placing it at the fingertips of LACPD attorneys and staff in an "intuitive interface," significantly enhancing the quality and speed of the important work done there. As of April 2024, the cost to the office for these services, including document recognition, video transcription, and indexing, is approximately $4,000 a month, replacing the costs of about 50 administrative positions.[2]

By Mike Holley
First Assistant District Attorney in Montgomery County

Friends, AI has arrived in our profession.[3]

AI is a topic that generates both confusion and strong emotions. For about the last 18 months, I have invested time reading about the subject, listening to podcasts, and attending conferences and seminars. I have spoken about AI and prosecution, and I have been utilizing AI tools myself and overseeing the use of AI tools in my office.[4] I have come to believe that the arrival of AI is inevitable, transformative, and deeply concerning. As a supervisor and prosecutor, my

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Our commitment to domestic violence training

Part of the TDCAA's Long Range Plan from 2023 is to create a Domestic Violence Resource Prosecutor (DVRP) position at TDCAA.

By Rob Kepple
TDCAF & TDCAA Executive Director in Austin

This concept is akin to the Traffic Safety Resource Prosecutor position (TSRP), ably staffed by our very own **W. Clay Abbott**. The concept of a Domestic Violence Resource Prosecutor is truly ground-breaking—there are 16 DVRPs in the country so far, and we aim to be in the vanguard of this important growing movement.

We are grateful that the Court of Criminal Appeals has given us baseline funding for the new position, but there will be much more to it as we develop a training and resource program for the entire state. The Foundation Board has committed to supporting this valuable program, and it will require significant resources to do it right.

We will talk more about this position and program as we move forward with it; in the meantime, if you want to designate a gift for the program, feel free.

Texas Prosecutor Society, Class of 2024

The Texas Prosecutors Society was created as a way for prosecutors and others to offer enduring support for the profession—and as a way to honor those who have demonstrated a true interest in advancing criminal justice and the profession of prosecution. We have nearly 200 members of the society today, and the endowment they support is nearing a million dollars. The invitations to join the 2024 class of the Texas Prosecutors Society are in the mail. Keep an eye out—you may be on the invite list this year! ❇

Recent gifts to the Foundation*

Brian Baker
Traci Bennett
Eric Carcerano *in memory of Guido Carcerano*
Rob Kepple *in honor of Bill Helwig*
Tom Krampitz *in memory of Gail Ferguson*
Lance Long
Tiana Sanford
Jaime Tijerina
Beth Toben
John Wakefield III
Erleigh Wiley

* gifts received between April 6 and June 7, 2024

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Ethos of a prosecutor

The prosecutor community is large, and through TDCAA it is a cohesive group.

By Rob Kepple
TDCAA Executive Director in Austin

Every community has an ethos—defined as the characteristic spirit of a community as manifested in its beliefs and aspirations. The ethos of our community is one of the reasons I think so many of us make prosecution a career.

The beliefs part is simple: We believe in prosecutor exceptionalism. We don't denigrate any other segment of the bar, as all lawyers have the opportunity to honorably represent their clients within the bounds of law and ethics. But only prosecutors wear the mantle of Ministers of Justice. Only prosecutors are tasked with seeking the truth first and foremost and going wherever the truth leads. Only prosecutors have the statutory and ethical duty to see that justice is done, not merely to seek a guilty verdict. All other lawyers can vigorously represent their clients and at the end of the day just assume that justice is done. Not a Texas prosecutor. We are compelled to go look for the truth and find justice in every case.

Our aspirations are lofty. As a representative of the people, we must aspire to be beyond reproach, to always play fair, and to refrain from "striking the foul blow." This is where people can sometimes confuse prosecutors with every other stripe of lawyer. In popular culture we seem to embrace people who are clever and try to get away with it. Just take most sports as a barometer. The ethos of baseball, our national pastime, is clearly one of getting away with it if you can. How many times have you seen a Major League Baseball player make a diving effort for the ball, clearly flub it, then hold it up in the air in an effort to convince the umpire of a catch? We've seen our most admired stars pretend to be hit by a pitch. Sign stealing is an art form. And it is not just one sport. We have seen pee-wee football coaches call the old "wrong ball" trick play to get one over on a group of middle-schoolers.[1] Motor sports teams are constantly punished for underhanded modifications to their cars. I could go on and on.

I will stick with sports to prove my point about creating a unique ethos within a community. Look at golf. The legendary golfer **Bobby Jones**, poised to win the 1925 U.S. Open, made a mistake when he improperly caused his ball to move in some rough grass. To the consternation of the tour authorities and even the other players, Bobby called a penalty on himself. As legend has it, when praised for his sportsmanship, he responded: "You might as well praise me for not robbing a bank." And whether that story is 100 percent true or not, the ethos of golf was born in that moment. Is that aspirational? Sure. Do all golfers always live up to that high standard? No. But having such an ethos makes the game of golf better.

We are all busy. The challenges to doing our jobs well abound. But it is worth remembering that the ethos of our profession remains solid, and we share a bond with thousands of like-minded professionals. We are all part of an exceptional profession. I am proud to be a part of it with you.

Rule 3.09 is a wrap

In my last column I discussed the referendum on the changes to Rule 3.09, Special Responsibilities of a Prosecutor, and the potential that the criminal defense bar, who had opined against the amendments, would tank the whole thing. I am pleased to report that with 89.89 percent of the vote, the proposed changes to Rule 3.09 were approved by Texas lawyers. Indeed, of the 12 proposals, the changes to Rule 3.09 passed by the widest margin. We still await, but fully anticipate, that the Texas Supreme Court will formally adopt these amendments in the near future.

I am very grateful to TDCAA leadership for working with the State Bar on these changes. It took a lot of work and it was a slow process, but our folks took the job seriously and got a good result.

Two hours of free ethics for TDCAA members

Here at TDCAA we are proud of the services we offer each and every Texas prosecutor and staff member. We are fortunate to have grant funding, which goes a long way in providing quality training and support. But there is always more to do, and your voluntary membership dues offer true value added. This year we have introduced a new membership benefit: two free hours of ethics. Paid TDCAA members may access (for free) an excellent online presentation by **Scott Durfee**, former general counsel for the Harris County DA's Office. Scott literally wrote the book on ethics, and he offers tremendous insights into the rules most impacting prosecutors and the procedures that govern a grievance. If you are a paid TDCAA member, take advantage of this excellent free training soon.

Thanks to Bill Helwig from Hooterville

Bill Helwig, Criminal District Attorney in Yoakum County and Chair of the TDCAA Board, has announced his retirement, effective early in 2025. Bill, fond of introducing himself as being from "Hooterville," is in his fourth term as CDA and previously served as the County Attorney in Coke County for 13 years. He has an impressive resume of service to his community, to the state, and to our profession. Bill is a joiner—I'm not sure there was a local or state effort he didn't join. Most recently Bill has served as an advisor to the Deason Rural Justice Program of the Southern Methodist University Dedman School of Law. Bill has had a fire in the belly to better rural Texas, and my guess is he isn't through with that effort. Thank you, Bill, for all you have done!

VAC training in Rockwall County

I want to thank **Kenda Culpepper**, Criminal District Attorney in Rockwall County, for her efforts in organizing a statewide training for victim assistance coordinators in Rockwall in April. People came from literally every corner of Texas for the training, and it was produced by **Jalayne Robinson**, TDCAA's Victim Services Director. It is great to see all the offices dedicated to providing professional assistance to crime victims. Thanks, Kenda and Jalayne! ❇

Endnote

[1] https://www.youtube.com/watch?v=4lj6sUah3qE.

Recent victim services training

On May 10, I had the pleasure of providing victim services training in Rockwall.

Victim assistance coordinators (VACs) and other prosecutor office staff from 63 Texas counties attended this event. Many were brand new VACs looking for guidance in their new positions, while others were honing their already vast array of skills as seasoned VACs. The three-hour session covered prosecutor office duties to crime victims, the crime victims' compensation program, victim impact statements, and protective orders. The statewide training, hosted by Rockwall County Criminal District Attorney Kenda Culpepper and held in Liberty Hall of the Rockwall County Courthouse, was a fantastic way for victim services professionals to gather for a day of education and networking. Many thanks to Kenda and her office for hosting us in your gorgeous courthouse!

TOP PHOTO (left to right): Philip Mack Furlow, 106th Judicial District Attorney; Jalayne Robinson, TDCAA Victim Services Director; and Kenda Culpepper, Rockwall County Criminal District Attorney. ABOVE: Victim services training in Rockwall County.

By Jalayne Robinson, LMSW
TDCAA Victim Services Director

National Crime Victims' Right Week events

During the week of April 21–27, communities across the United States observed National Crime Victims' Rights Week (NCVRW). The 2024 theme was: "How would you help? Options, services, and hope for crime survivors." The 2024 theme asks all of us—friends, family members, neighbors, colleagues, community leaders, victim service providers, criminal justice practitioners, and health professionals—how we can help crime victims. Are you prepared if someone confides in you about a victimization? Is your organization victim-centered and trauma-informed? Are you familiar with the services available in your community?

The Office for Victims of Crime offers a resource guide each year that includes everything needed to host an event in your community. Go to https://ovc.ojp.gov/program/national-crime-victims-rights-week/overview for additional information. You can also sign up for the NCVRW subscription list at https://ovc.ncjrs.gov/ncvrw/subscribe to receive mailings of future NCVRW theme and awareness poster kits for assistance in planning a future event.

Numerous communities across Texas observed NCVRW, and we would like to share photos and stories submitted by a few of our members:

Allison Bowen
Director of Victim Services in Tarrant County

Tarrant County officials gathered for National

Crime Victims Rights' Week, an event honoring victims in Tarrant County and those who work with them on April 22. During the event, certificates of appreciation were presented to the Tarrant County Coalition of Crime Victim Services, The Ladder Alliance, Arlington Urban Ministries, Gateway Outreach Team, and Mothers Against Drunk Driving.

TOP PHOTO: (left to right): Tarrant County Commissioner Roy Charles Brooks, Criminal District Attorney Phil Sorrells, Tarrant County Commissioners Alisa Simmons and Gary Fickes, Tarrant County CDA's office Director of Victim Services Allison Bowen, Tarrant County Judge Tim O'Hare, and First Assistant CDA Robb Catalano. ABOVE: A wreath for NCVRW.

Erleigh Wiley & Michelle Stambaugh Criminal District Attorney and Office Manager, Kaufman County

To commemorate this year's theme, the Kaufman County Criminal District Attorney's Office hosted its annual crime victims' luncheon on May 1 to recognize the victims of crime, service providers, and local law enforcement who played significant roles in obtaining justice for victims over the last year.

It takes a team working together to connect victims to resources after a crime, to assist in the investigation, and ultimately to prosecute the case bringing justice and as much closure as possible to the victims. Kaufman County is fortunate to have vast resources and local law enforcement officers who go above and beyond for crime victims.

Our guest speakers at this year's luncheon were Stephanie Wetzel, a trafficking crime survivor, and Meredith DePriest from Care Center Ministries, who provided services and resources to Mrs. Wetzel. As a result of those services, Mrs. Wetzel's life has been restored, and she is an example of the incredible importance of service providers.

The following were recognized for their dedication and service to the victims of Kaufman County over the last year: Robyn Beckham, Felony Chief, Kaufman County Criminal District Attorney's Office; Morgan Wilkerson, Forensic Interviewer, Kaufman County Children's Advocacy Center; Lt. Jason Tidwell, Terrell Police Department; and Chris Quigley, Investigator, Mesquite Police Department.

BELOW LEFT: Kaufman County Sheriff's Department Honor Guard. BELOW, TOP PHOTO: Michelle Bork, Civil Paralegal; Michelle Stambaugh, Office Manager; and Sabrina Mumaw, VAC. MIDDLE PHOTO: Shirley Bruner and Sabrina Mumaw, VACs. BOTTOM PHOTO: Erleigh Wiley, Criminal District Attorney; Marc Moffitt, Criminal Trial Chief; and Taylor McConnell, ACDA in the Street Crimes Unit.

KP–VS Board

Members of TDCAA's Key Personnel–Victim Services Board met recently to plan our fall conferences. Board members brought topic ideas to the meeting and the Board came together at TDCAA headquarters in Austin to collaborate and plan the KP–VAC track for the Annual Criminal & Civil Law Conference in September and the Key Personnel & Victim Assistance Coordinator Conference in November. Oh, what a great line-up of training is planned! Please stay tuned to TDCAA's website, www.tdcaa.com/training, to register for these upcoming conferences. Many thanks to each of the Board members who traveled from all over Texas for the meeting, as well as to TDCAA Training Director Brian Klas and Senior Staff Counsel Diane Beckham for their invaluable input and assistance. Lunch was served and at the end of the day a photo was taken of our Board members, below.

Victim services consultations

As the Victim Services Director at TDCAA, my primary responsibility is to assist Texas prosecutors, VACs, and other prosecutor office staff in providing support services for crime victims in their jurisdictions. I am available to provide training and technical assistance to you via phone, by email, in person, or via Zoom. I can tailor individual or group training specifically for your needs. The training and assistance are free of charge.

Are you a new VAC? This training would be perfect for you! To schedule a free consultation, please email me at Jalayne.Robinson@tdcaa.com. Many offices across Texas are taking advantage of this free training. ❇

The KP–VS Board (left to right): Jalayne Robinson, TDCAA's Victim Services Director; Sara Bill, KP–VS Board Chair and VAC in Aransas County; Dale Heimann, Office Administer, County Attorney's Office in Gillespie County; Michelle Stambaugh, Office Manager and Paralegal in Kaufman County; Jake Wright, Office Manager, County Attorney's Office in Palo Pinto County; Allison Bowen, KP–VS Board Vice-Chair and Director of Victims Services in Tarrant County; Rosie Martinez, VAC in Hidalgo County; Paula Nash, VAC in Tyler County; Karen Suarez, Legal Assistant and VAC in the 112th DA's Office; and Wren Seabolt, VAC in the County Attorney's Office in Williamson County.

Straightening out the FTMSL statute

The saga continues as the most helpful traffic offense in driving while intoxicated (DWI) enforcement continues to be housed in the most difficult statute to interpret.

By W. Clay Abbott
TDCAA DWI Resource Prosecutor in Austin

Yes, it is time to talk about Failure to Maintain a Single Lane[1] (FTMSL) again.

The Court of Criminal Appeals, in its recent *Daniel v. State*[2] decision, gave a bit of a reprieve to the suppression slaughter in DWI cases caused by *Hardin v State*.[3] In *Hardin*, the CCA reversed the plurality opinion in *Leming v. State*,[4] which found the offense of Failure to Maintain a Single Lane had only one element: failure to drive within a single lane. *Hardin* concluded that the offense has two elements: failure to maintain a single lane and doing so when it was unsafe.

In *Daniel*, the CCA helpfully laid out how the various intermediate courts decided the issue before *Hardin*: The First, Second, Third, Fourth, Sixth, Ninth, Thirteenth and Fourteenth Courts of Appeals all said the offense had two elements, while the Seventh, Eighth, Tenth, Eleventh, and Twelfth held there is just one. *Daniel* concluded that the state of the FTMSL law was so uncertain before *Hardin*, suppression of the evidence was not required if an officer relied on the law in his appellate jurisdiction.

Specifically, the Court of Criminal Appeals addressed whether the State could claim the "mistake of law" doctrine in arguing a traffic stop was reasonable—despite the officer failing to correctly predict whether the Court would dodge right or left in 2022 and exactly what the law was at the time he made the stop. If 12 appellate courts and nine CCA judges could not agree on an answer, the officer made a justifiable mistake of law. That being the case, the stop in *Daniel* was reasonable and did not require suppression because it occurred before the November 2, 2022, opinion in *Hardin*.

If you are prosecuting an intoxication case where the stop was based on FTMSL and the offense date was before November 2, 2022, please use the very helpful *Daniel* decision to avoid suppression. If the offense date is later than that, there are still two possible ways to combat a motion to suppress, and in DWI cases, you should always be making a record for and arguing both.

Two good arguments

1 FTMSL as reasonable suspicion for DWI. In *Hardin*, the traffic stop was not for DWI. A Corpus Christi police officer followed Sheila Jo Hardin, who was driving a U-Haul truck, because he had received a BOLO ("be on the lookout") bulletin earlier regarding a U-Haul suspected of involvement in multiple burglaries.

That aside, there are numerous mentions in the many opinions in *Hardin* that the traffic behavior described as Failure to Maintain a Single Lane could be part of reasonable suspicion of DWI, which makes great sense.

Inability to keep a vehicle in a road's marked lanes is directly connected to the visual impairment detected in horizontal gaze nystagmus (HGN). When nystagmus has an onset before 45 degrees (the second HGN clue), it means the eyes no longer have as wide an active field of vision. While an unimpaired driver can look straight ahead and see lane markers at 45 degrees in each direction without moving his eyes, an impaired driver with HGN cannot. An impaired driver must move his eyes to clearly see the lane lines. When a driver moves his eyes, he tends to turn his head and then the steering wheel too. (Read the published study in this endnote for a much deeper analysis of the science.[5]) Experienced officers, or perhaps a drug recognition expert (DRE) or standardized field sobriety test (SFST) instructor, can explain this completely expected re-

sult of HGN to the court and, just as importantly, get the explanation into the appellate record.

In addition to causing HGN, alcohol and every category of drug covered by DREs and toxicology labs also impair executive function. Executive function is the ability of the frontal lobe of the brain to focus, make effort, execute complex motor controls, and complete the surprisingly difficult physical and mental task of keeping a speeding vehicle in a fairly narrow lane while continuing to perform all of the other driving and non-driving tasks a driver must do. Quite simply put, the failure to keep a car in a lane is a very good "vehicle in motion" clue of impairment. In fact, experienced officers relate that it is the most common and dependable clue of impairment. This information also needs to go in the record.

Ask the officer to explain the need to react to a violation before it causes a crash instead of after a collision has already happened. (I know this seems a little obvious, but after I read the opinion in Hardin, *it must not be.)*

2 Prove both elements. While prosecutors should argue reasonable suspicion of DWI, don't give up on proving both elements of this traffic violation. Gather information to prove the lane violation(s) occurred and that they were unsafe, and prepare the officer and the facts of the case to do just that. First, have the officer describe the extent and frequency of the lane violations. Get solid detail here. In *Hardin*,[6] "tires touching the line once for a second on a curve" were hardly the facts we usually see in a DWI case. Have the officer discuss how often he sees lane violations as opposed to what makes him conduct a stop for Failure to Maintain a Single Lane.

To prove the lane violations were unsafe, use the in-car video to establish other traffic on the road at the time the suspect was driving, if not at the exact moment of the stop. Ask the officer to explain the need to react to a violation before it causes a crash instead of after a collision has already happened. (I know this seems a little obvious, but after I read the opinion in *Hardin*, it must not be.) Ask the officer to describe the road and traffic patterns. High-speed-limit roadways pose a danger because greater speeds give drivers less time to react, and crashes are particularly violent at faster speed. City streets, while slower, have their own difficulties, such as crossing and merging traffic, often with little warning. Does a late night or busy traffic time make the violation more dangerous? Make sure that every other observation, as well as time of day and location and weather conditions, also make it into the record—the ruling on the stop should be based on the totality of the circumstances.

If you don't have the officer walk through all his observations and put it all on the record, the eventual appellate opinion in your case may be the next one I have to rant about.

Conclusion

Failure to Maintain a Single Lane is a great clue in impaired driving cases that unfortunately carries its own appellate burden. While recent cases have certainly made things harder for prosecutors, we have two silver linings. First, the confusion concerning how many elements are in the offense is over: There are two elements for failing to maintain a single lane. The second silver lining is that there are ways to save these cases—it just takes some preparation and a better record than we have been making. ❇

Endnotes

[1] Tex. Trans. Code §545.060.

[2] 683 S.W.3d 777 (Tex. Crim. App. 2024).

[3] 664 S.W.3d 867 (Tex. Crim. App. 2022).

[4] 493 S.W.3d 532 (Tex. Crim. App. 2016).

[5] Burns, Marcelline; Southern California Research Institute and the National Highway Traffic Safety Administration. "The Robustness of the Horizontal Gaze Nystagmus Test," 2007. Available at https://rosap.ntl.bts.gov/view/dot/1821.

Diligently prepare and be vigilantly aware to avoid exclusion under *Heath*

Most people think the most important thing they will learn in a self-defense class is how to punch, kick, throw, or submit a potential assailant. While those are important, the more valuable lesson is situational awareness and avoiding the need for those techniques in the first place.

By Britt Houston Lindsey
Chief Appellate Prosecutor in Taylor County

The best way to protect yourself is to be aware of your surroundings and never put yourself in the position of having to use what you've learned—i.e., don't be there when trouble starts. This is a very old concept. As the Chinese general and strategist Sun Tzu said centuries ago (and Bruce Lee repeated more recently), the best way to win against an opponent is to avoid fighting at all—through diligence, preparation, and awareness.

That's still great advice, because the need for preparation and awareness is more important than ever for prosecutors and law enforcement after the Court of Criminal Appeals's recent decision in *State v. Heath*.[1] The short version of *Heath* is that trial courts do not abuse their discretion by excluding evidence in the possession of law enforcement that was not timely disclosed in response to a request under the Michael Morton Act, even absent a showing of bad faith on the part of the prosecution, or even any knowledge that the evidence existed.

Background

Dwayne Robert Heath was indicted for injury to a child and was appointed counsel, who made an email request for discovery to the district attorney's office. Discovery was provided in the form of law enforcement records, CPS records, and photographs, and the case was placed on the trial docket. The State announced ready at three different trial settings, but another case was set ahead and proceeded each time. Roughly a week before the fourth setting (and 14 months after the initial discovery request), the trial prosecutor met with the child victim's mother and learned that she had placed a 911 call on the date of the offense. The trial prosecutor requested a copy of the recording and provided it to defense counsel as soon as she received it. Defense counsel filed a motion to suppress the 911 call, arguing a violation of the Michael Morton Act.

The motion to suppress was heard the morning of trial. Heath's counsel argued that the Michael Morton Act in Code of Criminal Procedure Article 39.14(a) requires discovery in the possession, custody, or control of the State be provided as soon as practicable upon request, and that "the State" includes law enforcement dispatch, which had been in possession of the 911 call for over a year. The trial prosecutor responded that she had been unaware of the 911 call's existence until speaking with the child's mother, and that she provided it to defense counsel immediately on receiving it. Because there was no showing of bad faith, she argued, the proper remedy should be a continuance, not the exclusion of the evidence. Heath's counsel responded that a violation of Article 39.14(a) did not require a showing of bad faith, only that the State did not provide discovery "as soon as practicable," and that the discovery here had been in the possession of law enforcement since the request was made 14 months prior. The trial prosecutor responded that "as soon as practicable" means as soon as the prosecution becomes aware of evidence, which was six days earlier. The trial

court granted Heath's motion to exclude the 911 call.

The prosecution immediately filed a State's appeal,[2] putting the trial on hold, and argued that the trial court erred by excluding the evidence rather than granting a continuance because there had been no showing of a willful violation of Article 39.14(a). The court of appeals reversed the trial court on a different ground than the State raised, holding that the simple email request of "Can I get discovery on this client?" did not designate any items sought to be produced and did not trigger a duty under Article 39.14.[3] The Court of Criminal Appeals reversed and remanded back to the court of appeals to rule on the issue presented by the State, rather than reversing on an issue that was not presented to the trial court or raised on appeal.[4] Ordered to consider that issue, the court of appeals affirmed the holding of the trial court and found that the exclusion of the 911 call was not an abuse of discretion.[5] The State petitioned to the Court of Criminal Appeals, which granted review.

The majority disagreed with the prosecution that "the State" here referred only to the prosecution. "Article 39.14's use of the word 'state' means exactly what one would think it means– the "State of Texas." … It is not limited to the prosecutor trying the case."

As the judges saw it

On June 12, 2024, the Court issued a 54-page opinion, authored by Judge David Newell, affirming the court of appeals and the trial court. The question as the Court saw it was multifaceted.

One, does the Article 39.14(a) requirement that the "the State" produce discovery "as soon as practicable after receiving a timely request" include items in police and law enforcement possession that the prosecution doesn't know about? Two, does "as soon as practicable" require the prosecutor's knowledge of the undisclosed evidence? And three, does the trial court have the authority to exclude evidence that was not timely disclosed under Article 39.14(a) absent a showing of bad faith or prejudice on the part of the prosecution? The Court answered all questions in the affirmative: "The State" in Article 39.14 refers to not only the individual prosecutor's office but also to law enforcement. "As soon as practicable" does not require knowledge on the part of the prosecution, and the trial court did not abuse its discretion in excluding the evidence under the facts of this case.

The majority disagreed with the prosecution that "the State" here referred only to the prosecution. "Article 39.14's use of the word 'state' means exactly what one would think it means—the 'State of Texas.' ... It is not limited to the prosecutor trying the case." Judge Newell observed that where the statute intended to limit applicability to a particular agent of the State it did so specifically, as it did when exempting "the work product of counsel for the State," and reasoned that phrasing would be meaningless if "the State" only ever referred to the prosecution. General references to "the State" were accordingly to be read in the broadest sense, which means that the duty to disclose is placed on both the prosecution and law enforcement. Judge Newell also reasoned that reading "the State" as meaning only the prosecution would conflict with the statutory expansion of *Brady* obligations in Article 39.14(h):[6] If "the State" were read there to mean only the prosecution, the State's duty to disclose would be diminished rather than broadened, which frustrates the purpose of the Michael Morton Act. Finally, Judge Newell noted that reading "the State" to encompass both prosecution and law enforcement's duty to disclose was consistent with the 2021 passage of Article 2.1397, which mandates that the law enforcement agency submit a written statement that everything required to be disclosed to the defendant under Article 39.14 has been provided to the prosecutor.

The Court further rejected the State's contention that "as soon as practicable" required the prosecutor's knowledge of the undisclosed evidence. Judge Newell observed that *Brady* violations, discovery order violations, and ethical violations under the Rules of Professional Misconduct all include a scienter requirement; e.g., a prosecutor does not violate constitutional obligations under *Brady* when the State was unaware that exculpatory information not in its possession even existed. Judge Newell noted that this standard did not apply here and that the Court was "merely asked to consider whether the prosecutor failed to comply with the terms of a statute." The question is only whether the requested discovery was provided "as soon as practicable," meaning did the prosecution fulfill its duty to search for and disclose the discoverable evidence as soon as the State was reasonably capable of doing so, upon receiving a timely request from the defense? The Court held that here the State did not and that the statute was violated, as the 911 call was not disclosed until 14 months after the defendant's timely request, despite being in law enforcement possession since the date of the offense.

The discussion then turned to whether the trial court had the authority to exclude the evi-

dence for a violation of Article 39.14(a). Here, the court agreed with the court of appeals's conclusion but not its analysis. The court of appeals found that the failure to ascertain the existence of the evidence rose to the level of something akin to bad faith on the part of the prosecution, holding that "a failure to at least inquire about the existence of discoverable items in response to a proper request in a timely manner is all the evidence necessary to show that the failure to timely produce the item in discovery was due to what was previously characterized as a 'willful violation' or 'bad faith.'"[7] The Court of Criminal Appeals's opinion disagreed that the failure to inquire about the existence of discoverable evidence rises to the level of "bad faith" on the prosecutor's part but held that the trial court was not required to find the State acted in bad faith or that the defendant was prejudiced to exclude the evidence for a discovery violation.

Although 39.14 has never had a provision regarding a potential remedy for a discovery violation, Judge Newell observed that the Court has previously recognized that the trial court has the inherent authority to exclude exculpatory evidence that was withheld in violation of the court's discovery order, even when the withholding was inadvertent. This was the case even before the passage of the Michael Morton Act. In *Hollowell v. State*,[8] the Court held that a prosecutor "willfully" (but ultimately harmlessly) violated the trial court's discovery order by not disclosing palmprint evidence prior to trial, saying that "just as defense counsel has an obligation to investigate the case before he goes to trial, the prosecutor has a duty to know what evidence is at his disposal."[9] Later cases saw the "willfulness" standard morph over time into essentially a bad faith requirement,[10] but in Judge Newell's concluded that was a misinterpretation of the *Hollowell* standard of willfulness and a response to the arguments raised rather than an inherent limitation of the trial court's authority to exclude evidence.

The State further argued that the appropriate remedy here should be a continuance rather than the exclusion of the evidence. While the Court agreed that would be a much more restrained solution, it qualified that the question before it was only whether the trial court abused its discretion in choosing the remedy that it did. Although reasonable minds could disagree and it "might have been better practice for the trial court to grant even a short recess," when considering the 14 months between request and disclosure and the State's three prior announcements of ready for trial without the evidence, the exclusion was not an abuse of the trial court's discretion. The prosecution's inadvertence and lack of bad faith was immaterial.

The dissent

Judge Keel wrote a dissenting opinion joined by Judge Yeary and Presiding Judge Keller. The dissent took exception to the central premise of the majority opinion that "the State" refers to both prosecution and law enforcement: "When the Legislature means 'law enforcement,' it spells it out. [Because] it did not do that in Article 39.14, we should not, either. ... The majority's contrary reading is at odds with the rest of the Code of Criminal Procedure where 'the State' most often means both the State of Texas as a party to a criminal lawsuit and the prosecution as its representative but never means—as far as I can see—law enforcement." Judge Keel cited 14 examples of the Legislature using the phrase "law enforcement" to mean exactly that,[11] and argued that the majority's reading of "the State" turns Article 2.1397 into a redundancy. Because the purpose of Article 2.1397 was to ensure that law enforcement disclosed to the prosecution the discoverable material that law enforcement possessed, which the prosecutor would then disclose to the defense under Article 39.14, reading "the State" to include law enforcement in Article 39.14 renders Article 2.1397 meaningless. To this end, she pointed out that the Sponsor's Statement of Intent in the bill analysis for Article 2.1397 says, "Under Article 39.14 prosecutors are required to turn [discoverable material] over to the defense," but goes on to say, "Law enforcement agencies, however, are not compelled to disclose the information."[12]

She argued that the majority's references to "the State" and "counsel for the State" draw a distinction without a difference, as a statute that requires a magistrate to provide a copy of a report to "the attorney representing the State" would mean the same thing if it required the magistrate to give a copy to "the State." Because Judge Keel read "the State" to mean the prosecution, she would find that the State disclosed the 911 recording as soon as practicable because the prosecutor did so as soon as she learned of its existence.

Although 39.14 has never had a provision regarding a potential remedy for a discovery violation, Judge Newell observed that the Court has previously recognized that the trial court has the inherent authority to exclude exculpatory evidence that was withheld in violation of the court's discovery order, even when the withholding was inadvertent. This was the case even before the passage of the Michael Morton Act.

The takeaway

At the outset I want to point out here what Judge Newell was very careful to say: This is not the equivalent of a *Brady* violation, this is not the intentional violation of a court order, and this is not a violation of the Rules of Professional Conduct. There is no inherent ethical violation here; this ruling merely addresses whether the prosecution has complied with a statute mandating timely disclosure and what the appropriate remedies may be if not. Your case may suffer, but your law license should survive intact.

So how do we avoid problems with *Heath*? First, impress heavily upon our allies in law enforcement that the timely disclosure of evidence in a case they have filed with us is critical. Under *Heath*, a trial court has the authority to exclude evidence that the prosecution was unaware of, even without a showing of bad faith on anybody's part. Be sure officers know that evidence we do not disclose in a timely manner may not come in at trial, potentially invalidating all the hard work done in the investigation of a case. Our own office is implementing some changes to our discovery policy to head off *Heath* problems as it pertains to 911 calls: When paper discovery is uploaded, the discovery clerk will also send a request to police and sheriff dispatch for any 911 calls to be provided, which will then be digitally uploaded for defense upon receipt.

Our own office is implementing some changes to our discovery policy to head off Heath *problems as it pertains to 911 calls: When paper discovery is uploaded, the discovery clerk will also send a request to police and sheriff dispatch for any 911 calls to be provided, which will then be digitally uploaded for defense upon receipt.*

Other offices will likely be coming up with problem-solving policies of their own, and if your office finds something that works well, by all means drop me a line so we can discuss it here in the journal or at TDCAA's Annual Conference in September. It's a concern that we don't yet know the outer limits of the ruling and who else may be "the State," other than the prosecution and the law enforcement agency that filed the case, for Michael Morton purposes, so try not to make your case the one that tests those limits. It may well be that you discover relevant CPS records in the possession of the Department of Family and Protective Services; unlike the filing agency, authorities there would not know that prosecutors needed this information for an open case. Avoid *Heath* problems here by doing some documentation and legwork on the front end if you think this may be an issue in a case.

Another point to remember if you run into a *Heath* problem is that exclusion of the evidence is *a* remedy, not *the* remedy. Judge Newell's opinion took care to make clear that the Court was not saying that this would be the appropriate remedy in every case. Rather, the Court was expressing an opinion as to whether it was the appropriate remedy in *this* case, and even acknowledged that "it might have been better practice for the trial court to grant even a short recess." As Judge Newell wrote, "We acknowledge that a continuance would be a much more restrained solution. But that's not the question before us. ... It may very well be that reasonable jurists could disagree about the appropriate remedy in a particular case, but unless the trial court's decision is outside of the zone of reasonable disagreement, this Court will not overturn its ruling." In the unhappy event you are presented with an argument to exclude based on *Heath*, be prepared to explain why exclusion is not the appropriate remedy. In *Heath*, the request was made 14 months prior, the 911 call was turned over only six days before trial, and the State had previously announced ready to proceed to trial three times without the 911 call, which indicated that the call was not critical to the case. If the facts of your disclosure are different from those in *Heath*, explain how and why. Also be aware that if you are requesting a continuance, you may need to fulfill the formal written requirements to preserve error.

Yet another concern is that we don't yet have much guidance as to what would constitute an abuse of discretion in the trial court. The length of time between the request and disclosure is clearly paramount, but the importance of the evidence to the State's case is something that I would also argue should be a consideration in the analysis. In *Heath*, the evidence was presumably not critical because the prosecution was ready to go forward without it on numerous occasions, but evidence of greater importance may weigh more heavily in finding an abuse of discretion when the trial court excludes it. The Court's opinion relied a good deal on the civil rules in explicating the burden of disclosure and the trial court's inherent power to exclude evidence as a remedy, and the civil rules also say that a discretionary sanction[13] must be "just," meaning directed at the offender (whether counsel, party, or both), and not excessive, meaning no more severe than necessary to satisfy its legitimate purposes.[14] The civil rules recognize that it may not always be just to punish a party for its counsel's transgressions,[15] and while a victim is not technically a party to a criminal action, there is at least some argument that a crime victim has an interest in seeing justice done—which a judge should consider. Also, civil courts consider so-called "death penalty sanctions" only for the most egregious of discovery violations, and the exclusion of

evidence that is "case-determinative" (i.e., precludes presentation of the merits and disposes of the entire case) is a form of death-penalty sanction. There should arguably be a difference in treatment between an exclusion of evidence that inconveniences the presentation of the State's case and one that eviscerates it, so if an exclusion is essentially the equivalent of dismissing the prosecution, that should be brought to the trial court's attention and preserved on the record for review.

Let's hope that future cases will offer further clarification on who is and isn't "the State" for Michael Morton Act purposes and when exclusion of the evidence may rise to an abuse of discretion; mandate on *Heath* has not yet issued at the time of this writing and the State Prosecuting Attorney's Office will likely request a rehearing to gain some further guidance, but it is likely that we will have to wait. Until then, avoid *Heath* problems altogether by making sure disclosures are timely. We don't have to worry about trouble if we avoid it before it starts. As Sun Tzu said, win the fight by avoiding fighting. ❇

Endnotes

[1] No. PD-0156-22, __S.W.3d__, 2024 Tex. Crim. App. LEXIS 446, 2024 WL 2952387 (Tex. Crim. App. June 12, 2024).

[2] The State may appeal a pretrial ruling in only a few circumstances; the most common is the granting of "a motion to suppress evidence, a confession, or an admission, if jeopardy has not attached in the case." Tex. Code Crim. Proc. Art. 44.01(a)(5).

[3] *State v. Heath*, 582 S.W.3d 495 (Tex. App.–Waco 2018).

[4] The reasoning here is tricky to explain. Reviewing courts are generally free to consider "unassigned error," claims that were preserved in the trial court but were not raised on appeal. Preservation is the catch, though: "Errors that are subject to procedural default may not be remedied by the appellate court as unassigned error unless the error was in fact preserved in the trial court." *Sanchez v. State*, 209 S.W.3d 117, 121 (Tex. Crim. App. 2006). In other words, the Court of Criminal Appeals held that the court of appeals ruled in favor of the State on an issue which the State had procedurally defaulted.

[5] *State v. Heath*, 642 S.W.3d 591 (Tex. App.–Waco 2022), *aff'd*, 2024 Tex. Crim. App. LEXIS 446 (Tex. Crim. App. 2024).

[6] "Notwithstanding any other provision of this article, the State shall disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, control of the State that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged."

[7] *Heath*, 642 S.W.3d at 597.

[8] 571 S.W.2d 179, 180 (Tex. Crim. App. 1978).

[9] *Id*.

[10] See *Oprean v. State*, 201 S.W.3d 724, 727 (Tex. Crim. App. 2006) (State's failure to turn over DWI videotape demonstrated a calculated effort to frustrate the defense, given the prosecutor's statements and actions); *State v. LaRue*, 152 S.W.3d 95, 97 (Tex. Crim. App. 2004) (trial court's exclusion of DNA evidence was erroneous when no evidence showed the trial prosecutor intended to violate the discovery order or harm the defense).

[11] E.g., Tex. Code Crim. Proc. Art. 2.12(6) (specifying certain "law enforcement agents" as peace officers); Art. 18.191 (setting out duty of "law enforcement" officer or agency when seizing a firearm); Art. 38.20 (specifying identification procedures to be used by law enforcement agencies); Art. 45.0217 (requiring certain records "held by law enforcement" to be kept confidential).

[12] S. Comm. on Crim. Justice, Bill Analysis, S.B. 111, 87th Leg. R.S. (as filed May 31, 2021).

[13] Tex. R. Civ. P. 215.

[14] *TransAmerican Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991).

[15] *Id*.; see also *Ogunboyejo v. Prudential Property and Cas. Co.*, 844 S.W.2d 860, 863 (Tex. App.–Texarkana 1992, writ denied) (a party should not be punished for the transgressions of its counsel); *Glass v. Glass*, 826 S.W.2d 683, 687-88 (Tex. App.–Texarkana 1992, writ denied); see also *Bradt v. West*, 892 S.W.2d 56, 76 (Tex. App.–Houston [1st Dist.] 1994, writ denied) (holding that a party to a civil suit cannot be liable for the intentional wrongful conduct of his attorney unless the client is implicated in some way other than merely having entrusted his legal representation to the attorney).

Photos from our Homicide Conference

Photos from our Civil Law Conference

Gerald Summerford Award winners

Two people were honored with this year's Gerald Summerford Civil Practitioner of the Year Award. TOP PHOTO: C. Scott Brumley (left), County Attorney in Potter County, was honored for his work on the Rule 3.09 committee; he's pictured with Rob Kepple (right), TDCAA Executive Director. ABOVE: Barbara Nicholas (right), an ACDA in Dallas County, also won the award. She is pictured with Carlos Madrid (left), Chair of TDCAA's Civil Committee. Congratulations!

Photos from our Fundamentals of Management Course

An AI primer for prosecutors on its peril and potential (cont'd from the front cover)

hope is to manage these AI tools in a way that enhances our mission without compromising it. This will be a challenge. Part of the challenge is the emotional aspect of this issue. Specifically, I know from many discussions with people that this subject causes people anxiety, frustration, and sometimes outright hostility.

I get it.

Let me say here at the outset that it will be OK. We can start with this article, where I will try to assist you in navigating these new trails. I hope to make this subject as straightforward as possible. The topic is complex, but I will try to use plain language and avoid the overstatements that often accompany discussions of AI. This is a primer, a foundational first step. It's not the end of the discussion but a start.

General statements about AI

Looking under the hood, you see that AI is just software. That's it. The software is then fed information—spreadsheets, books, websites, images, speeches, videos, etc.—and put to work in various ways. The software operates as a type of machine learning, and it can do wondrous things. It can also do stupid things. There is an element of randomness to the software, both by design and as a byproduct of how the software works.[5] Exactly how the software does what it does and what data goes into the "machine" is often unknown by the user. For this reason, AI is sometimes considered a "black box" system because we can't look inside to see exactly how it works.[6] Significantly, the software can convincingly mimic the human mind, but—and this is very important—the software is *not* a human mind.

There are three main types of machine learning to consider:

1) AI, or "artificial intelligence," is a system that performs *specific* tasks that normally require human intelligence, such as playing a game or recognizing human speech. An example of AI is ChatGPT, which is also called a "large language model" (LLM). An LLM specializes in dealing with text. Another example of AI would be DALL-E, which is called a "generative adversarial network" (GAN). A GAN creates realistic synthetic images or audio from textual description. "Deepfakes" would fall in this category.

2) AGI is "artificial general intelligence," and it is a system much closer to human intelligence. AGI is capable of performing any intellectual task a human can do, and it is not limited to specific tasks. AGI is theoretical at this point and does not currently exist at the time of this article.

3) ASI is "artificial superintelligence." ASI is a system which would surpass human intelligence in all aspects, including creativity, problem-solving, and emotional understanding. ASI, like AGI, is a theoretical concept and has not yet been achieved.[7]

Many smart, well-informed, educated people worry that AI or, more likely, AGI or ASI, poses an existential threat to humanity. There are different theories as to how this will occur.[8] Other smart, well-informed, educated people are concerned that AI, even as it currently exists, will damage our civilization by, among other things, causing us to lose the ability to think for ourselves or perform other essential tasks (such as reading and writing) or further impair our (already degraded) skills at dealing with one another in person. Others are concerned that AI will create significant unemployment.[9] Sometimes, these people are referred to as AI "safetyists," "decelerationists," or "doomers."[10]

A different group of smart, well-informed, educated people believe AI will lead to a massive, positive transformation of society. They believe AI will lead to innovations in education (what if every child had a world-class tutor who never got tired and never complained?[11]), medicine (what if AI could be a near-perfect doctor on your smartphone or could cure cancer?[12]), and bring improvements to every possible area of life (what if AI could translate every written or spoken language in real time?). They believe AI will allow humans to move from tedious, repetitive, or dangerous work to higher-quality, more fulfilling work. They believe AI will assist us in solving hard problems (sometimes called "wicked problems,"[13] such as homelessness or nuclear proliferation) that we have not previously been able to solve on our own. They believe that we should push AI harder and faster. These people are sometimes referred to as "effective accelerationists" or "e/accs" (pronounced "e-acks").[14]

Efforts to regulate AI face significant, perhaps insurmountable challenges. For one, AI is prolif-

erating at an astonishing rate, greatly aided by two other powerful technologies: the internet and the smartphone. AI cannot be completely contained because, at its core, it is information, and information is capable of being transmitted quickly, freely, and effortlessly across borders. Moreover, because AI is a powerful technology, governments and individuals aggressively and continuously seek to develop and employ it. Notably, regulating AI in one country or one area will not prevent AI from advancing in another country or area. AI is developing at a breakneck speed, making it as challenging to regulate as holding back a flowing river with your hands.[15] OpenAI, Anthropic, Google, and Meta are the major tech companies developing AI in the United States, but thousands of other businesses and organizations are developing or adopting their products (67,000 companies as of January 2024).[16] In 2022, IBM reported that 35 percent of global companies are using AI, with China having the highest rate of AI adoption at 58 percent.[17] These numbers have doubtlessly increased in the intervening two years.

Criminal law and AI

Our primary interest lies in the intersection of AI and criminal law. Here are some considerations in that regard.

People with criminal intentions are actively and effectively using AI now and will continue to do so. AI "supercharges" known criminal activity, particularly fraud, and creates new types of criminal conduct, some of which our current law does not adequately address.[18] (We know better than anyone that a determined criminal will use powerful technology in any and every way he can.)

AI can create audio or visual reproductions of people, objects, places, or events that are difficult to distinguish from the real ones. This creates two problems. First, we must guard against being deceived by fake or altered videos. These could come from several sources, including complaining witnesses, defendants, and experts. *The second, and I cannot stress this point enough, is to find ways to overcome our jurors' growing doubts about the authentic video and audio we offer into evidence.* At some point, jurors may be unwilling to trust anything they see or hear presented in digital form, which is disastrous for our work. We must stay ahead of these challenges in whatever way we can.

An emerging challenge for us as prosecutors is that the evidence we present to juries will be increasingly attacked as to its veracity, with doubt being liberally and creatively sown in the jury box. We must, therefore, develop methods and procedures to repel these attacks and to guard ourselves against deception.

Some AI companies are philosophically averse to using their work to aid law enforcement, which may create challenges for prosecutors seeking applications.[19] There are also operational security issues and privacy concerns with law enforcement's sensitive information, particularly when we "upload" information into AI systems.

AI brings robust and novel new tools for law enforcement to detect and address crime.[20] Some AI applications—facial recognition, for example—raise questions of fairness, privacy, and racial disparities that must be addressed squarely, skillfully, and honestly.[21]

Practical applications for AI

Given the above, here are some considerations for using AI in your day-to-day work.

AI can digest any information, summarize it, and respond to queries. For example, AI can read a lengthy report and then list witnesses and their significance to the case or create a comprehensive timeline of events. AI can review bank or medical records and then summarize trends or patterns or answer (as if you were speaking to a person) questions about those records. AI could quickly digest jail calls or body cams and answer queries about that information. AI can also translate virtually any language in real time, including victim or witness interviews or defendant statements; transcribe audio and video; and identify nuances of communication that may interest a prosecutor in a particular case.

AI can be positioned to assess probabilities of success for probations and diversions and help us more quickly and accurately assess cases that may need to be directed to specialty courts. AI could also assist with bond recommendations and conditions.

AI can create visual and audio depictions of virtually any event, including crime scene recreations, demonstrative exhibits, etc. A prosecutor using a keyboard and computer can soon accomplish tasks that previously required a film studio.[22]

AI can greatly aid our textual work. Although there have been some widely publicized stumbles involving "hallucinated" cases created for legal briefs, AI has the potential to be an extremely

That investigation made one interesting discovery that proved critical to our case. Many years earlier, while Cordarius was a young special needs student in Tennessee, Charlotte Pegues had secured disability benefits on his behalf. She had been collecting those benefits ever since.

Uncomfortable as it may be to contemplate, I cannot help but believe that both Cordarius and his mother are better off now than they were before.

powerful aid to legal research and writing. For example, very soon (perhaps right now?), a prosecutor could receive a defense appeal and then feed the appeal and record of the trial into an AI system. The AI system would then craft a very good response brief in minutes instead of days. The brief would need to be checked and polished, but still, the quality of the work might be on par with (or perhaps even better than) what many prosecutors could do given the other responsibilities we have, and the work would certainly be done much more quickly.[23] AI can instantly draft a bench brief, and soon, AI will be able to suggest (and respond) to objections in a trial in real time.[24] AI can also draft pleadings, warrants, and other legal documents quickly and (increasingly) accurately for our review.

AI is a tremendously powerful idea generator. AI can propose arguments and counter-arguments, suggest voir dire questions, offer trial themes, etc. (In this area, anything a colleague could do for you, AI is likely able to do. Think of AI as an always-on-hand assistant who does not drink the last of the coffee but then refuses to make another pot.[25]) AI can also write anything you are required to write—from an email response to a challenging victim to an opening argument to a speech you give high school students about the dangers of fentanyl.[26] AI can also help train prosecutors and staff in various ways.

Next steps for prosecutors

With the above information in mind, here are possible next steps for you in your office.

For mid-size and large offices, designate an innovation officer and have that person start experimenting with AI. Contract with companies that will help us create self-contained systems that protect the sensitive information in our possession without disclosing it more widely. Determine what AI systems will help us "see that justice is done." Then, pass this information along to the rest of us.

For smaller offices, start with a large language model such as ChatGPT or Claude. Start with the free version and just experiment with the system as an idea generator. This will be trial and error, but you will see the value with time and a little patience. Treat these LLM's like you would a 3L intern. Try the Lexis or Westlaw AI features and see if they don't add value to your work. *(There is a real skill in "prompts" that you will need to learn and practice. Be patient with this, and don't quit too soon.)*

We need conferences and serious papers on this subject, and we need to be part of managing AI's relentless advent to achieve what good can be achieved and mitigate its negative impacts.[27]

We need to work with legislators to protect the people of Texas from criminals who use AI to exploit or endanger them.

We need to stay the course. Whether the e/accs are right, the Doomers are right, or both are right and wrong in one way or another, we need to be clear-headed and committed to our fundamental, most human of missions. We should neither panic nor ignore AI. We should continue to lead and serve.

At the Montgomery County District Attorney's Office, we have used AI in a number of ways (see this endnote for specifics[28]). We are very interested in continuing this conversation with you, and if you are interested in doing so, please contact us. Whether you reach out to us or not, we wish you every success in this "brave new world" of AI.[29] ❇

Endnotes

[1] Law Offices of Los Angeles County Public Defender. (n.d.). https://pubdef.lacounty.gov/about-us.

[2] Comments made by Mr. Mohammed Al Rawi during the "Prosecution Leaders of Now" Spring 2024 Workshop entitled "AI and Prosecution." Many thanks to Patrick Robinson (and others) for putting that conference together. You can find several excellent resources about AI and prosecution at www.aiandprosecution.com.

[3] It may be wise in what follows to keep "Amara's law" in mind, which states that we "tend to overestimate the effect of technology in the short run and underestimate the effect in the long run." DevIQ. (n.d.). Amara's Law: A Quick Guide on Technology Predictions. https://deviq.com/laws/amaras-law#what-is-amaras-law.

[4] In our office, I have appointed a "King of AI," Mr. Chris Seufert, and a "Queen of AI," Ms. Lianne Baldridge, to assist us in our efforts. Chris leans forward–and is doing a tremendous job at finding ways to use AI, and Lianne is the wise voice of caution. Both are appreciated.

[5] Because AI inherently includes a degree of randomness as a feature rather than a bug, demonstrating the reliability of AI results to court may be challenging. For example, when a judge says, "Show me how you got that result," the same prompt you used

before may result in a slightly different outcome. One Washington state Superior Court judge recently rejected the admission of video exhibits offered by the defense which were "enhanced by artificial intelligence," partly because the results were not reproducible. *Washington v. Puloka* (Superior Court of Washington for Kings County, March 29, 2024). This is an unreported decision.

[6] Yasar, K., & Wigmore, I. (2023, March 17). "What is black box AI? Definition from TechTarget." WhatIs. www.techtarget.com/whatis/definition/black-box-AI. The opposite of a "black box" is a "glass box" which is fully interpretable by people. For more on this subject, see Garrett, Brandon L. and Rudin, Cynthia, The Right to a Glass Box: Rethinking the Use of Artificial Intelligence in Criminal Justice (February 16, 2023). *Cornell Law Review*, Forthcoming, Duke Law School Public Law & Legal Theory Series No. 2023-03, Available at SSRN: https://ssrn.com/abstract=4275661 or http://dx.doi.org/10.2139/ssrn.4275661

[7] If AGI or ASI comes into existence, I hope it will consider how respectful I've been here. I, for one, welcome my new AI overlords.

[8] This group describes the probability that AI will kill everyone either on purpose or on accident as their p(doom). For frame of reference, Elon Musk, who has heavily funded OpenAI, the maker of ChatGPT, reportedly has a p(doom) between 20 or 30 percent. Still, Mr. Musk remains a proponent of AI. Marantz, A. (2024, March 11). Among the A.I. Doomsayers. *The New Yorker*. www.newyorker.com/magazine/2024/03/18/among-the-ai-doomsayers.

[9] This is a hotly debated topic with some suggesting AI will create jobs and others claiming AI will destroy jobs. It's difficult to know who is right. Regardless, consider carefully this idea that often comes up in AI discussions: "AI may not replace the lawyer, but the lawyer who uses AI will replace the lawyer who does not." Or consider this comment from a recent MIT grad. She obtained degrees and math and computer science but pivoted to a degree in programming that is "closer to the hardware." She said, "Absolutely it's about staying ahead of the curve. A good rule of thumb is looking for jobs and skills that require [judgment] or research in some way." Gen Z is entering the workforce with Generative AI skills. *The Washington Post*. (n.d.). www.washingtonpost.com/technology/2023/06/28/ai-gen-z-work/. That's likely good advice.

[10] Marantz, A. (2024, March 11). Among the A.I. Doomsayers. *The New Yorker*. www.newyorker.com/magazine/2024/03/18/among-the-ai-doomsayers.

[11] Harvard Business Publishing Education. (n.d.). https://hbsp.harvard.edu/inspiring-minds/ai-as-personal-tutor.

[12] Could AI cure cancer? Worldwide Cancer Research. (n.d.). www.worldwidecancerresearch.org/news-opinion/2024/february/could-ai-cure-cancer.

[13] What's a Wicked Problem? Stony Brook University. (n.d.). www.stonybrook.edu/commcms/wicked-problem/about/What-is-a-wicked-problem.

[14] Marantz, A. (2024, March 11). Among the A.I. Doomsayers. *The New Yorker.* www.newyorker.com/magazine/2024/03/18/among-the-ai-doomsayers.

[15] This is an overstatement. I acknowledge that it is. But not by much.

[16] Cardillo, A. (2024, May 5). How Many Companies Use AI? (New Data). Exploding Topics. https://explodingtopics.com/blog/companies-using-ai.

[17] *Id.*

[18] UCL (2022, February 2). Policy brief: AI-Enabled Future Crime. Dawes Centre for Future Crime at UCL. www.ucl.ac.uk/future-crime/policy-briefs/policy-brief-ai-enabled-future-crime.

[19] The creators of AI are responsible for the "alignment" of the software. AI alignment is the "process of encoding human values and goals into large language models." Martineau, K. (2024, March 29). What is AI alignment? IBM Research. https://research.ibm.com/blog/what-is-alignment-ai. Of course, who chooses these values and who chooses the goals makes all the difference.

[20] Blasius, M. (2024, April 26). How AI is stopping shoplifters, including here in the Valley. ABC15 Arizona in Phoenix (KNXV). https://www.abc15.com/news/local-news/investigations/how-ai-is-stopping-shoplifters-including-here-in-the-valley. A remarkable aspect of AI technology–and if you are reading the endnotes then perhaps you are the type of person to follow up on this–

is that AI can be used to detect images from brain waves. Words will not be far behind. You could, for example, take a witness incapable of speech and "see" what he or she is thinking. The applications here are both thrilling and terrifying–but mostly terrifying.

[21] Johnson, A. (2023, October 4). Racism and AI: Here's how it's been criticized for amplifying bias. *Forbes*. https://www.forbes.com/sites/ariannajohnson/2023/05/25/racism-and-ai-heres-how-its-been-criticized-for-amplifying-bias.

[22] I recommend spending some time reviewing OpenAI's product Sora. You can find it at https://openai.com/index/sora/. Sora creates realistic scenes from text instructions. Sora has its issues (which its creators are working on), but the application reminds me of Arthur C. Clarke's quote that "any sufficiently advanced technology is indistinguishable from magic." Some of the Sora images are, frankly, breathtaking, and they have caused a least one major Hollywood power player to put an $800 million studio expansion on hold. Kilkenny, K. (2024, February 23). Tyler Perry puts $800m studio expansion on hold after seeing OpenAI's Sora: "Jobs are going to be lost." *The Hollywood Reporter*. www.hollywoodreporter.com/business/business-news/tyler-perry-ai-alarm-1235833276.

[23] There is a phrase often used in military circles when speaking about units or weapons: "Quantity has a quality all of its own." In litigation, the same could be said for speed, where speed has its own quality, particularly in a trial setting.

[24] Perhaps one of you will create a tablet that sits at counsel table and identifies objectionable questions and answers and provides responses to objections using Texas law?

[25] This is actually a decent metaphor for AI. Of course, AI cannot (yet) make coffee, but it doesn't drink coffee, either. But it can help you write an opening statement, and it never calls in sick.

[26] I did use AI for this article, but only for revisions of particular phrases or sentences. I use AI almost every day, but I still resist using AI for the overall structure for a project like this. That's because I don't want to lose what limited abilities I have to write. I would like to be a better writer, and I'm concerned that handing the reins completely over to AI, or even largely over to AI, works against that goal. This is a personal preference, and I could be entirely wrong. You will spot the completely original work of mine easily because it will be ungainly, unwieldy, and ungrammatical. Like that last sentence.

[27] "Listen, and understand! That Terminator is out there! It can't be bargained with. It can't be reasoned with. It doesn't feel pity, or remorse, or fear, and it absolutely will not stop, ever, until you are dead!" Kyle Reese, MGM Home Entertainment. (2001). *The Terminator.*

[28] We have used AI in the following ways: to draft preliminary pleadings (Notice of Master Case File, Notice of Joinder, Motion to Stack, Notice of Intent to Use Business Records Aff.); to draft charge language in Promotion of Child Pornography Cases; to summarize Arrest Reports for attorney work-product form summaries; to re-write sentences and paragraphs in search warrants to increase clarity and succinctness and improve grammar; to draft language to permit the use of a drone before and during the service of a search warrant; to draft language for search warrants explaining complex topics like NAT'd IP Addresses, HASH collisions, the Onion browser, etc; to list names from reports to be included in discovery responses; to analyze a massive SnapChat spreadsheet (100,000+ lines) to identify useful information and generate word documents with chats between specific users; to analyze sentiment of emails to ensure the tone is what we intend; to create challenge coin artwork; to create PowerPoint graphics to illustrate specific points; to create a graph of the cases filed by each detective in a special division in the last 12 months; to create a transcript of a Kik chat from screenshots; to draft a paragraph for speaker bios to customize it for a particular presentation; to translate audio from Spanish to English and from English to Spanish; to analyze the transcript of an interview and identify inculpatory and exculpatory statements; to summarize jail calls; to create initial drafts for internal reports, position descriptions, etc.; to brainstorm trial strategies; and to age regress images for use in ICAC investigations. Again, special thanks to our King of AI, Chris Seufert, for many of these applications.

[29] "It isn't only art that is incompatible with happiness, it's also science. Science is dangerous. We have to keep it most carefully chained and muzzled." Huxley, A. (2010). *Brave New World* (11th ed.). Vintage. (Ironically and perhaps fittingly, this is an argument for the advancement of science.)

Navigating hospital blood search warrants

It is a familiar but unfortunate scenario: Local law enforcement officers have just responded to and investigated the scene of a multiple-fatality crash in your county.

By Jay Johannes
District Attorney in Colorado County, and
Brandy Robinson
First Assistant District Attorney in Austin County

The officers determined that the driver who caused the crash was likely intoxicated. They would normally do a search warrant for a local blood draw, but there's a problem: The driver, now a prime suspect in an intoxication manslaughter case, was life-flighted to a larger hospital system in another jurisdiction.

How can you help?

When it comes to necessary evils in our profession, hospital records and blood samples obtained from search warrants are the true devil's backbone of many an intoxication assault or manslaughter case. For prosecutors not familiar with the process, particularly rural prosecutors who must deal with hospitals outside of their jurisdictions, the path to this vital evidence often seems needlessly convoluted. However, you can use a few road-markers to guide the way.

The destination

It might be wise for an early step in the process to be calling the prosecutor office in the hospital's jurisdiction. Not only is it courteous to give local prosecutors a heads-up that you're seeking information in their county, but they could also offer help and advice. They might be able to open doors and make introductions that would be difficult to do on your own.

The ultimate goal of hospital search warrants is to obtain evidence related to a suspect's blood-drug and blood-alcohol levels in intoxication cases. To make our best possible case, we should seek two main types of information:

1) patient records
2) physical evidence

Patient records help us in three ways. First, they often provide us with the hospital's own analysis of the suspect's blood or drug intoxication levels, because virtually all patients undergo a blood draw and blood testing upon admission to a hospital. Second, they contain the names of those who drew the blood and performed the testing—potential witnesses for a future trial. Finally, the records may contain useful statements or admissions that the suspect made to medical personnel. These statements, made for the purposes of medical diagnosis, may come into evidence under an exception to the hearsay rule.[1]

Physical evidence often helps us distinguish between a crime and a tragic accident. In a best-case scenario, law enforcement seeks a search warrant early enough to obtain physical evidence as well. Hospitals typically save the blood that staff has drawn from a patient for a short time. A residual blood evidentiary search warrant can give officers authority to retrieve the suspect's actual sample before the hospital destroys it. Then, the sample may be transported to a DPS crime lab for testing.

Why bother with DPS testing if you already have a blood intoxication result from hospital records? Anyone who has ever needed to track down and subpoena hospital witnesses to prove up a hospital blood draw at trial likely already

knows the answer to that. Many times, it can be extremely difficult to determine from hospital records the name of the person who performed a blood draw or testing. Even if you find the staff members involved, their ability to testify to their processes and the standards used by different hospitals varies widely.

In contrast, Department of Public Safety labs use the same standardized processes for testing across the state. Furthermore, DPS lab personnel are often human performance toxicologists and receive extensive training on how to testify properly to their results in court. We also have a much better chance of locating them when trial time comes around. If officers can secure the blood from the hospital, it is always worthwhile to try.

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The road to success

Grand jury subpoena. The first step we can take to assist officers is to prepare a grand jury subpoena for the suspect's patient records from the hospital. This document may be directed to the hospital's risk management department and should set out the patient's name, date of birth, and suspected date(s) of treatment.

HIPAA preservation letter. The next step is to prepare and send a HIPAA preservation letter. This letter from your office also should be directed to the hospital's risk management department along with the patient's name, date of birth, and suspected date(s) of treatment.

The HIPAA preservation letter should make two main requests. First, it should include a request for the hospital to preserve evidence, which consists of blood drawn from the named patient, along with access to protected health information regarding the same patient. Next, it should request permission for the hospital to make oral disclosures to the investigating law enforcement officer of information related to the treatment of the patient.

The letter to the hospital should state that you are familiar with the requirements of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and with the regulations providing guidance in the application of that statute. The letter should state that your office has carefully considered the predicate requirements of 45 CFR §164.512 (f)(l)(ii)(C)(l)-(3) and represents that:

1) the information and preservation of the blood evidence is relevant and material to a legitimate law enforcement inquiry;

2) the request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and

3) de-identified information could not reasonably be used in its stead.

You should also include the investigating officer's name in the letter so that the officer can fax or email any necessary paperwork to the hospital. (Send a copy of the letter to the officer so that he can relay the information to the hospital.) Ultimately, this will allow the hospital to orally give the officer the initial information that he needs.

Armed with the HIPAA preservation letter, the investigating officer should call the hospital and ask for the legal or "risk management" department as soon as possible to obtain the following information:

- alias name given to the patient (example: "Alpha3427, female");
- Medical Records Number (MRN) of the patient;
- verification that the hospital laboratory does possess residual blood vials from the patient;
- the identity of the person who drew the blood; and
- instructions and directions on where the officer should go to obtain the blood when he comes to execute the evidentiary search warrant to obtain the blood.

The investigating officer should speak with either hospital legal staff or to a lab supervisor and instruct them not to destroy the blood because a court order is in the works. He should coordinate with the hospital legal department to make sure that the letter is faxed or emailed to the lab members directly in charge of the blood sample.

Once you and the investigating officer have ensured that the hospital will preserve the blood and have obtained the necessary patient information, it is time to move to the most important step of the process: preparing the search warrant.

Preparing the evidentiary search warrant. Counties across the state differ regarding the level to which district or county attorneys assist with search warrant preparation. In some rural counties, it may be common for the investigating officer to come up to the DA's office with his probable cause in hand. Some counties have the officer submit his probable cause via fax or email so the prosecutors can assist with preparation of the

warrant. Once prosecutors have reviewed the probable cause from the officer, they can discuss any questions with the officer regarding additional information that may be necessary. Then, drafting begins. Samples of these three documents (grand jury subpoena, HIPAA preservation letter, and evidentiary search warrant) are available on TDCAA's website; look for this article in the Journal section.

A few potential speed bumps

Keep an eye out for the following challenges any time you assist an officer with obtaining a warrant seeking blood from another county.

1 **Identifying the officer.** When it comes to drafting search warrants, remember that experience counts. One area that officers commonly forget to discuss in search warrant affidavits is their level of training and experience. When a search warrant relies on an officer's training and experience in forming an opinion, it is important to identify exactly what that training and experience level is. You may learn this by questioning the officer directly or by having a DA investigator search TLO for the officer's licensing information to learn how many years he has worked in law enforcement.

2 **Identifying the suspect.** Identifying a patient—our suspect—sometimes becomes tricky when dealing with the medical establishment. Although we heavily depend on patients' names in the criminal justice field, hospitals typically rely on the medical records number, or MRN, in their internal record-keeping. For this reason, it is extremely important to identify the patient in the search warrant by not just his or her proper name and date of birth, but also by the hospital's alias for the patient—if you can obtain it—and the suspect's MRN.

From a factual perspective, identifying the suspect also means "wheeling the driver." One of the most common mistakes we see in search warrant applications on intoxication manslaughters and assaults is a failure to adequately describe the facts that led an officer to place that suspect behind the wheel at the time of the crash. Make sure the search warrant sets out specific, articulable facts that place the driver behind the wheel, such as: witness statements, suspect statements, physical evidence such as seatbelt bruising or airbag powder, and any information that nails down the length of time between the crash and the time that officers first arrived on scene.

3 **Identifying the judge.** Once the search warrant application is drafted, it is time to find the judge. Sometimes, that can be easier than it sounds. Locating the appropriate judge to sign the search warrant may be simple when the suspect's blood has been drawn and stored in your own county. Smaller counties often know their local judges' names and numbers by heart. Larger counties will contact their internal intake division to locate the on-call magistrate.

However, this process becomes significantly more complicated when the suspect has been transferred out of county for medical treatment and you are seeking blood from another jurisdiction. If the suspect has been transported out of county for medical treatment, you should assist the officer in locating a district judge (or other appropriate magistrate under Code of Criminal Procedure Art. 18.01) within that jurisdiction to sign the warrant. The intake divisions of many prosecutor offices in larger counties keep a running list of the magistrates currently on duty.

For smaller counties that routinely rely on hospital trauma centers from neighboring large counties, it is a good idea to identify and keep a list of the contact information for the DA intake division of your neighboring large jurisdiction(s) well in advance. Then, when a warrant needs to be signed, you or the officer can call the DA intake staff and ask which district judge is on duty for warrants at the date and time you expect the officer to arrive in the jurisdiction.

If your officer is seeking to have the warrant signed outside of normal business hours, there may be magistrates available to sign warrants during those times. Remember that in almost all counties in Texas, the judge signing the evidentiary search warrant must be a licensed attorney.[2]

Once you have identified the appropriate judge, his or her location, and his or her contact information, notify the officer. Many judges will now handle warrants through email, fax, and phone. Remind the officer that if he is swearing out his application in front of another officer before faxing or emailing the application to a judge, that other officer must sign the application as well. Some officers who are used to swearing in front of a judge directly may forget that step when preparing to send a warrant application by fax or email.

For smaller counties that routinely rely on hospital trauma centers from neighboring large counties, it is a good idea to identify and keep a list of the contact information for the DA intake division of your neighboring large jurisdiction(s) well in advance.

Also, when the officer presents the warrant to the judge, remind the officer to get the judge's name printed on the search warrant along with the judge's signature.[3]

Reaching the destination

Finally, the evidence is at hand! The officer can now execute the search warrant by seizing the blood from the hospital's lab. When the officer is retrieving evidence pursuant to the warrant, he should also request a sworn business records affidavit. Some hospitals have begun having lab personnel issue a sworn business records affidavit for the blood without the officer requesting one.

Some labs may try to provide the officer with the suspect's urine samples as well as the blood. Because DPS will be testing only the blood, the officer may want to politely inform the lab staff that the officer only needs the suspect's blood tubes and not the urine sample. This way, DPS will not have to use valuable storage space on a sample that will go untested.

Ask the officer to take a photo of the labels on the blood tubes before he packages them. The names, initials, dates, and identifying information should be clearly legible. Let the officer know that this information helps prosecutors confirm different identifying information with witnesses and is a helpful practice to shore up the chain of custody.

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Remember, the officer should refrigerate the blood tubes up to the time he transports them to the DPS Crime Lab and maintain a clear chain of custody along the way. Remind him to forward you a copy of the DPS Lab Submission Form he submitted so that your office maintains a copy in the file.

If the officer executed the warrant and completed the return outside your local jurisdiction, you may offer to assist the officer in sending the completed return to the appropriate district clerk's office. You can call the clerk's office and ask how they prefer to receive the return. Many accept it via certified mail; you should also request a return receipt.

If the district clerk's office requires the documents to be sent in person, then identify the location and inform the officer about any steps he may need to take regarding the documents. For example, in Harris County, there is an in-person drop-off in a lock box located in the lobby of the Harris County Criminal Justice Center. A file stamping machine is stationed on the box, and the officer should file and date-stamp the documents before dropping them into the box.

If your office is assisting the investigating officer by sending the documents to the clerk's office on his behalf via certified mail, then your office can make copies of the documents for your file before mailing them to the other jurisdiction. You can also include a self-addressed stamped envelope and a written request for the clerk's office to provide you with certified copies of the documents once filed.

However, if the officer is personally dropping the documents off at the clerk's office, ask the officer to make a copy of the documents himself for your office's files before making the drop-off, if possible. Once he has dropped them off, your office will need to contact the clerk's office directly to obtain a certified copy for your file.

Conclusion

Coordinating with medical professionals and your local law enforcement to execute these warrants can be a trying process. However, familiarizing yourself with the people, places, and processes ahead of time can set both you and your officers on the road to a successful prosecution. ❇

Endnotes

[1] Tex. R. Evid. 803(4).

[2] Tex. Code Crim. Proc. Art. 18.01(h)(i).

[3] See *State v. Arrellano*, 600 S.W.3d 53, 55-57 (Tex. Crim. App. 2020); TDCAA's May 8, 2020 Case Summaries Commentary at www.tdcaa.com/case-summaries/may-8-2020.

Bigamy in Texas? The 'pastor's' lies

The Domestic Violence Division of any DA's office typically handles, well, domestic violence cases. Murders, aggravated assaults, and simple family assaults are the majority of crimes, with the added obstacles of uncooperative, recanting, or minimizing victims.

By Vanessa Goussen
Assistant District Attorney in Harris County

However, there are times when we are entrusted with an anomaly, such as a bigamy case I recently handled. Such cases are not often prosecuted because they are uncommon—we rarely see these types of crimes in Harris County—but like any other crime, when it happens, the victims deserve justice.

Bigamy is the first offense listed under Chapter 25 of the Texas Penal Code for Offenses Against the Family. Section 25.01 states that an individual commits bigamy if:

1) he is legally married and he

A) purports to marry or does marry a person other than his spouse in this state, or any other state or foreign country, under circumstances that would, but for the actor's prior marriage, constitute a marriage; or

B) lives with a person other than his spouse in this state under the appearance of being married; or

2) he knows that a married person other than his spouse is married and he:

A) purports to marry or does marry that person in this state, or any other state or foreign country, under circumstances that would, but for the person's prior marriage, constitute a marriage; or

B) lives with that person in this state under the appearance of being married.

Suspects often use deception and fraud to conceal an existing marriage, but neither is required as an element of the crime. The statute also does not require that any monetary damages be incurred or proven by the complainants.

In Texas, bigamy cases are third-degree felonies, carrying a max punishment of up to 10 years in prison. I believe this truly shows how seriously the legislature takes these cases and therefore, I treated this case with that same sentiment.

The background

On August 26, 2021, a deputy received a bigamy call for service, probably the first in his career. A woman, Jeanette, had discovered that her husband, Orlando Coleman, was receiving money from another woman, Angela, through CashAPP, and Angela confirmed that she and Coleman were still married in Delaware.

Jeanette and Coleman met at the very beginning of March 2021 and married later that month. He told Jeanette that he was divorced and that he was a bishop. His bishop status was supported by the way he spoke and the fake regalia he owned. Jeanette quickly trusted Coleman because he was a bishop, and at a mature age, she thought marriage was righteous after almost 30 days of knowing him. However, Jeanette quickly caught her new husband lying to her several times. The first real red flag was that he wasn't interested in going to work. Jeanette became concerned about how he was earning money if he wasn't working. He lived in Jeanette's home and spent most of his day on Facebook. Clearly, things

were just not adding up, and it was apparent that Coleman was using Jeanette for room and board.

Jeanette was suspicious of Coleman's obsession with Facebook (where he added multiple women to his friends list), his unemployment, and his financial situation. When she happened upon the CashAPP transactions with Angela, she decided to reach out to her via Facebook to address the probable infidelity with her husband as well as get answers to her questions. She had no idea that she was about to uncover more than just unfaithfulness. Angela confirmed that she was in fact still legally married to Coleman and sent immediate proof (their marriage license). Both women made a pact to continue uncovering their husband's lies.

These two women were the forefront of the investigation. They truly made the investigator's job simple because they had, through the internet and social media, reached out to many other women whom Coleman had conned and victimized—and married. The ladies soon realized that they shared the same story: They were all middle-aged, hard-working women who were heavily involved in their churches and who led spiritual lives. They had all met Coleman through their church or faith-based connections. Coleman posed as a traveling pastor or bishop infiltrating small African-American churches. He used this sham status to persuade women to marry him after dating for a short period. I believe Coleman used marriage to corroborate his status as a bishop but also to ensure that he obtained as much financial gain as possible from his wives. We prosecutors were unable to contact each woman he married, but we did significant research and found records proving roughly 13 marriages in at least seven states. The research was somewhat difficult because not all states and counties record marriage licenses the same way. Also, some of these women did not want to be contacted; they were still suffering from the embarrassment and victimization of Coleman's deception.

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Coleman conned these hard-working women for a place to lay his head every night, money, food, and anything else he could take. The manipulation continued as he jumped from state to state, using the excuse that he was a traveling pastor. While at the new church, he'd reach out to one of his wives for financial assistance, all while starting a new relationship that led to marriage with another woman. His lies were extreme and delusional; he told some women he was a veteran and had many advanced degrees. Based on our research, Coleman had never been in the military and did not hold any degrees.

Coleman never came clean to any of the women he conned. He was a habitual liar and would never admit to any of his wrongdoings. He often used aliases on social media to cover his tracks and remain untraceable, and he'd quickly move on from wife to wife. In court, he originally used a walker and then a wheelchair to approach the bench, which was contrary to the clean-shaven, handsome man these women first met. I believe he used these mobility aids to gain sympathy from whomever he could, including the court.

We decided to charge Coleman with bigamy and not with theft because we understood that proving deception is complex.

A guilty plea

When it was time for a recommendation, everyone initially wanted him to serve time in prison, but we prosecutors were concerned that many of his victims would not want to testify at punishment. Because Coleman's lies were so obvious now, many of these women were embarrassed and ashamed—they were educated and esteemed members of their communities and couldn't believe that they had been conned by a vagrant. Looking back, they realized the warning signs were there and were obvious. Thus, after the defendant rejected our offer of a two-year pen trip, we offered three years deferred adjudication. When I spoke to the two main women about the categories of punishment, they assured me that he would do it again, and I assured them that if he did, he would go to prison.

Everyone's assurances came to fruition when only two months after he was placed on deferred probation, Coleman married another woman in Kentucky. I was in shock and upset with myself that I didn't listen to the complainants more, and I second-guessed my plea offer of deferred. However, I truly did not think that Coleman would marry again, especially so soon, because the thought of going to prison would be enough to scare him; plus, I didn't think it was that difficult to abstain from marriage. Apparently, marrying women is the main thing Coleman does in life.

Continued in the red box on page 32

With a little help from our friends

May 21, 2019, started off as a normal day here in San Jacinto County.

By Todd Dillon (left)
Criminal District Attorney, and
Rob Freyer (right)
First Assistant Criminal District Attorney, both in San Jacinto County

It was a hot and muggy Tuesday morning. Rhonda Richardson, a mother, grandmother, and guard at the Department of Criminal Justice's Polunsky Unit in Livingston, was winding up a distinguished career and starting the next phase of her life. Little did she know that May 21 would be the last day she'd be seen alive. Rhonda had the misfortune of encountering Robert Clary, who was her neighbor and an overall awful individual. At the time, Clary was a 63-year-old loner whose accomplishments were limited to prison trips in 1992, 1995, and 2007 for Felony DWI and Indecency with a Child in Montgomery and Harris Counties.

In the early afternoon of the following day, deputies from the San Jacinto County Sheriff's Department were called because a deceased woman had been found off a trail almost half a mile deep into the forest. The 911 dispatcher learned that the caller—who turned out to be one of Clary's nephews—reported that Clary came to their residence and told him he had found a body in the woods and he didn't know who it was. This nephew cooperated with police and told the responding deputies that he saw Clary taking pictures of the body with his phone. Another one of Clary's neighbors overheard him telling people that he "did not want to be the person who called 911."

That body ended up being Rhonda Richardson. She lived on the edge of the Sam Houston National Forest off Hoot Road in Shepherd. She was also the owner of two dogs who had a penchant for leaving her house and running into the woods. Deputies noted that her body was in an advanced state of decomposition, the skin of her face and neck had been peeled back, and she had sustained numerous sharp force injuries. Rhonda's body was transported to the Forensic Center in Beaumont, where the pathologist listed the cause of death as multiple sharp force injuries and the manner of death as a homicide.

Questioning Clary

Detective Gary Sharpen with the sheriff's department was assigned to lead the investigation. He, along with then-Assistant DA Todd Dillon (one of the co-authors of this article) attended the autopsy and obtained multiple witness statements, including one from Clary himself. Det. Sharpen learned that the first deputy to arrive at the scene (who fortunately is no longer in law enforcement) told Clary to delete the pictures he had taken "unless he wanted to appear in front of the grand jury." Det. Sharpen did a thorough job from the onset locking in Clary's version of events over the two-day period, and it was apparent that his version did not make sense. He said hardly knew Rhonda and never talked to her, but he had offered to help look for her dogs because "they got out all the time." Despite them being neighbors, he said he never called her and never spoke to her, and she never called him either.

The investigation began to build with the assistance of outside agencies. Clary agreed to complete a polygraph, and at the same time, investigators executed a search warrant at his trailer in Shepherd. During that search, a large bloodstain was found in the carpet. Coordination between the interview team and the search team got that information back to the interviewer, where Clary seemed to be very concerned about the prospect of blood evidence being found in his

We discovered his new marriage through his probation officer in Kentucky. During his deferred plea, Coleman asked the court if he could transfer his probation to Kentucky, as he had plans to live there, and the judge granted his request. During one of his meetings with his probation officer, Coleman actually admitted that he had recently gotten married. The officer obtained the marriage license and sent it to Harris County, where Coleman's probation was quickly revoked. He was arrested the next month and extradited to Houston.

It was apparent that Orlando Coleman will not stop taking advantage of women and scamming anyone whose path he crosses, and we all strongly believe it will continue even after serving his three-year prison sentence. He wrote a letter to the judge of the 482nd District Court while he was awaiting sentencing, where he again shifted the blame for his own choices and behavior to the victims. He signed this letter with post-nominal initials indicating that he held three post graduate degrees: doctorate, theology doctorate, and a doctorate of divinity. We do not have any proof that he holds any of these titles, demonstrating yet again that Coleman was doubling down on his lies without regard for his many victims. He has continued to maintain a relationship with a woman while incarcerated, which has been confirmed via recorded jail calls.

Conclusion

Bigamy cases stand out as complex puzzles demanding careful navigation. Charged with prosecuting individuals accused of entering into multiple marriages simultaneously, we are tasked with upholding the sanctity of marriage and protecting the rights of those affected. Many women were hurt by this defendant's cowardly sham when he posed as a bishop and a loving new husband. He manipulated many women and left them vulnerable and distant from their faith-based communities. His continual pattern of behavior proves his lies will likely never stop, but when they cross the line into committing a crime, we will prosecute. ❇

home. The dominoes were falling, and with seriously suspicious (though not outright inculpatory) statements he made during the polygraph interview, it seemed just a matter of time until we had a lab report showing Rhonda's blood in Clary's home.

Until suddenly it wasn't. Inexplicably, a lab report showed the blood had one contributor: Clary himself. No DNA connected to Rhonda was ever found in Clary's home or vehicles. This setback completely derailed the investigation's momentum. Even though detectives all had a good idea that Clary had been involved in Rhonda's death, the investigation went cold.

Another set of eyes

Fortunately for Rhonda and her family, what this case needed most was another set of eyes. That came in the form of former Harris County Assistant DA Kelly Siegler and her talented coworkers on the show "Cold Justice." Kelly began working with "Cold Justice" a few years after her retirement in 2008. She has traveled to all 50 states and has met with (mostly) smaller law enforcement agencies to offer years of the experience, energy, attention, and extensive resources that cold cases require. This was the second case that "Cold Justice" helped with in our county in 2022. By that point, Todd was the elected Criminal District Attorney, and he had already worked with Kelly and the show to re-open another cold case in our county. Based off that experience, we had a good foundation of trust in the transparency and organization of the process, so we asked for help solving Rhonda's murder.

When Kelly and "Cold Justice" returned to San Jacinto County, she enlisted the help of our office, Detective Sharpen, Lieutenant Charles Dougherty, and Sergeant Omar Sheik with the sheriff's department. We interviewed the same witnesses who had been interviewed in 2019, and upon reopening of this investigation, we were reminded of the importance of getting a suspect's story committed. We were able to go back and confront the parts of Clary's statements that defied comprehension.

The members of "Cold Justice" brought not only years of combined law enforcement experience, but also vast resources that are often lacking in smaller jurisdictions. Kelly encouraged us to reach out to Montgomery County forensic pathologist Katherine Pinneri, who has conducted no fewer than 2,000 autopsies in her career. Pinneri re-examined photographs, lab

reports, and the original autopsy report, and she determined that the injuries to Rhonda's body were not caused by animal predation as originally suspected.

We also learned that the technology involving cell phone data records and tower information had advanced greatly in the proceeding four years. Former Harris County Assistant DA Eric Devlin (now retired and a contributor to "Cold Justice") re-examined and "re-downloaded" both Rhonda's and the defendant's phones. Devlin used this cell phone data and call detail records—cold records that have no bias or motive to lie—to prove conflicts and discrepancies in Clary's story. Clary had told Det. Sharpen back in 2019 that he had "never met Rhonda" but that he had gone out help look for her missing dogs. But phone logs showed that he had called her—he actually called her phone after he knew she was dead! And no fewer than three witnesses reported seeing Rhonda on the back of Clary's four-wheeler on the afternoon she was last seen alive. In fact, Clary was the last person to see her alive and the first person to see her dead.

Ms. Siegler and retired Milwaukee Police Department investigator Steve Spingola accompanied Det. Sharpen back to the scene in October 2022 and found Clary in the same house where he had been living in 2019. Clary even willingly spoke to them, but once again he continually contradicted himself now that we had so much information that blew his original story out of the water. Devlin assisted us and Detective Sharpen in writing up a very detailed probable cause statement, and upon getting it signed and a warrant issued, Clary was taken into custody the same day. The defendant was indicted for the murder of Rhonda Richardson the following month, and the case was assigned to the 411th District Court, the Honorable John Wells presiding.

Case preparation

In preparing the case for trial, Todd and First Assistant Rob Freyer (co-author of this article) met extensively with Rhonda's son and daughter, who, after four frustrating years, could finally look forward to seeing justice for the man who had brutally and inexplicably murdered their mother. After we completed discovery and the case progressed, we finally received a trial date of April 29, 2024. We were faced with the same issues that had presented themselves four years earlier, but we knew that we had a strong circumstantial case. Clary was now almost 67 years old, and our main objective was to obtain a sentence that would guarantee he would never leave prison.

On April 25, less than a week before trial, Clary entered a plea of guilty for Rhonda's murder in exchange for a sentence of 30 years. Her daughter delivered an impassioned victim impact statement and was relieved that the defendant's day of reckoning had finally arrived.

Lessons learned

In working on and preparing this case, we learned a lot: Never give up, don't be afraid to reach out for help, and focus on the types of evidence that cannot be contradicted or explained away (phone records, for example). They always show up, they don't have any bias, and they don't have any reason to lie. We also learned how working with a team like "Cold Justice" can be a great benefit to a small county with minimal resources. Todd initially had some reservations about what it might look like to try a case where a film crew had dozens and dozens of hours of footage of the process of the investigation, but it actually wound up being a strength of the case. The defense team was privy to all of the footage, and the process resulted in the most transparent investigation our office had ever conducted. "Cold Justice" brought a ton of resources to bear on a cold case, assisted the investigators in doing the work, and compiled all notes in an easy to comprehend format. I would highly recommend considering the option, should you find yourself with a stagnating cold case in a jurisdiction with few resources.

We would like to once again thank Kelly Siegler and the "Cold Justice" team for their assistance. Rob, one of this article's co-authors, had the privilege of working directly with Kelly for the first 12 years of his career in Harris County, and it was a real honor to work with her again. We would encourage smaller counties out there to seriously consider taking another look at any unsolved murder cases you may have, and to reach out to Kelly and her coworkers for their guidance and insight, because for Rhonda and her family, it proved to be invaluable. ❇

The members of "Cold Justice" brought not only years of combined law enforcement experience, but also vast resources that are often lacking in smaller jurisdictions.

Taking a big swing on behalf of a longtime victim of domestic violence

Dwight Shears slept at his girlfriend's house the night before he broke into her house. He was not found at the scene. He left no visible injury. He caused almost no damage to the house.

By Amy Wren
Assistant District Attorney in Nacogdoches County

And yet, Shears was found guilty of burglary and aggravated assault during an attack on his longtime partner, and a jury sentenced him to 25 years in the pen. You read that right.

When I received this case in April 2023 for a trial setting later that summer, I had those facts and just a little bit more. I had a statement from the victim (we'll call her Sabrina) that she saw Shears outside her home, that she went inside and locked the door, and then while she was relaxing in the bathtub, she opened her eyes to see him sitting on the toilet. He was angry, and when she got out of the tub, he swung a baseball bat at her. (He missed.) I also had a statement from the parties' 15-year-old son that he intervened and grabbed the bat when his father prepared to swing again.

I could discern from the report that the victim and the defendant were family members, but that was it. There was no kicked-in door, no open windows, no damaged locks, no holes in the wall, not a dent, not a single spot of paint chipped—and no injuries. These offenses occurred on January 10, 2019, so I also had a significant lapse in time, and there was no body-cam video due to an issue with the law enforcement agency's storage system: All body-cam videos from prior to April 2020 were lost. To top it off, the defendant was uninterested in any plea agreement other than time served.

Start digging

It would have been easy to offer time served and move on to the next case, because let's be honest, this one wasn't looking so good and there were plenty of others on the trial docket that had better facts. But this one nagged at me. I had seen the defendant in court, and he was very vocal about being eager to confront the witnesses against him. I'm not one to back down from that kind of challenge, and I learned a long time ago, especially where relationships are concerned, that if you dig deeper, it's likely you'll find additional incidents and sometimes even other victims. So that's what I did. I dug and dug all the way back to 2015.

I found multiple reported incidents concerning the same victim and defendant. I reviewed all of them and discovered that the victim, in all cases, either did not want to pursue charges from the start or decided later that she did not wish to pursue charges. In all but one case, the State did not file charges. The one that was pursued occurred in 2016; that's when Shears threatened Sabrina with a knife and later pleaded guilty to terroristic threat. I knew in my gut that there was more, and the reason there was more is because the victim kept going back to her abuser. My typical jurors were not going to like that.

I needed to keep digging, but I had run out of paper to dig through. So, armed with some knowledge of the relationship, I decided it was time to contact the victim. Shears was indicted in May 2019 and there had been little contact with her. I knew the defendant and the victim had been back together after indictment because law enforcement had responded to incidents between them up to September 2022. The defendant was arrested in October 2022 and had not

been able to bond out of jail. I knew where he was, but I didn't know where she was—or whether she would want to talk to me.

The victim

I met the victim, Sabrina, in May 2023. She was quiet but well put-together. She informed me that she was working the nightshift at a local hospital as a certified nurse's aide and that she lived with her youngest son in town. When I told Sabrina that the case was set for trial, her face took on an expression of hesitation and fear. I watched her start to shut down and attempt to shrink into her chair. Before she could completely close off, I jumped in and told her that all I needed to know was the truth and I would never ask any more of her than that. She nodded and I knew she was still with me. I asked her to start from the beginning.

Sabrina started to talk about the night of January 10, 2019, about the burglary and aggravated assault. I stopped her and said I meant the real beginning, from the time Shears entered her life until the last time she saw or spoke to him. Sabrina was obviously confused and asked something to the effect of, "Why does it matter? He's going to trial for burglary." I told her that it was all important because I had a feeling that the burglary was just the last thing (the most recent thing), which could be explained only by knowing everything. In my mind I saw their relationship as the cycle of violence, and I knew that the last thing is always related to the first thing.

And so Sabrina started at the beginning. She sat in my office with me and a victim's assistance coordinator, Holly George, for more than two hours. In that time, she relayed the heartbreaking account of a young girl who grew up in the projects with a single mother, an absent father, and no siblings or other close family. She met Shears when she was 15 years old. He was 24. While all the other girls wanted to get to know him, he gave his attention to Sabrina. She felt special, and he exploited that. The defendant impregnated her almost immediately, and she gave birth to a baby girl at 16 years old.[1] One month after the little girl was born, Sabrina's mother, her only support system, passed away. Sabrina went to live with her father, whom she did not know. He often kicked her out of the house, leaving Shears as the only steady presence in her life, the one who always came to the rescue.

At 18 years old Sabrina was able to get government housing. The defendant moved in with her, but he told her she needed him and she believed it. In her words, the defendant "raised her." He taught her to cook, clean, wash, etc. He told her these were the things women are supposed to do. When she got it wrong, he would tell her to lie across the bed on her stomach and he would whip her with a belt. She described feeling insignificant and small, like a child.

At 19 years old, Sabrina was pregnant again. There was a gathering outside of the apartment complex and Shears came inside raging, accusing her of messing around on him. He strangled Sabrina until she lost consciousness and urinated on herself. This was the incident that Sabrina identified as the first time he abused her, even though he had been verbally and physically abusive previously. Even as she sat in my office, it was difficult for her to describe past incidents because to her, unless it rose to the level of being strangled to unconsciousness, it wasn't really that bad. Finally, I had to stop asking her about "assaults" and "abuse" and instead ask about every possible way that abuse could be perpetrated for it to register what I was asking about. With this prompting, Sabrina went on to describe the "lesser abuse" that she endured on a frequent basis: slapping, kicking, stomping, strangulation that wasn't as bad as the first one, being spit on, being threatened, and being demeaned. She described a time Shears spat in her face and then told her that he loved her, that it was just him and her against the world. She told me about the 2016 incident where Shears pled guilty to terroristic threat; it stemmed from her receiving a government benefit card and buying groceries. Shears came at her with a butcher knife.

This was the life she had lived for 25 years.

She went back to him

Sabrina estimated that she tried to leave the relationship more than 10 times, but she always went back. She described believing wholeheartedly that she could not make it without Shears. She believed that she was stupid and that no one would want her. Sometimes he made her feel bad by saying he was cold or hungry. When she would resist the name-calling and the attempts at making her feel bad, he would do something to scare her. On one occasion she had moved out of the bedroom into the living room and was sleeping

on a mattress on the floor. Shears came out and told her that she was going to "give him some." Sabrina told him no, but he persisted. She laid there not making a sound because she didn't want her child to come out of his room and see her like that. The defendant finished, then got up, and left. He let her know who was in control, and she felt powerless to stop him.

Sabrina got brave again after that and kicked Shears out of the house. He wanted to come back, but she stood her ground until one night she was asleep in her room and could feel that there was someone with her. She rolled over and opened her eyes and was met with Shears pointing a gun in her face saying, "You could be dead right now." She let him come back, because at least if she knew where he was, she could see what was coming.

He wanted to come back, but she stood her ground until one night she was asleep in her room and could feel that there was someone with her. She rolled over and opened her eyes and was met with Shears pointing a gun in her face saying, "You could be dead right now."

She even went back after he swung the baseball bat at her head in January 2019. The following month he met her in the driveway with a screwdriver and threatened to stab her in the heart. After that, she moved to San Antonio to get away from him. Things didn't go well. She couldn't make it, and she believed he was right, that she needed him. She came back to Nacogdoches and asked Shears to take her and their son back.

But then she came back to us

In September 2022, Sabrina contacted the county attorney's office and wanted a protective order (PO). Sabrina had left again, and Shears was outraged. She brought with her many text messages from several days in September that contained manipulation and outright threats of violence. But even after all she'd been through, she hesitated and actually told the victim's assistance coordinator that she felt bad seeking a protective order.

She was granted a temporary *ex parte* PO, and two hours after the defendant was served with it, he violated it. He told her that if he was going to jail he was "taking bodies" with him and that he was going to sit at her house and at her job and torment her. A two-year protective order was issued when the defendant did not show up to contest it. The defendant's bond was revoked based on the text messages, and he was arrested in October 2022. By the time I was meeting with Sabrina, she had been physically free from him for about seven months, but it was clear that she was struggling with letting herself be mentally and emotionally free from him, and it made sense. Not only was she caught in the power and control wheel and cycle of violence, but he had also groomed her as a child. He was all that she knew.

How many ways can I lose this case?

I knew after reviewing the case that there were many paths to a not-guilty verdict. I met with Sabrina's son, the one who grabbed the bat, in May 2023. It was very clear that he was not going to be the third-party witness we all hope for. Not because he had turned on his mom, had felony convictions, or had started using drugs—no. Rather, it was because he was a clear example of what a child who grows up in a household of violence can turn out like. He wasn't aggressive at all. In fact, he may be the most passive and submissive person I have met with in 10 years. We talked about the case, and it was apparent he was very uncomfortable; he would be easily led down any path either attorney wanted to because he just could not handle conflict. If he was going to add anything positive toward the case, it was going to be minimal.

So, there I was, with one hesitant witness who had only known going back to the defendant for 25 years, with no injuries and no damage to the house.

But there's a way to win, right?

One thing I knew after meeting Sabrina was that I believed her, but I believed her because I knew what I was looking for after many hours of training and many hours spent with victims of family violence. Even then, I am human, and I still find myself frustrated with victims. So, my challenge was to figure out how I could get the jury to see what I saw and believe Sabrina without the many hours of training and the benefit of having met with many victims. I needed them to feel outraged *for* her and not frustrated *with* her, or at least have a willingness to protect her in spite of their frustration.

I had already looked at all the incidents involving Sabrina and the defendant, so I went back and looked at all calls to the address where Sabrina was living in 2019, just to see what might turn up. I found an incident that happened on the morning of January 10, 2019, approximately 12 hours prior to the burglary and aggravated as-

sault. It involved the defendant and a man named Leodis. Shears had been in a verbal altercation with Leodis because Shears believed that Sabrina was in a relationship with this other man. I also learned that the defendant had a screwdriver in his waistband when officers contacted him, that he referred to Sabrina as his ex, and that the defendant admitted to telling Leodis that if Leodis ever came back to the residence, the defendant would "air him out." This information was helpful because that night, Sabrina told officers that when she noticed the defendant sitting next to her while she was in the bathtub, Shears was berating her about her supposed relationship with Leodis. He was angry, and she knew she had to get out of the tub because she was in a vulnerable position. Those two incidents happened on the same day and were very clearly related. It was also helpful because the officer who responded on the night of January 10, 2019, noted that there was torn weather stripping on the front door (which Sabrina had locked) and marks on the latch consistent with a flat tool forcing the latch back, e.g., a knife or screwdriver. That was good evidence, right? Sort of.

It's a good time to mention that at this time my indictment contained one count: burglary of a habitation with the commission of an aggravated assault. While the incident on the morning of January 10, 2019, gave me motive and corroboration, it also gave me a statement from Sabrina that she let the defendant spend the night at her home the night before. That statement, coupled with Sabrina's history of going back to Shears and allowing him to return home for many, many years, created a problem for my burglary. I planned to re-indict, but I was hoping to keep a felony one burglary. I hit Westlaw to see if there was any caselaw to support an indictment with both burglary with intent to commit aggravated assault and aggravated assault. Turns out, there is.[2] The statute of limitations for aggravated assault was two years at the time; however, because the case was indicted within two years, the statute of limitations was tolled.[3] I took the case back to the grand jury and obtained a new indictment charging burglary and aggravated assault.

With my charging figured out, I moved on to witnesses. The investigating officer had retired from the law enforcement agency, and I had never seen him testify. He confirmed that there were no injuries to Sabrina, there was no damage to the hallway where the bat was swung, and there was no damage to the windows, screens, or doors other than some torn weather stripping on the front door. He was able to say that the tears on the weather stripping appeared fresh due to the lack of dirt on the exposed area and that the latch on the door had markings consistent with a flat object sliding past it. That, combined with testimony from the responding officer during the morning hours of January 10, 2019, that the defendant had a screwdriver and that the defendant stated he always carried one, gave me the best shot I had at proving burglary.

My review of prior incidents turned up many responding officers, but only one who witnessed Shears's behavior toward Sabrina. While the officer didn't see the defendant threaten her with a knife, he did observe the defendant exhibit aggression toward her and aggression toward the officer. I also had one officer who arrested the defendant for criminal trespass at Sabrina's address two and a half months before the burglary. This testimony would bolster Sabrina's testimony not only about the night of January 10, but also about the entirety of her relationship with Shears. I made sure that I outlined my arguments for why Sabrina's testimony about the entirety of the relationship—more specifically the bad acts that occurred—should be admitted pursuant to Texas Code of Criminal Procedure Art. 38.371 and, if need be, Texas Rules of Evidence 404(b). I did the same for the officers' testimony. I did not want to have to stop mid-trial to research whether the testimony could be admitted or why.

I then moved on to thinking about how I could educate the jury enough to get them to want to step in and protect Sabrina, even if they were frustrated by her repeated returning to the defendant over the course of 25 years. I knew her going back to Shears was going to seem counterintuitive to most people and would therefore give some jurors a reason to return a not guilty verdict. I sought advice and guidance from local mental health professionals and was directed to a licensed professional counselor (LPC) in the community, Shelby Brown, who previously worked at the Family Crisis Center.[4] Although she had never testified in court, she was confident in her experience and her education. We spoke multiple times about what was needed from her, what visual aids she wanted to use, what hypotheticals she may be asked, and courtroom testimony in general.

So, there I was, with one hesitant witness who had only known going back to the defendant for 25 years, with no injuries and no damage to the house.

If the defendant was convicted, I also wanted someone to build on the work of my LPC in explaining how dangerous Shears was, especially with regard to Sabrina. I knew that my local forensic nurse, Kim Riddle, would be just the person. She is informed about strangulation and how dangerous it is, and she puts in a significant amount of time educating herself about strangulation in general, as well as about strangulation in relationships that involve family violence.

Our community has many people who are very "pull yourself up by your bootstraps" types, and they generally wield a hammer when it comes to punishment. I knew in this case those same folks, while good for many of our cases, weren't likely to be as open to a mental health professional and may look unfavorably upon a victim who continued to go back to her abuser.

Putting all the pieces together

Trial time finally came. Jury selection occurred on April 15. I knew I needed a different kind of jury from what I would pick for a murder or sexual assault of a child. Our community has many people who are very "pull yourself up by your bootstraps" types, and they generally wield a hammer when it comes to punishment. I knew in this case those same folks, while good for many of our trials, weren't likely to be as open to a mental health professional and may look unfavorably upon a victim who continued to go back to her abuser. The jurors I needed would likely be softer in punishment than we are used to in Nacogdoches County; however, I needed a guilty verdict before I could get to punishment. I had a plan going into voir dire and I executed it, focusing on my issues regarding the burglary, lack of injuries, and the dynamics involved in family violence. A jury was seated and we began evidence the following day.

I am a firm believer that you shouldn't just call witnesses because they appear in your offense report. I spend a lot of my trial prep time determining not only who the potential witnesses are, but also what they bring to my case, whether it be positive or negative. Up until the morning of trial I was arranging and rearranging my witness order and visualizing my trial with and without certain witnesses. I decided that Sabrina's son was either not going to add much or was going to hurt me because he was easily led wherever the person asking questions wanted to go. Although he saw Shears swing the bat and had actually stopped the defendant from swinging again, he wasn't going to say so unless I could lead him there, and I didn't have any video of his previous statements that could be played. I decided not to call him.

I also had to decide where my expert on family violence, Shelby Brown, was going to go. Would she go first and set the jury up for what they were about to hear from my victim, or would she go last and explain that everything Sabrina said made sense? I had prepared her for both.

The victim's assistance coordinator in my office, Tammy Sanders, performs many duties outside of victim services and one of those is listening to jail calls. She informed me that the defendant was talking to various family members about testifying in his trial. On the morning that evidence began, I saw many of those family members and knew they were likely to testify, so I decided to put Shelby last. She was going to explain why everything Sabrina said fit within the cycle of violence and the power and control wheel, and she was going to set up the jury to be ready for the defendant's family members, who were likely going to testify to protect him.

I had the officer who responded to Sabrina's address on the morning of January 10 testify first to provide context to what Sabrina would testify happened later that night and how the officer who responded believed the defendant entered the home. Sabrina testified for three hours about what happened that night and about the nature of her relationship with the defendant. She told the truth, even when it might've made her look bad. The officer who responded to the terroristic threat in 2016 and the officer who arrested the defendant for criminal trespass at Sabrina's address in 2018 testified after her, followed by my expert.

The defense called the defendant's sisters who came off well—until they were confronted with the "did you know" questions regarding his assaultive behavior. The defendant himself then decided to testify, and that could be another article all by itself. I knew he thought he was smarter than everyone else and that he planned to talk himself out of trouble. I asked him only questions that would contradict his earlier statements or confirm Sabrina's statements. I didn't argue with him, in other words. I learned a long time ago that arguing with a defendant rarely, if ever, turns out well for the State. In this case, if I let him know where I was headed, he was going to talk until he had someone convinced it wasn't his fault or until he had everyone thoroughly confused; but one thing he wasn't going to do was flat-out admit to any of his behavior—so why argue? I didn't want the jury to take their eye off the ball, so I got what I needed and saved the rest for argument. For ex-

ample, he stated Sabrina already had a child when he met her; however, he also testified that he knew her mother well before she passed. Both of those things could not be true because Sabrina's mother passed one month after the birth of Sabrina's first child, the one whom the defendant fathered but was trying to distance himself from. I also asked him about the 2016 terroristic threat and he said that was just a misunderstanding. During the defendant's direct and cross-examination, he was showing many of the behaviors in the power and control wheel that my expert had already educated the jury about, and I was prepared to point that out during closing argument.

In the end, the jury found the defendant guilty of both burglary and aggravated assault. They also made a finding that a deadly weapon was used during the burglary. During punishment, several jail officers testified to the defendant's behavior while in jail and Kim Riddle testified beautifully about strangulation and the danger that the defendant poses to not only Sabrina, but also law enforcement and the community. The jury returned a punishment verdict of 25 years in the Texas Department of Criminal Justice.

While I think he deserved more, I spoke to the jury afterward to understand their thought process. They absolutely believed Sabrina and gave the defendant one year for every year he tormented her during their relationship. I can't argue with that logic. His only felony criminal history was a state jail dope charge from 20 years prior, so he had not done any significant time previously. This case had no injuries, and there was no damage to any part of the house other than the door's weather stripping. You have to walk before you can run, and you have to get a guilty verdict to get to punishment. Stepping back, I can see that two and a half decades in prison is a long time—and it was a powerful message to Sabrina and the defendant that the jury believed her and they were willing to swing big (pun intended) on the defendant's first serious offense.

Some takeaways

I hope after reading this article you take a few things with you. First, put in the work. It's easy to look at a case that isn't great on its face and just move on to the next one. I'm guilty of it too; however, cases involving family violence victims aren't just words on paper. They are real people who have endured real violence and who endure real hardship in leaving those relationships. Not every case is going to get better, and we do have to let some of them go, but before you let one go, make sure you've put in the work first.

Second, we have to care. I have heard the question, "If she doesn't care, why should I?" too many times to count. We should care because sometimes it's the very thing that gives a victim hope. Sometimes all they need is to see that someone will stand with them. We should care because prosecutors are in a unique position to do something. If not us, then who?

Third, just do it. If you're looking for a reason not to take a tough case to trial, you will surely find it—and you will find many people who agree with you. What if you changed the perspective and looked for a reason to at least try? In this case, the defendant came into Sabrina's life when she was 15 years old. He made sure he was in control of her life and that she knew he could take it away if he wanted to. She needed to know that there was someone out there to stand with her so that she could take back power over her life. She is one of too many. She was worth taking a big swing, and so are the rest of them.

And with that, I leave you with this line from Dr. Seuss's classic *The Lorax*: "Unless someone like you cares a whole awful lot, nothing is going to get better. It's not." ❇

While I think he deserved more, I spoke to the jury afterward to understand their thought process. They absolutely believed Sabrina and gave the defendant one year for every year he tormented her during their relationship. I can't argue with that logic.

Endnotes

[1] The grand jury indicted the defendant for sexual assault of a child on June 2, 2023, and the case is still pending.

[2] *Lang v. State*, 183 S.W.3d 680 (Tex. Crim. App. 2006).

[3] Tex. Code Crim. Proc. Art 12.05.

[4] Family Crisis Center of East Texas provides shelter, advocacy, and counseling to victims of family violence.

A rundown of Investigator Section awards

Friends, investigators, all TDCAA members: Lend me your ears.

By Bob Bianchi
CDA Investigator in Victoria County & Investigator Board Chair

(Sorry, I just couldn't think of how to start this article.) As the Investigator Board Chair, I'd like to write about the different awards that the Investigator Section hands out each year. Don't get me wrong, all investigators are professionals, but some of them really stand out, and they deserve the recognition. There could be one you work with who's done something special, who always seems to go above and beyond to help others and get things done. If there is someone like that in mind, you might consider nominating him or her for one of the awards I'm about to cover.

The Investigator Board gives out at least five different awards each year:

- Professional Criminal Investigator (PCI) certificates
- Chuck Dennis Investigator of the Year award
- Career Investigator award
- Oscar Sherrell award
- Lifetime Achievement.

We've recently had a few minor changes to the awards process so be sure to carefully follow the instructions on the nomination forms before submitting to avoid them being returned.

There may be older versions of some of the nomination forms floating around; please note that all current forms will have a revised date of June 2024 in the upper right corner. The revised dates should change every year with the new contact person's name and email address. Also pay attention to the deadlines as the nominations will not be accepted after those dates and will need to be resubmitted for the following year (PCI certificates are the only exception). If an application is received before the December 1, deadline, the award will be given at the Investigator Conference in February; if it is received after December 1, it will be awarded at the Investigator Conference a year later.

The awards

Professional Criminal Investigator (PCI) certificate. This is available to any TDCAA investigator who meets the following criteria:

1) must be a licensed peace officer and employed *full time* as an investigator by any elected county, district, or criminal district attorney,

2) minimum of eight years of full-time employment with an Advanced TCOLE Certificate or five years of full-time employment with a Master TCOLE Certificate, and

3) must be a paid member of TDCAA.

Chuck Dennis Investigator of the Year Award. This award is given annually to a prosecutor's investigator who exemplifies the commitment of the law enforcement community to serving others, serving his office and remaining active with TDCAA. Chuck Dennis was the first DA investigator in Victoria County back in 1973. Prior to accepting the position, he was a U.S. Air Force veteran, patrol deputy for Bexar and Fort Bend Counties, patrol officer for Castle Hills and Olmos Park police departments, Deputy U.S. Marshal in San Marcos, and police chief in Stafford. Chuck was a Victoria DA Investigator until his untimely passing in 1980 after undergoing heart surgery. This award was created by the Investigator section shortly after his passing.

Career Investigator Award. This award recognizes an investigator who is retiring and has

given of himself to the Association and the profession, worked with and for the goals of the Association, and spent a considerable amount of time as a prosecutor's investigator. Nominees must also meet the following criteria:

1) obtained his or her PCI certificate

2) has been a paid TDCAA member for 10 years (may be cumulative but not broken by more than 10 years)

3) retiring after 15 years of service as a prosecutor's investigator that has at least 20 years total service as a sworn Texas peace officer.

Oscar Sherrell Service to TDCAA Award. The Oscar Sherrell Award recognizes those enthusiastic investigators who excel in TDCAA work. This award may recognize a specific activity that has benefited or improved TDCAA or may recognize a body of work that has improved the service that TDCAA provides to the profession.

Lifetime Achievement Award. This award recognizes exemplary service and contributions to the profession and the Association and is *not* intended to be awarded on a regular basis. Those nominated for the Lifetime Achievement Award *must* meet the following criteria set forth by the Association prior to being forwarded to the TDCAA Parent Board for final approval:

1) be a dues-paying member of TDCAA and in good standing

2) have a least 10 years' experience in a prosecutor's office (cumulative, not continuous)

3) have received the Professional Criminal Investigator (PCI) certificate

4) be a past recipient of the Chuck Dennis Award

5) be retiring or retired from a prosecutor's office.

More information is available at TDCAA's website (search for "Investigator Section awards"). You can also reach out to your Regional Investigator Board members or myself, and we can assist you in the award application process or anything else you might need.

I'd like to personally thank the Investigator Board for their hard work and dedication to TDCAA and their respective offices:

Ruben Segovia in Bexar County (ex oficio)
Robert Bianchi in Victoria County (Chair)
Joe Medrano in Bell County (Regions 3 & 8 Director)
Mike Holley in Kaufman County (Secretary & At-Large Director)
Chris Hamilton in the 97th Judicial District (Regions 1 & 7 Director)
Fred Gutierrez in Webb County (Regions 2 & 4 Director)
Oscar Ruiz in the Special Prosecution Unit (Regions 5 & 6 Director)
Amber Howell in Milam County (At-Large Director) ❇

Putting a small-town mayor on trial

The story was simple: small town Texas, blatant government corruption, and a paper trail a mile long to prove it. The prosecution of the case, however, was anything but.

By Bennett R. Dodson (left) & Elliot Clark Beatty (right)
Assistant Criminal District Attorneys in Waller County

When we were assigned this case just a few weeks before the prospective trial date with instructions to "figure out what's going on and if we can actually prove this," we had no idea what we were stepping into. Our hope is that if you encounter a similar situation, this article will give you a better idea of how to handle it.

Background

Hempstead is a small town an hour northwest of Houston, nestled at the juncture of Highways 6 and 290. Hempstead has a population of less than 8,000 people; it's the seat of Waller County (and home to the criminal district attorney's office), and the county's population is approaching 60,000 people.

Michael Shayne Wolfe was elected mayor of Hempstead in 2004. Previously, the Hempstead city charter distinguished between a city manager and the mayor, with administrative duties and powers split between the two. Wolfe ran on a platform to amend the city charter and fire the city manager, who was regarded as tight-fisted, and that's exactly what Wolfe did when he won the election. This left Mayor Wolfe the sole authority to hire, fire, and approve payroll, along with many other nebulous, undefined oversight duties.

While Hempstead has a five-member city council that ostensibly provides oversight, the mayor has final say over the formulation of agenda and what items are presented to the city council. By 2018, at least three members of the council habitually voted with the mayor, and items he proposed were virtually always passed by a 3–2 vote. Mayor Wolfe regularly made decisions that were never put before the city council, such as approving invoices for road work. He had few in the way of political challengers, and as a Hempstead native, former teacher, and current pastor, he enjoyed broad support in the community.

If you asked a wide spectrum of Hempstead citizens in 2018, probably at least a few would have opined that something stunk at city hall. It was well known that some people did not pay their utility bills, and citizens would frequently appear at commissioners court (located in Hempstead) to complain about the quality of the roads. They always received the same answer: They should complain to the city. Road repair and maintenance occupied a large portion of the city's budget, yet there was little improvement to the roads.

In 2018, the city ordered an audit in accordance with Local Government Code Chapter 103,[1] as it had every year prior. The firm they had formerly hired had raised its rates, and in an ironic twist, Wolfe decided to hire accounting firm Belt Harris Pechacek LLP instead. Following its usual auditing practices, the firm asked for random utility receipts from the city and immediately raised red flags when one of the accounts was marked as $5,000 in arrears but still active. This caused the firm to ask for a register of all utility accounts, which revealed hundreds of delinquent but active accounts, some thousands of dollars in the red. The mayor and his daughter themselves each owned nearly $10,000. Digging further, the firm uncovered numerous other issues involving repeated transactions with a single vendor for roadwork—in violation of state bidding law—and the use of city credit cards for what clearly seemed to be personal transactions, such as payments to Netflix, Dave & Busters, and Best

Buy. The firm calculated that for the amount the mayor's card was being used for gas, despite receiving a car allowance, he had to have been driving nearly 1,000 miles a week on "city business." The discrepancies were so alarming that employees at the firm issued a draft audit and informed the city council in April 2019.

This was when our office and the Texas Rangers got involved—and where things started go sideways.

Investigation and trial

Shortly afterwards, our office's then-district attorney requested that the Rangers investigate. By October of that year, a Ranger had completed what he considered to be his investigation, drafted a warrant, and submitted a case to our office for Theft of Services regarding the utilities. The DA assigned a staff prosecutor from our office and a special prosecutor, the former first assistant (now defense attorney) to prosecute the case.

Then COVID struck, and the case languished for nearly two years. We won't bore you with the procedural specifics, but by 2024 the staff prosecutor had resigned in lieu of termination for unethical conduct, the mayor had been additionally indicted by our office for Misapplication of Fiduciary Property (Greater than $300,000), and trial was nowhere in sight. The case had twice been continued from special trial dates, a significant investment in scheduling, as we have a part-time district court and one felony setting a month, due to various health ailments and issues of the defense attorney and special prosecutor. Finally, in January 2024, our newly appointed DA removed the special prosecutor from the case and assigned it to us.

With trial set for the second week of February, figuring out exactly what evidence we had of what offenses was our top priority. After finding the electronic files incomplete and getting conflicting information about the location of additional evidence we were sure existed, we finally located a box of evidence and trial materials—two weeks before the trial date—in a rarely used ancillary room at the sheriff's office. The box contained only seven marked exhibits; by the time of trial, we had compiled more than 200. We had, at a minimum, two professional audits, several years' worth of bank statements, and seven years' worth of construction invoices to review. After review, we decided we had three major items we could prove.[2]

First, utility violations. One of Mayor Wolfe's enumerated duties was to collect utility payments for the city; they are the city's primary source of revenue. In city hall, there is a utility department, and the head utility clerk works directly under the mayor. The utility department generated a "cutoff" list for delinquent accounts; customers on that list would have their electricity shut off. Customers could ask the utility department for one extension and receive a five-day grace period to pay their bills. If the customer was experiencing serious health or financial constraints, he could approach the mayor for additional or larger extensions. This was not provided for anywhere in city policy, but it was accepted as common practice as a way to help people out.

Mayor Wolfe eventually began highlighting names on the list to be removed (and thus keep these customers' utilities on). At some point, he began regularly highlighting several names: his daughter's, the economic development chair's, that of a local apartment complex, and his own name. These four accounts continued to accrue a massive negative balance and by 2018, Wolfe's daughter had a balance of over $9,000, the economic development chair owed over $50,000, the apartment complex had a balance of over $40,000, and the mayor himself owed over $10,000. Other delinquent accounts, which numbered in the hundreds, ranged from several hundred to several thousand dollars in arrears. Most of this money had to be written off as uncollectable. The mayor ultimately admitted in an interview with the Texas Ranger that he "knew it wasn't right" in regard to this violation; in fact, when the audit and subsequent investigation arose, he paid his $10,000 balance immediately.

Second, bidding law violations. According to Texas law, municipalities must competitively bid any outsourced job that will cost more than $50,000 with procedures prescribed by the Government Code.[3] It is a Class B misdemeanor to award a job without bidding or to break up a job to avoid the $50,000 threshold.[4] Before around 2015 or so, Mayor Wolfe followed the bidding laws as set out by the code and city charter. At some point, however, he deemed this process unnecessary and started planning and paying out the jobs himself directly. Wolfe had no background in construction or construction manage-

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ment. He would receive invoices from Glover's Concrete and Construction, approve the invoices the day they were received, and direct an accounts payable clerk to write a check. The invoices were unconscionably vague, especially when compared to industry standard invoices. A standard invoice is heavily itemized and prices individual materials by the cubic yard, how much a machine costs to operate per hour, and so on. Prices *might* be rounded to the nearest dollar or nearest increment of 10 to simplify accounting, but the Glover invoices typically said something along the lines of, "Road work at 19th, leveling and grading, $10,000.00." Nearly every invoice read this way, and there were more than 100 of them.

Many of the roads clearly did not require the work that was being done, for example, grading (or leveling the dirt of) an already paved asphalt road, which would do nothing other than damage the grader. As another example, Glover provided invoices and was paid for over $100,000 of work in one year on a dirt road that had two houses on the street. Our expert, the current road supervisor, told us short of a hurricane completely washing out the road multiple times, there was no way to justify that expense on that road.[5] The Ranger's report did not include information on bidding violations, and most of the investigation on this issue was actually submitted to us by private citizens who had utilized public information requests to assemble it. City councilmembers and a local private investigator who were aware of the mayor's practices had been stockpiling the data for years through public information requests to the city, waiting for the moment they could get law enforcement to act on it.

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Finally, use of the city credit card. While less egregious than the other offenses in terms of dollar amount, bank records made it clear that Wolfe's city credit card, for which there were very few use policies laid down by the city, was employed frequently and regularly for personal expenses. The dollar amounts he spent at gas stations were inconsistent with what he claimed he was doing. He told the Ranger in an interview that he was simply trying to "help people out" (a frequent excuse he used) by filling up their cars with gas, but he could never identify any specific times he did it or whom he had "helped out."

Pre-trial and trial

Besides desperately attempting to marshal our paper trail, most of our pre-trial preparation consisted of meeting with witness after witness. If there is one thing we took away from this case, it's that you need to talk to *everyone*. In a small town, everyone knew something about what was going on, and many people knew more than most. Most city employees were more than willing to talk about who they'd seen doing what, how they'd been wronged, and whom they suspected at city hall. Every witness we met with changed our theory of the case, and every time we looked at our indictments, we found something new wrong with them or we decided to approach the case differently based on the new information.

The primary offense on which we proceeded at trial was Penal Code §32.45 (Misapplication of Fiduciary Property). For those unfamiliar with this statute, it criminalizes a fiduciary intentionally, knowingly, or recklessly using property contrary to the agreement under which the fiduciary holds it and in a manner that exposes the money to a substantial risk of loss. We had several reasons for feeling that this charge was our best shot: It offered the greatest possible exposure to the defendant based on the offense level;[6] the availability of a reckless mental state; various procedural issues with other offenses;[7] that the money was actually lost to the beneficiary (taxpayers) so the money necessarily must have been exposed to loss; and that the mayor's repeated and egregious violations of bidding laws were far more offensive in scope than just the utilities. The violation of an applicable law, here the bidding violations, is an available manner and means of violating the agreement, and a broad definition of fiduciary was available in the caselaw, which we felt most people would agree an elected office qualified for: a relationship "holding, held, or founded in trust or confidence."[8] All of this together served to negate the most likely defense at trial: "I'm just a simple small town guy, I didn't know what I was getting into, I was just trying to help people," and so on.

In the courtroom

Ultimately, trial was a simple, if stressful, ordeal. We called nine witnesses: the accountant who had performed the audit, the former city secretary, the former assistant city secretary (now city secretary), two former city council members, a second Texas Ranger who had assisted in the interrogation,[9] an account payables clerk who had

issued most of the checks to Glover's Concrete and Construction, and the current road supervisor. The courtroom was packed with interested Hempstead citizens and Wolfe's allies. We were permitted to introduce the entire audit as a business record, and defense counsel went hard enough on the accountant about the credit cards and utility billings that we could introduce that evidence in full in the case-in-chief. The former city secretary changed her story on the stand and insisted she had never witnessed any wrongdoing by the mayor,[10] but not before we introduced all the invoices as business records, as well as maps (under Rule 1006) detailing every job and where it was performed.

When viewed in this manner, the offense almost seemed obvious: four or five jobs conducted on the same out-of-the-way road in one year; another year, when the violations were especially egregious, several roads each had two jobs, each one billed at $48,000 or $49,000, and each of the two jobs done a week apart. The aforementioned dirt road is on the outskirts of town, which Glover's always found a reason to work on and which was described at trial as "Glover's Folly." Some invoices were paid to build roads that still do not exist, which is visible (or not, as the case may be) on satellite photos. Every single invoice, all 135 of them, had the mayor's initials on it, and fewer than 10 actually went before city council for approval.

On the third day of trial, our star witness, the new road supervisor for the city who had decades of experience with TxDOT and road construction contractors, detailed the flaws with dozens of invoices, from billing methods and irregularities in work Glover's claimed they did, to the work supposedly done on nonexistent streets. The road supervisor had commissioned a survey of the city streets, which indicated that nearly every single street was either of "very poor" quality or had outright failed and needed to be redone from scratch.[11] After he completed his testimony, we rested.

Defense counsel, who had previously proclaimed they would produce multiple witnesses to exonerate their client, quietly approached us and asked if there was a plea bargain on the table.

Michael Wolfe ultimately pled mid-trial to six years in prison. We considered this an enormous victory given his popularity in the community and his lack of criminal history. Every juror after the fact told us they would have voted to convict. Wolfe's motion for shock probation, filed a month after his conviction, was denied.

The owner of Glover's Concrete and Construction, Robert Glover, now stands charged with first degree Theft by Government Contractor (his first court date was in June 2024). We never did determine why Wolfe was so dedicated to giving Glover a free ride.

Conclusion

This was a unique case with unique stressors, as every case has, but it is our strong belief that this sort of small-town corruption may be more common than we think. The primary impediment to our cases had far more to do with the early handling of the case and some potential witnesses' unwillingness to take the stand than the strength of the evidence or legal arguments. However, if given the proper encouragement and the belief that something *will* be done with the information they give you, there are far more people willing to do something about it than you might think. ❇

Defense counsel, who had previously proclaimed they would produce multiple witnesses to exonerate their client, quietly approached us and asked if there was a plea bargain on the table.

Endnotes

[1] Tex. Loc. Gov't Code §54.004.

[2] There was other wrongdoing we discovered in the material that we could have pursued, but it was never charged by the special prosecutor and had not been provided as discovery, and we were very concerned about losing our trial date.

[3] Tex. Gov't Code §252.021.

[4] Tex. Gov't Code §252.062.

[5] The specific phrasing he used was, "Paying these invoices would be like putting a bulletproof vest on and shooting yourself in the head."

[6] Our final tabulation for the roadwork done without bidding was in excess of $2 million since 2014. Section 32.45 utilizes the same value ladder as in §31.03(e) (Theft) and §32.21(e-1) (Forgery), among others.

[7] The utilities indictment was horribly drafted, and we didn't have enough time to correct it without losing our trial date.

[8] "Fiduciary" is defined self-referentially in the statute as "any other person acting in a fiduciary capacity." Caselaw has interpreted this to mean that the common-

Continued in the red box on page 47

Lessons from Deketric Love

For several weeks in late 2022, a teenage boy in Frisco was stalked by a serial burglar who had become obsessed with him.

By Jamin Daly
Assistant Criminal District Attorney in Collin County

Over the course of a month, this man looked into the boy's room from the shadows outside his window, broke into the home multiple times, set up a camera in the boy's bedroom, and took mementos from the house. Police were called multiple times but were never able to catch the guy in the act. Eventually he would be shot in the neighbor's yard, linked to his crimes by a plethora of forensics, and sentenced to life in prison.

This case was more than just a good result, though. It taught me valuable lessons about the significance of working the process and letting young prosecutors have important roles.

This was one of the first cases I tried after spending more than a year and a half in our Crimes Against Children unit. For anyone who has spent any amount of time prosecuting those cases, you know that evidence tends to be scarce: a child's testimony, maybe a journal entry or text message, and, if you're lucky, pictures of the offense location. This case was a sea change from the ones I had been trying. The evidence was an embarrassment of riches: DNA from multiple items on multiple dates; fingerprints from the child's home; fingerprints from a neighbor's home; 911 calls; home security system data; security camera footage, items the defendant left behind; items the defendant took; digital forensics from the home's wi-fi router, defendant's phone, and his cloud account; and on and on.

I am grateful we also had detectives working the case who were not content with having merely connected the defendant to the offense they were investigating. By continuing to pull at the threads they saw, they uncovered a much more complete picture of this defendant and how prolific and dangerous he really was. By the time they completed their investigation, they had discovered two of his previous victims, as well as another individual and five other families he had preyed upon. Combining all this with a new felony prosecutor who had the right attitude put us in a position to get the right result.

The investigation

In November 2022, a 15-year-old boy was spending the night alone at his home in Frisco while his father was out of state on business. He woke up when his dog started barking around midnight. As he lay in bed trying to go back to sleep, he started hearing noises—things being moved in the kitchen, doors opening and closing, and leaves crunching under someone's foot outside. Then he saw a shadow moving outside his window. He wanted to call the police, but he also didn't want to be the boy who cried wolf, so he decided to look out the window. After quietly moving to the window, he quickly popped the blinds open and saw a man's face looking right at him. He jumped back, grabbed his phone, and immediately called police. By the time they arrived, the man was nowhere to be found.

For a while, it seemed like this was a one-time incident. That changed a month later when the boy came home from sports practice to find a box of bandages sitting on his bed. He asked his dad about them, but his dad said that he had not been in the room. He went back into his room and saw that the home's wi-fi router, which was on his dresser, had been turned around. It was while he was looking at the router that he noticed a camera had been set up on the dresser. Someone had clearly taken steps to hide it. Bandages, presumably from the box on the bed, had been placed around the outside of the camera in an attempt to camouflage it, the red light that indicated when the camera was in use had been covered with electrical tape, and a sock from his drawer

had been wrapped around the camera's base. The boy also noticed a charging block and cable plugged into his power strip that had not been there before. Police came out and collected the items. They also found a used bandage with blood on it outside the boy's window, and they checked the router to see if any unknown devices had connected to it.

Now that they knew someone had been inside their house, the boy's father bought a home security system and installed it over the weekend. Just a few days later, while neither of them were home one afternoon, the security system picked up movement inside the house. Police were again called, and again they found no one there. This time, however, they finally got a lead as to who might be burglarizing the house: In addition to the officers finding fingerprints on a window screen and some plastic molding left behind in the boy's room, one of the newly installed cameras captured a video of someone leaving through the back door. As police were reviewing the video, a neighbor came by to say fingerprints had been taken from one of their windows after an attempted break-in, and they had been told that a match had been made to Deketric Love.

Officers pulled up Love's information, and his driver's license picture appeared to match the person in the security camera video. The Frisco Police Department immediately went to work tracking down Love, doing surveillance on his last known address, and visiting places he had recently worked, but to no avail.

Three days later, the boy was up late doing homework when he started hearing familiar sounds outside his window. He was able to peek out the bottom of his blinds and saw someone's foot as he moved around the corner. He went and alerted his dad, who got a gun, and the two of them went outside to confront whoever was out there. This confrontation happened in their neighbor's side yard, where the dad attempted to shoot the ground near Love to keep him from running away before police could arrive, but he ended up hitting Love in the leg. Love was able to jump a fence and get away, but he was stopped while trying to drive out of the neighborhood. He claimed he had been shot while delivering Uber Eats to someone. When police returned to the neighbor's yard, officers found a jar of petroleum jelly on the ground where Love had been shot, and several globs of the jelly formed a trail back to the boy's window.

sense dictionary definition is available in addition to the statutory definitions. *Talamantez v. State*, 790 S.W.2d 33, 35 (Tex. App.–San Antonio 1990, pet. ref'd).

[9] The Ranger who was lead on the original investigation did not appear for trial and did not respond to our attempts to communicate with or subpoena him.

[10] She also called Mr. Beatty, one of this article's co-authors, the night before to say she had contracted COVID-19. The judge ordered that she testify wearing a mask behind a shield.

[11] The process involved utilizing a van with seismographs on the wheels and an X-ray machine mounted on the floor which produced objective measurements as to how rough the roads were to drive on and just how much material was on the surface. On a scale of 100, with 60 being "very poor," most of the city streets averaged a score of 40.

With Love arrested and in custody, detectives tried to link him to these offenses. They had plenty to work with. Fingerprints on the charging block, plastic molding, and window screen all matched Love. Crime-scene investigators were also able to develop a thumbprint from the adhesive side of one of the bandages that had been stuck to the camera. Wetwop, which is print powder suspended in a solution thicker than water, was painted onto the adhesive surface, allowed to settle, then rinsed off. The process was repeated multiple times until sufficient ridge detail for a comparison was developed. The thumbprint came back to Love. DNA from the blood on the used bandage outside the boy's window, as well as DNA from the charging block and the camera itself, was compared to Love's, and they were a match. Location data from Love's cell phone put him at the house not only on the three occasions police knew about, but also on half a dozen others. Information from Love's phone also showed that he had used an application associated with the camera, and that his phone was one of the devices on the router's connection log.

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Based on all of this evidence, Love was charged with Burglary of a Habitation and Burglary of a Habitation with Attempt to Commit Invasive Visual Recording.

Building a punishment case

This case was already set for trial by the time I became chief of the court where it was pending. It was assigned to prosecutor Baileigh Hale, and she set up a roundtable meeting with everyone at Frisco PD who had worked on these cases shortly after I took over. Right before we left for that meeting, we were told that she was being moved to our Crimes Against Children division and a misdemeanor prosecutor was being promoted to take her place. In virtually the same breath, Andrew Eberlein was told that he was being promoted and then invited to come with us to Frisco PD. Andrew threw himself headlong into this case, and his tireless efforts over the next several months, along with the hard work of the detectives, resulted in a punishment case that included seven extraneous victims.

The first was one of the victims from Love's previous Online Solicitation of a Minor charge, a case from six years prior for which Love was still on deferred out of another county. Andrew got a copy of the offense report and used the information therein to track down the victim. He was initially hesitant to speak with us, but over the course of several meetings he ultimately agreed to come testify.

While going through the discovery on our cases, Andrew saw a single email to the lead detective that mentioned an incident number from another county. He requested a copy of that incident report and got in touch with this victim. He was a young man who had briefly lived in the same apartment complex as Love in 2021. During the few months they overlapped, he caught Love watching him through his bedroom window multiple times. Eventually Andrew brought him in from Houston to testify.

Then there was Love's former coworker who had spent several months in 2022 making police reports because he was convinced someone was regularly lurking outside his family's home. Police were not able to confirm those suspicions until Love's phone was extracted. A Frisco detective was combing through the extraction and found videos of someone getting out of the shower; they had been filmed through window blinds. The location data associated with those videos put them at this victim's house in Duncanville, so Frisco PD alerted Duncanville PD. When Duncanville officers told this victim about the videos, he said he had previously worked with Love and Love had seemed to be fixated on him.

Remember when the officers investigating our offenses had been told by a neighbor that fingerprints were lifted from their son's window on a previous occasion, and they had been told those came back to Love? Andrew had the neighbor and his son come in to give us the details of what happened at their house, which included Love trying but failing to break into the place on multiple occasions. The father came to testify at trial.

The remaining three victims were all neighbors in University Park. Realizing how prolific Love was, Frisco PD had sent out a BOLO ("be on the lookout') to agencies in surrounding jurisdictions. A detective with the University Park Police Department thought the pictures and information might be associated with three reports his agency had received on the same night in May 2021. The first was a woman who had fallen asleep on her couch, only to wake up when Love walked in her back door. She screamed at him, and he ran away. Second was a woman who decided to check her security cameras after she

heard about a lock being broken off a neighbor's gate. She saw Love sneaking around her backyard in the middle of the night, looking in windows and trying to open doors before leaving because he couldn't find a way inside. The third woman woke up when her son started screaming there was a man in his room. Her son, who lives on the third floor of the home, told her that he woke up to find a man standing at the foot of his bed. She thought it was a bad dream and checked their security cameras to prove to him that no one had come in or out. Instead, she saw Love going into and out of her home not once but twice. The Frisco detective who had performed the extraction dug through thousands of lines of location data to confirm that Love had been at all three houses that night. All three women came to testify.

These victims were not the end of our punishment case, either. Multiple images and videos of child pornography and age-difficult images were found on Love's cloud storage account, and a selection of these were presented to the judge. Andrew also reached out to the probation officer and sex offender treatment provider from Love's prior charges. The former testified about his probation violations, which had resulted in a then-pending petition to adjudicate. The latter told the judge all the reasons Love had been kicked out of treatment, not once but twice, and that Love was the reason she changed the way she ran her practice after more than 20 years in the business. Her experience with Love made her more critical of her clients and caused her to institute a zero tolerance policy for those who continued to be around children.

We even had punishment evidence being generated while we were in trial. On the first day of the punishment phase, we made it about halfway through our case before breaking for the day. That evening, Love was caught masturbating in a common area of the jail while his boyfriend showed him pornography during a video visit, which are all recorded. We quickly contacted the representative of the service provider for the video visits in our jail. He came to present the recording first thing in the morning.

Important lessons

Needless to say, this was the kind of punishment case prosecutors dream of. An overwhelming amount of evidence proved that Love was guilty, but we had even more for punishment. However, I haven't given this expansive recitation of our evidence as some sort of victory lap, but rather to highlight a couple of things I took away from this case. Both are fundamental, elementary even, but the way this case played out really brought home their importance to me.

The first is that it is exceedingly worthwhile to follow all the little threads in a case to see what is at the other end. This, at first, seems almost like a truism. We always talk about the need to "attack your cases," how they'll either get better or worse when you do, and how both of those are good things in the end. This was by no means a new concept to me going into this trial, but the number of threads there were to follow, the amount of time spent following each one, and the extent to which each one paid off, bordered on surreal. It was the type of experience that takes something you have been taught from mere knowledge to actual belief.

Each incident came with its own menagerie of evidence. Dozens of pictures and videos, hundreds of pages of reports, and multiple types of forensics that all overlapped with and connected to each other. Associated with all of these were upwards of 50 officers and detectives from various agencies and multiple individuals and families who had been affected. We spent hours going through evidence, learning and re-learning the forensics, and meeting with witnesses. While this was a long and tedious process, the case got better every time we came back to it. As the case was worked over and over, new connections were made, another helpful piece of information emerged, or another witness came out of the woodwork. Obviously, working the process doesn't always play out this way, with gain after gain and no previously hidden issues popping up, but the fact that it did work that way here underscored the value of putting in the time to work the process in all our cases. In a way, this case became a sort of exception that proves the rule.

The second lesson is the value of letting young prosecutors take on important roles. Having only been a felony prosecutor for a handful of years, I still consider myself a young prosecutor, but this was my No. 2's first felony lead. Before this trial, Andrew had never given an opening statement, directed an officer, directed a victim, or given a closing argument in a felony case. He was also presenting DNA, presenting fingerprints, and

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putting on a punishment case for the first time. While I took on all the digital forensics, he had to learn them well enough to argue them effectively to a jury. All these things come with their own learning curves to one degree or another, and doing all of them in the same case had to have seemed like a monumental task, but Andrew was eager to do as much as I would let him.

I don't know that I ever mentioned it to him, but I was very hesitant to let him take on so much at once. Every time we sat down to talk about who would be doing what, I got a little more nervous about handing off something else to him. On the one hand, I didn't want to overwhelm him. On the other, I wanted him to gain as much experience from this case as he could. I made sure that I was there alongside him to prep each witness, sift through each piece of evidence, and learn about each forensic discipline, and there was plenty of time spent on my own making sure all of it was handled correctly, but it would ultimately be a brand-new felony prosecutor putting it all on in front of the jury.

In the end, it resulted in a guilty verdict and a life sentence. It had paid off. Part of that had to do with the wealth of evidence we had to work with in both phases of trial, to be sure, but it was also because of the time Andrew spent learning each part of the case and how they fit together. This again shows the value of working the process, but I include it here because of what it means for him going forward. The next time he handles a victim (or 10) in one of his trials, he's done that before. The next time he works with DNA, fingerprints, or digital forensics, he's done that before. The next time he has a case with a lot of moving parts, where more and more keeps getting added to the mix to be absorbed and collated, he's done that before. That's not to say either of us have arrived, but being trusted with so much, putting in the required work, and seeing it play out the way it did will allow him to carry a degree of confidence into future cases. Assuming that the experience can be internalized and applied going forward, it has started him on the road to expertise. All of this within the span of his very first lead. In some ways it very much felt like a gamble to let him take on so much, but if this is the result, then we have both won big.

Conclusion

More than being a win for us as prosecutors, it was a win for all officers at the agencies who spent so much time putting their cases together against this defendant. It was a win for all of the families and children whom Love victimized. At the end of the trial, everyone involved could look back at what had happened, at the roles that they had played, and know that justice had been done. ❇

Battling the 'bad businessman' defense in contractor thefts

Anyone who has spent time in prosecution has dealt with cases involving a breached contract, a slippery contractor, and an aggrieved victim. Most such cases quickly find the "decline" pile due to the "bad businessman" defense.

By Eddie Wilkinson (left) & Alex Hunn (right)
Assistant District Attorneys in Williamson County

The typical sleazy contractor defendant is well trained in excuses for not getting his work done: Material costs were higher than anticipated; a subcontractor failed to deliver; he fell ill or was injured; he had a relapse into drug use or alcoholism, etc. We suspect readers can fill in several more excuses they have encountered.

These excuses work because theft is a specific intent crime. At trial, prosecutors are called upon to prove not only that a contractor failed to do what he promised but that he either secured the promise with lies or he promised performance he *knew* he would not deliver on. Enter the "bad businessman" defense: Every lie made at the outset was a result of the defendant's poor business sense, and every failure to deliver was a result of his hard luck and poor planning. These excuses are implausible, but even an implausible excuse may amount to reasonable doubt, so we prosecutors turn down the criminal case and advise the victims of their civil remedies, well aware that typical defendants in these cases are judgment-proof, having mastered the art of being broke at all times no matter how much they steal and how much they manage to spend on shoes, watches, and pickup trucks.

State v. Oviedo

Every once in a while, however, a good contractor theft case will appear. We tried one such case this February, a third-degree felony theft from an elderly individual, *State of Texas v. Jonathan Ruiz Oviedo*. It resulted in a conviction and an eight-year prison sentence.

The basic facts of the case were as follows: 80-year-old Rosemarie Merlino was not renewed in her apartment contract due to a change in income, and she needed to move all her belongings to storage while she found another apartment. Jonathan Oviedo happened to be in the area working as a mover for a major company, and he offered to move Rosemarie's property for $400, plus $100 a month in storage fees. When the time came to move the property into her new apartment, though, Oviedo was suddenly unable to. He came up with numerous excuses: His car broke down, the timing was bad, and he needed more money for a U-haul. The bottom line was that he wouldn't return her property nor tell her where it was unless she paid him more money.

It turned out that her property had been taken to Oviedo's parents' house, and by the time anything was recovered, 90 percent of it was already gone—Oviedo had trashed it after a tragic water leak had damaged it. Jewelry and similar valuables that would have survived such a leak were also missing, and pawn receipts suggested these items had been sold the day after the initial move.

This article is divided into a section on evaluating this case and others like it (written by Eddie Wilkinson from the intake division) and another section on presenting these cases to a jury on those rare occasions that they make it to trial (written by Alex Hunn).

Picking winners

Intake on consumer complaints can be tough business. Detectives assigned to property crimes often have more work than they can handle and want an agreement to prosecute before they will commit to doing the investigation required to effectively try one of these cases. Such a request is akin to asking for the final score before buying a ticket to the game. Usually when the cases show up, patrol officers have taken a statement from the complainant and little more has been investigated. I try to sift through the deluge of partially investigated cases by looking at some key indicators of predatory behavior and then request additional investigation on the ones that stand out.

First, I look for multiple complaints involving the same person or business. This can be done through a simple Google search, checking the Better Business Bureau, or querying law enforcement databases. I once Googled a contractor's name and found a website devoted to warning others of his thievery. The better cases involve multiple complaints over a sustained time period, rather than a sudden failure with lots of complainants at the same time. A sudden failure on its own may be insufficient because some businesses operate with difficult finances for an extended period using new customers' money to pay old debts, all the while hoping to keep their promises, yet they still end up insolvent despite their best intentions—these are the actual bad businessmen our defendants are pretending to be.

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The next step is to follow the money. In cases where services or materials were paid for but not delivered, find out how the customer made payment and then determine what the suspect did with the money. If a customer paid by check, request a grand jury subpoena for the bank records where the check was deposited. If the account was overdrawn, the funds immediately were used for something personal, or the check was taken to a check cashing business, these are some good indicators of criminal intent. You may even find corroborating victims by looking at other checks deposited in the same account. Or you might find that a suspect's other customers had no complaints, a good reason to close the case and move on to the next.

Finally, never accept a case until law enforcement has either interviewed the suspect or, failing that, documented a thorough effort to speak with him. There is always a small possibility of a confession, but the more likely result will be to lock the suspect into one excuse; in the worst case that he refuses to talk or make himself scarce, a record of the attempt will show the jury that he was given an opportunity to correct the record before being formally accused. All these possibilities will be foreclosed as soon as the case is charged and the defendant lawyers up.

Getting to the "yes" at intake

None of the usual indicators were present in this case, which is one reason I initially declined prosecution against Jonathan Oviedo. I had concerns with the initial agreement between Oviedo and Rosemarie, as it seemed vague, and I anticipated that the defendant could fairly argue that more money was owed under the agreed-upon terms. Further, I could not easily demonstrate what deception occurred during the appropriation without having a detailed agreement to reference. Most of the complaint came from Rosemarie's adult daughter, Pamela, who was not present when the deal was made.

However, a few weeks later she called me to discuss the case. These calls from disappointed victims are uncomfortable, but as I listened to her account of the events, several details piqued my interest.

The first thing that stood out was how incredibly heartbreaking the situation was for the victim. Like many of us, I have a soft spot for grandmothers, and 80-year-old Rosemarie had literally lost everything she owned but for a single overnight bag. Her daughter described to me how she sat alone in an apartment with nothing while the suspect had possession of the entire contents of her home and would not return them. She thought Rosemarie was so sad she might just give up and die sitting in her empty apartment. While the crushing impact of a victim's loss may not be relevant to legal elements of the crime, its emotional impact on the jury is still a major factor in making the case winnable at trial.

Pamela then described her repeated attempts to retrieve the property from Oviedo and the repeated excuses she received in return. These communications made it clear that he was not conducting business but simply trying to extort the maximum amount of payment. He had texted her pictures of Rosemarie's belongings to prove

he still had them, and he was demanding more money before he would return the items. It was clear that the boxes were being stored in a residence and that the boxes had been opened and the contents rummaged through.

With this new information I had some evidence of deceit based on the defendant lying that he planned to store Rosemarie's property in a legitimate storage facility. It was also apparent that he was not running the sort of legitimate moving business he implied when he made the agreement. The rummaged-through boxes provided evidence of intent to deprive. Penal Code §31.01(2)(B) includes deprivation when the defendant offers "to restore property only upon payment of reward or other compensation," a definition tailor-made for a case like this one in which the suspect was holding property for ransom.

I requested follow-up from the detective and thought about the case for a few days. I couldn't stop thinking about Rosemarie sitting in her empty apartment. Eventually, my overly analytical mind gave up and decided we needed to try our best to prosecute the case.

Trying the case

It took two years to get the case to trial, and during this time Rosemarie held onto the hope that her treasured items would be returned. The missing items included irreplaceable family photos, mementos from a deceased child, and innumerable beautiful decorations she had accumulated through her life, from a set of Hummel figurines to a taxidermied owl she brought with her to America when she first left Germany in the 1960s. She had replaced few of her items because she continued to hope they would be returned, and meanwhile she lived in a sad, empty apartment. By taking all her property, Oviedo stole an enormous portion of the joyful retirement she had worked so hard to earn.

Despite months of trying, the defendant rejected my final two-year prison offer, and we went to trial.

While I often disagree with the adage that trials are won in voir dire, in this type of case voir dire is a critical opportunity to make the jury start caring about a "petty" theft case. A portion of voir dire should therefore be dedicated to getting the panel thinking about why this crime matters, and in a theft case that means thinking about the victim. The victim in my case, Rosemarie, grew up in a small town in rural Germany during the 1940s. She was a trusting woman living a simple life in her retirement. She was clearly targeted because of her vulnerability. To get the panel empathizing with my victim, I asked the following two questions:

1) Why did the legislature make it a more serious offense to steal from people 65 or older? and

2) Has anyone here had an elderly relative fall victim to a scam?

Of course, I struck a few people who fought me on the concept of elderly people being more vulnerable or 65 being the proper cutoff, but the major dividend of this strategy was getting half the panel to raise their hands and start telling me the sad stories of victimization that happened to someone they loved. We live in an era of scams, and these scammers ruthlessly target more trusting, technologically inept elders. In my panel, I not only had many potential jurors relaying stories of how their beloved parent or grandparent was taken advantage of, sometimes to the tune of more than $10,000, but one juror even volunteered how they themselves had been victimized. And those who didn't raise a hand would at least now be thinking about their own aging loved ones.

A case's specific facts will vary, of course. Victims of these scams may not be elderly, but they are likely vulnerable in some way that allowed them to be victimized. Maybe they speak English as a second language, maybe the defendant occupied a position of trust such as a relative or friend, or perhaps the victim was in dire financial straits. Maybe they were simply unfamiliar with a topic and relying on the defendant's purported expertise. (Most of us know someone who has been grievously upsold by an unscrupulous mechanic!)

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Countering the defense

Once you establish why the case and victim are important, the next critical issue to address is the focus of this article—the bad businessman defense. This defense negates either of two elements: consent or intent. The theft statute articulates several facts which make consent ineffective. While a few are listed, the most com-

mon way to show this is deception, namely by:

(A) creating or confirming by words or conduct a false impression of law or fact that is likely to affect the judgment of another in the transaction, and that the actor does not believe to be true;

(B) failing to correct a false impression of law or fact that is likely to affect the judgment of another in the transaction, that the actor previously created or confirmed by words or conduct, and that the actor does not now believe to be true;

(C) preventing another from acquiring information likely to affect his judgment in the transaction;

(D) selling or otherwise transferring or encumbering property without disclosing a lien, security interest, adverse claim, or other legal impediment to the enjoyment of the property, whether the lien, security interest, claim, or impediment is or is not valid, or is or is not a matter of official record; or

(E) promising performance that is likely to affect the judgment of another in the transaction and that the actor does not intend to perform or knows will not be performed, except that failure to perform the promise in issue without other evidence of intent or knowledge is not sufficient proof that the actor did not intend to perform or knew the promise would not be performed.[1]

I discussed with the panel hypotheticals to articulate each of these means, which were present in my case. I used the example of a computer repairman who was unable to fix a paying client's computer, and then added facts one by one. What if the "repairman" lied about his credentials? What if, after being unable to repair the computer, he demanded additional payment before returning it? What if he refused to identify the location where the computer was being stored? These hypotheticals placed my potential jurors on a continuum identifying how much bad faith I would need to prove for them to believe a crime was committed.

In addition to hypotheticals, I identified several potential jurors who worked in various contracting roles and had them explain the importance of being honest and transparent in business dealings. On my panel, I had an auto mechanic who was happy to explain that when a client declines work after being presented with an estimate, that client is entitled to have her vehicle returned. Every professional will have a standard order of business to reduce ambiguity and to ensure fair dealing with customers—let those people tell the panel all about the *right* way to do business.

Proving deception will do the heavy lifting in proving intent. This type of thief will never admit to having ill intent. Everything that goes wrong will be hung on sob stories of his personal misfortunes, deflections criticizing some aspect of the victim's behavior, and at worst his own honest mistakes.

Presenting the evidence

Once you've provided the jury with what to look for, presenting the case is as simple as delivering on that expectation. They expect to hear from the victim. They expect the details of the original agreement and what work was actually performed.

Proving deception will do the heavy lifting in proving intent. This type of thief will never admit to having ill intent. Everything that goes wrong will be hung on sob stories of his personal misfortunes, deflections criticizing some aspect of the victim's behavior, and at worst his own honest mistakes. Each individual deception or broken promise the prosecutor proves will chip away at the possibility of good faith on the part of the defendant. Make him claim each and every excuse until it defies credibility.

You will want to put on evidence ahead of the excuses you anticipate to take advantage of primacy bias. If this case made it past intake, it's because there was good evidence of intent. For my case it was the attempts by law enforcement to get the defendant to return the property. The detective had told Oviedo point blank that he could not keep Rosemarie's belongings regardless of whether he thought she owed him money or any other contractual reason, and the officer said she would charge the defendant with theft if he failed to do so. In spite of this, the defendant not only refused to return the property but also refused to say where he was holding it.

Aside from addressing the primary issues of intent and deception, be diligent in proving the value element. If the jury is sympathetic to the victim, they will most likely accept the valuation the State proposes, but we still need to get that evidence into the record to assuage the concerns of any skeptical jurors and to protect the verdict from a sufficiency objection on appeal. Value can be surprisingly persnickety in a theft case like this one in which the defendant has stolen many items of different values. The elderly victim had almost everything she owned stolen, and common sense dictated that the replacement value was well over the $2,500 I needed to prove. Most of the items had not yet been replaced, however, and my evidence was speculative. ("Have you

looked at how much a replacement might cost?") Worse still, Rosemarie was hard of hearing and unable to answer complicated questions about valuation. I would have been wise to spend more time with my star witness, the victim's adult daughter, going through Home Depot or Amazon's online catalog to nail down replacement costs before trial. Good thing for me that the defendant had stolen a hearing aid that had cost $3,000 to purchase—this item alone covered for our value case.

Ultimately, these three issues are what any "bad businessman" defense will boil down to: that there was no deception, there was no intent, and as a last resort, the items stolen are being overvalued. If you can check off these three issues, you'll be well on your way to victory.

Conclusion

In a felony office, offenses can be more damaging to the individual victims, few affect as broad a swath of our communities as thefts do. Pick a single jury on such a case, and the panel will quickly remind us just how much they care about these crimes. Bad actors use plausible deniability to make a profit at the expense of the most vulnerable members of the community and fall back on the "bad businessman" defense when confronted on their grifts. By carefully identifying the winning cases, addressing the issue head-on at voir dire, and calling out every excuse at trial, we can expose them for the thieves they are. ❇

Endnote

[1] Tex. Penal Code §31.01(1).

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