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

A question of sanity

An Austin man brutally stabbed and killed his own father and claimed insanity at trial. How prosecutors pursued justice when mental-health experts disagreed on the defendant's culpability.

On the evening of September 18, 2013, Alexander Ervin, a 20-year-old man who lived in his own home on the back of his parents' property, waited patiently for his mother, Leslie, to leave the house. Alex's brother, Max, age 17, watched Alex pace back and forth with a folding knife in his hand as he opened and closed it repeatedly. At the time, Max didn't think anything of it, as his brother's behavior was always a little different because of his autism.

By Marc Chavez
Assistant District Attorney in Travis County

Alex locked the family dogs in the pantry, then went out on the front porch to watch his mother drive away. Within minutes, Max, from the other end of the house, heard blood-curdling screams. His first thought was that his brother had done something to the dogs. He ran to the room where the screaming was coming from and found Alex with a pipe wrench in one hand and a knife in the other. He was standing over their father, Ray Scott Ervin, who was seated in a desk chair. Ray had been stabbed and was bleeding profusely. Max tried to intervene and stop his brother from attacking his father, and with Max's help his dad was able to get the pipe wrench away from Alex.

Alex told his brother in a robotic tone that he was a CIA agent and that he had done this many times before. He also told Max that "that man," referring to Ray, was not their father but rather an imposter. Ray managed to fight off multiple attacks from Alex and defend himself by hitting Alex in the head with a glass vase over and over until it shattered, ultimately subduing Alex so that Max and Ray could get out of the room. Max stood at the door holding it closed to keep Alex inside while his father ran to call 911.

Ray, losing significant amounts of blood, was unable to complete the phone call; his bloody fingerprints were left on the phone's "9" and "1" buttons. Max then called 911 from his cell phone as Ray struggled to breathe as he lay on the kitchen floor. He was hurried to the hospital but was pronounced dead upon arrival. Ray Scott Ervin died from multiple sharp force injuries and the resulting blood loss. He had been struck over the head at least twice with the pipe wrench and was stabbed six times with the knife.

When officers arrived on scene, they placed Alex in custody. His immediate statement to law enforcement, without being prompted by any question, was, "I want

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TDCAA's online *Brady* training

As you all know, all long-time prosecutors and most new prosecutors needed to take a mandatory course on the prosecutor's duty to disclose exculpatory and mitigating evidence and information by December 31, 2014. TDCAA offered a ton of *Brady* training at many of our 2014 seminars, as well as some regional sessions, but we also had the support of the Foundation and the Criminal Justice Section of the State Bar in producing an hour of online training. That video is at http://tdcaa.litmos.com/online-courses and is available for free to anyone who'd like to watch it for both *Brady* credit and MCLE ethics credit. To date, over 1,000 people have completed the course, and that is quite a benefit to prosecutors.

By Rob Kepple
TDCAA Executive Director in Austin

Additional training

But wait, there's more! We had a lot of great feedback on the online *Brady* course, and a lot of it centered on the short roundtable discussions among several experienced prosecutors. Those roundtables were so good that, thanks to additional support from the Foundation, the complete roundtable discussions are now offered as an additional free hour of MCLE ethics credit for prosecutors; it's called "A Prosecutor's Duty to the Truth: A Roundtable Discussion." Just go to www.TDCAA.com for the link. Take a look and let us know what you think!

Victim services hits the road

Thanks to the Foundation and grant funding from the Office of the Governor, TDCAA's Victim Services Director, **Jalayne Robinson**, has been on the road. Her mission is to train and support our victim assistance coordinators, as well as investigators and prosecutors, in our duties to victims of crime. And Jalayne has been busy. She has done a series of in-office trainings in Harris Hays, Hopkins, Limestone, Mason, Milam, Newton, Panola, Upshur, Van Zandt, and Washington Counties. This spring, Jalayne will be making a swing through the Panhandle to visit with the folks serving Dallam, Hartley, Moore, Potter, and Sherman Counties.

Jalayne's unswerving help for victim assistance coordinators could not have happened without the Foundation's support, so thanks for your contributions to the Foundation.

The Foundation's achievements to date

The Texas District and County Attorneys Foundation is in its ninth year. Thanks to the Foundation, TDCAA has been able to bring more services and training to Texas prosecutors, as we say, "So the State is always ready." These services include:

- A partnership with the Anheuser-Busch Companies to produce three statewide and national DWI Summits focusing on investigating and prosecuting impaired driving;
- TDCAA's Advanced Trial Advocacy and Advanced Appellate Advocacy Schools held each summer at the Baylor School of Law;
- An annual Train the Trainer course that prepares prosecutors and others to effectively present and teach information;
- Faculty support for TDCAA's Prosecutor Trial Skills Courses;
- The first position of its kind, TDCAA's Victim Services Director;
- TDCAA's Senior Appellate Attorney position;
- A free *Brady* webinar funded by the Criminal Justice Section of the State Bar;
- Creation of the Prosecutor Management Training Institute (launching this year);
- TDCAA's *Family Violence Resource Notebook*;
- TDCAA's Penal Code Reference sheets;
- Three Champions for Justice events honoring the careers of distinguished prosecutors; and
- The creation of an endowment funded by contributions of the members of the Texas Prosecutors Society.

As you can see from this list, we at the Foundation have been busy! And we could not do it without your support. Thank you so much. ❇

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So long, John R. Justice—we were just gettin' to know ya

By Rob Kepple
TDCAA Executive Director in Austin

Not too long ago some of you were part of what we had hoped would be a growing program for prosecutors: the John R. Justice Student Loan Forgiveness program. Created by Congress in 2008, it was modestly funded at the outset with $10 million, but we had high hopes to increase the appropriation. Texas's Higher Education Coordinating Board created an application process, and some of you began to receive modest loan relief.

Then came the economic downturn, which decreased the appropriations for the program until it was down to just $2 million a year—for all of the prosecutors and public defenders in the country. And now comes the coup de gras: The President's FY 2016 budget eliminates any funding for the JRJ program. The National District Attorneys Association will be working with Congress to fund it in the amount of $8 million, which would at least keep the program alive. The NDAA proposal would call for a minimum of $100,000 for each state, to be split evenly between prosecutors and public defenders. We all recognize that Texas alone could use the $8 million to make the loan forgiveness meaningful to our younger prosecutors, but for now we will support NDAA's effort to keep the thing alive. (Watch this journal for future articles on student loan forgiveness and loan repayment programs—important topics for prosecutors both new and seasoned.)

The legacy of Place 9 of the Court of Criminal Appeals

As a matter of personal privilege I want to take the time to wish a happy retirement to **Cathy Cochran**, who retired from Place 9 on the Court of Criminal Appeals on December 31. Cathy was one of my first court chiefs in County Court 13 in Houston, and I don't think I have ever met anyone smarter or nicer than Cathy. And you all know how well she can write—so that people can understand, appreciate, and even be entertained by her opinions. After all, who but Cathy can gracefully and logically observe that a butt crack can be a pocketbook (but perhaps shouldn't be)?[1]

So it falls to **Judge David Newell**, former Assistant District Attorney in Harris County who now fills Place 9, to pick up where Cathy left off. Mind you I am not asking for a particular outcome in any case—I'm just hoping for a fun read. I am worried though: At his investiture Judge Newell made it a point to honor Cathy as the Oracle of Delphi, while branding himself as a Magic 8 Ball. Actually, come to think of it, that's about my level, so this could be fun!

Cut out domestic violence

You have read a lot recently in *The Texas Prosecutor* about domestic violence initiatives and work that prosecutors are doing to protect victims. One of the most innovative programs that launched recently helps victims of domestic violence find the help that they need.

Cut It Out, a program started by **Jarvis Parsons**, the Brazos County DA, trains hair salon professionals on how to recognize warning signs of abuse and safely refer clients, colleagues, friends, and family to local resources. Many victims of domestic violence don't report abuse, but at some point may confide in someone they trust—and that person just might be their hairdresser. Brazos County got the idea from Williamson County Attorney **Dee Hobbs,** who wrote about his office's program to educate salon professionals on the signs of domestic violence in the May–June 2012 issue of this journal (available on our website, www.tdcaa.com).

Jarvis reports that the salon professionals in his community are excited and serious about the program, mostly because they have seen signs of abuse with some of their clients and have not known what to do about it. They are anxious to help in Brazos County and would probably be anxious to help in your community too.

Serial podcast

By now most of you have heard

about *Serial*, a podcast that has been all the rage. This 12-part report by journalist **Sarah Koenig** explores the investigation, trial, and conviction of **Adnan Syed** for the murder of his ex-girlfriend in 1999. For prosecutors it is well worth listening to. You will recognize it as a tough case with some sketchy characters playing pivotal roles, and it's a great example of how a case can be examined and re-examined in microscopic detail well after the fact.

And it is a good lesson in how different facts can seem to grow or diminish in importance over time. The only downside is that you won't hear from the investigators or prosecutors on the case because it is still in litigation. There will be a time, I hope, when we do hear from them.

An interesting and unusual development in the case: Recently a Maryland court granted a new appeal on the ground of ineffective assistance of counsel. (See the newspaper story here: www.baltimoresun.com/news/bal-maryland-court-of-special-appeals-grants-adnan-syeds-application-to-reappeal-conviction-20150207-story.html). You may not be surprised to learn that the defense attorney in the case has long since passed away, so she isn't going to be able to defend herself. And that might mean there will be some additional *Serial* segments in the future.

Pruitt's Memorial Scholarship Fund

In the May–June 2014 edition of *The Texas Prosecutor* I wrote about the passing of one of our beloved former prosecutors, **George Dwayne Pruitt** of Brownfield. Dwayne's children, Elizabeth, Michael, and Jason, have put a lot of thought into how best honor their parents' memory, and it centers on education. Dwayne was a great leader of this outfit, and he was dedicated to better training for prosecutors through TDCAA. Carol was a career educator, and I know for a fact how dedicated she was to education (having watched her on more than one occasion take my young boys on her lap at TDCAA meetings and read with them).

So it is with great pleasure that I announce the Dwayne and Carol Pruitt Memorial Scholarship at the University of Texas School of Law. This is a great tribute to two educators, and I hope you will consider a contribution. The address is: The University of Texas School of Law, attn: Linda Lewis, 727 East Dean Keeton St., Austin, TX 78705. ❇

Endnote

1 *McGee v. State*, 105 S.W.3d 609 (Tex. Crim. App. 2003 (Cochran J. concurring).

NEWS WORTHY

Correction

In the last issue of this journal, an article on U-visas by Michelle Permenter, director of the Victim Witness Division in the Harris County District Attorney's Office, incorrectly stated that Michelle is the coordinator who reviews all U-visa requests. That is incorrect. Debra Schield is actually the person who reviews all U-visa requests, and Michelle does the final certification. We regret the error. ❇

TDCAF NEWS

*Recent gifts to the Foundation**

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It's time to change how we deal with victims of trauma

In 2002, my wife, Meg, was returning to our house in Washington D.C. from book club with several friends, and it was close to midnight when she got off at the nearest bus stop and started walking to our house.

By Staley Heatly
District Attorney in Wilbarger, Hardeman, and Foard Counties

What happened next was a blur. A man was walking toward her, and she looked down at the sidewalk. The man passed her, and then all of a sudden she was on the ground struggling as he ripped her purse from her. She made it to our house with the help of a neighbor who saw her zig-zagging down the street in a state of utter confusion. She had suffered a horrific concussion.

When police eventually showed up at the emergency room with us, they asked the usual who, what, when, where, and how questions. Meg was incredibly confused. She told the police that she must have tripped and fell, hitting her head on the sidewalk. Her answers made little sense. She couldn't seem to piece together what had happened to her. The officers spent about five minutes with her and then left. We never heard from them again. It was only the next day that Meg remembered that the man carried what appeared to be a gun in his hand as he passed her. Then she remembered the feeling of the butt of that gun crashing against the back of her skull. She hadn't tripped after all. But why didn't she remember this when the police interviewed her the night before?

Trauma affects memory

Hang on, we're about to get scientific. Studies on the neurobiology of trauma have revealed why it is so difficult for victims of trauma to recall the traumatic event in a logical, chronological fashion. The human brain experiences events and records memories in different ways and in different locations. When we are experiencing normal, non-traumatic events, our actions are controlled by the cerebral cortex. The cerebral cortex is our rational brain, and it chooses the focus of our attention, weighs alternatives, reflects on choices, and regulates our emotions and thoughts. The hippocampus processes this information into memories. It takes all of the sensory information that a person is experiencing, organizes it, and stores it. When someone recalls a memory of an event where no trauma was involved, her memory should be orderly and the narrative chronological.

When a person experiences trauma, a number of hormones are released into her body that disrupt the orderly storage of information. These include adrenaline (for the flight response), cortisol (to increase energy), opiates (to dull pain), and oxytocin (to increase positive feelings). During a traumatic event, the rational brain frequently shuts down, leaving the amygdala, or primitive brain, to experience and record the traumatic event. This part of the brain focuses on the danger or threat, operates the primitive functions, and triggers automatic responses like fight, flight, or freeze. The amygdala does not weigh courses of action. Memories recorded by the amygdala are often fragmented and illogical.

In other words, traumatic memories are encoded differently in the brain. The information regarding the sequence of events, context, and details are poorly encoded and remembered. The primitive brain focuses on the details most important to survival such as the threat of harm ("weapon focus"), emotion, and sensation. These memories are often called flashbulb memories because they are brief and intense but scattered and incomplete.

Officer-involved shootings

Law enforcement agencies have been aware of the effects of trauma on officers involved in shootings. After such a traumatic event there may be "critical incident amnesia." This makes it hard for an officer involved in a shooting to give a detailed account of the incident immediately after it occurred. In fact, studies on

officer-involved shootings have shown that an officer's memory will increase by up to 50 percent after one sleep cycle and by up to 90 percent after a second sleep cycle.

Because of the effect of trauma on the brain after an officer-involved shooting, many police agencies have policies that discourage the immediate interview of an officer involved in a shooting. In fact, the influential International Association of Chiefs of Police in its Officer-Involved Shootings Investigative Protocols suggests that "whenever feasible, officers should have some recovery time before providing a full formal statement." The protocol goes on to suggest that "at least one night's sleep is beneficial prior to being interviewed."

While these policies acknowledge the effects of trauma on these officers, oftentimes the criminal justice system fails to recognize these same effects on victims of violent crime. We expect victims to be able to provide the who, what, when, and where right after a crime has been reported. This approach can have devastating impacts on our ability to successfully gather evidence and often results in cases being closed before an arrest is made.

The neurobiology of sexual assault

Sexual assault is traumatic. Not surprisingly, victims of sexual assault are frequently unable to provide a coherent, logical, chronological recounting of the events that they have experienced. This fact has caused an enormous number of sexual assault cases to be shelved before a thorough investigation is undertaken.

Rebecca Campbell, a professor of psychology at Michigan State University, has spent several years researching the neurobiology of sexual assault. As part of her study, she looked at data on sexual assault from six metropolitan jurisdictions over a 12-year period. In her study, released in 2012, Dr. Campbell found that 86 percent of reported sexual assaults were never referred by police to the prosecution. Additionally, almost 70 percent of the time, victims felt that police encouraged them not to seek charges. Victims were frequently asked about their dress or what behavior they might have exhibited to provoke the assault. Most victims reported that they left this initial interaction with the police feeling blamed, depressed, and anxious.

As part of her research, Dr. Campbell interviewed victims and the officers who had investigated some of the cases. She found that investigators were not malicious in their advice to victims, but rather they had a poor understanding of the behaviors of trauma victims. Simply put, they didn't believe the victims because the victims could not give chronological narratives of their experience and because the victims often exhibited "counter-intuitive" behaviors during the course of the rape.

One of those behaviors is called tonic immobility. During a sexual assault, the victim will suffer an incredible release of hormones (adrenaline, cortisol, opiates, oxytocin, and corticosteroids) into the blood. These hormones not only impair the victim's ability to record and remember the event but they also affect her ability to respond. We often hear that trauma can induce a "fight or flight" response in a victim. While this is true, it is only partially so. Trauma can induce three responses: fight, flight, or freeze. This freezing, also called tonic immobility, is common in all forms of trauma but it is particularly common in rape. Tonic immobility, or "rape-induced paralysis," occurs up to 50 percent of the time in sexual assaults. Tonic immobility, like fight or flight, is a legitimate life-preserving strategy selected by the primitive brain. However, it is frequently misunderstood by law enforcement.

In one particular case study, Dr. Campbell talked to a woman who was forcibly raped at a party. After the first rapist finished, he invited a friend to have sex with the victim as well. During the course of the rape, the victim shut down and became completely unable to move. After a friend of the victim became aware of what was happening, she went in to find the victim lying completely still in the bed. She shook her friend and yelled at her, but the victim would not respond. She had to physically drag her friend out of the bed to break the state of tonic immobility. The victim went to the hospital where a rape kit was completed. She also filed a police report. The police department refused to pick up the rape kit and quickly dismissed the case. The officer who investigated the case told Dr. Campbell that the victim "just laid there, so she must have wanted it. No one wants to have a train pulled on them, so if she just laid there and took it she must have wanted it." The officer told Dr. Campbell that he had no idea that tonic immobility could happen.

In Dr. Campbell's study, investigators frequently cited the victim's inability to provide a coherent, chronological narrative of the traumatic events during the initial interview as a reason to disbelieve the victim. But as we know, the trauma of a sexual assault makes it difficult for victims to immediately recount the

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event to police. Their memories are fragmented and disorganized just as the memories of officers involved in shootings are fragmented. Trauma is trauma. We need to respond to victims of sexual assault and other traumatic events in a way that treats them with respect and that will help us obtain the best, most accurate information.

Forensic Experiential Trauma Interview (FETI)

Law enforcement officers are trained to get the details of a crime from a victim or witness based on the assumption that the victim or witness will be able to recount the event with ease in a chronological fashion. This approach of asking who, what, when, where, and how ignores the role that the primitive brain plays in recording the details of a traumatic event. The primitive brain does a great job of recording experiential and sensory information, but it poorly records the kind of details that law enforcement professionals are trained to obtain.

Russell Strand of the United States Army Military Police School advocates the use of the Forensic Experiential Trauma Interview (FETI) for victims of trauma. FETI uses some principles from child forensic interviews, including the use of open-ended, non-leading questions; a soft interview room; and empathy. The concept behind this approach is to give the victim the opportunity to describe the experience of the traumatic event both physically and emotionally because that is how the event is recorded in the primitive brain. Rather than ask the victim to "start at the beginning," for example, FETI allows the victim to recount what she remembers about the experience and what sensations and emotions were most powerful. Throughout the process the interviewer should show empathy with the trauma victim and give her the time she needs to put the scattered memories back together. This technique is a far cry from the traditional interrogation technique that many victims face.[1]

Our criminal justice system often treats victims as though they were third-party witnesses to their own crime. A better approach would be to consider the impact of the trauma on the victim by conducting an open, empathetic interview using FETI principles. In Dr. Campbell's research she specifically recalled the experience of a 25-year-old woman who was raped by her brother's friend at a Fourth of July party. According to this victim, her initial interview with the police was a terrible experience. Referring to the detective, she said, "He wouldn't let up, pounding me with question after question after question. Trying to trick me. Trying to get me to mess up." The detective would not give her a minute to think. After several minutes of this, the detective stormed off, and an older, more experienced detective came in to speak with her. This detective started the interview by asking the victim if she wanted a cup of coffee. He took the time to make the coffee just like she wanted it. He showed empathy for the victim and he was patient in the interview. She described this second interview as "like we were putting together a puzzle and drinking coffee." At a subsequent interview with Dr. Campbell, the detective said that he has found in his experience that sexual assault victims do better when they have a few minutes to breathe. When this detective slowed down his questions, he gave the victim the chance to reconstruct the scattered, traumatic memories that were stored in her primitive brain.

When asked if he was worried that the woman could make up a story during such slow questioning, the detective said, "If they're lying, we'll catch it eventually. I think it's just hard for victims to talk about and we just need to have a little patience."

Considering the effects of trauma on memory, investigators should give strong consideration to conducting follow-up interviews with victims of trauma within 48 hours of the initial interview. Giving the victim a sleep cycle or two will allow the memories to consolidate in her mind and will improve her ability to recall the event by up to 90 percent.

Conclusion

As prosecutors, we aren't involved in the front-line, initial contact with victims. However, as ministers of justice we must work to ensure that our criminal justice system uses the best methods possible to obtain evidence and information. By treating victims of trauma with empathy, patience, and understanding, the professionals in our criminal justice system will not only improve the experience of victims but will also obtain reliable and accurate information. ❇

Endnote

1 A detailed analysis of FETI is outside the scope of this article. However Strand's article is available online and it is definitely worth a read. See *The Forensic Experiential Trauma Interview (FETI)*, by Russell W. Strand, United States Military Police at www.tdcaa.com as a PDF; just look for this column in this issue of the Journal Archive.

A VAC's role in providing safety for crime victims in court

As victim assistance coordinators (VACs), have you ever been concerned for the safety and welfare of a crime victim during trial? During my 22 years as a VAC for a criminal district attorney's office, my job was to respond to the needs of crime victims in general—and a big part of that was to advocate for safeguards during criminal proceedings.

By Jalayne Robinson, LMSW
TDCAA Victim Services Director

I will never forget a courtroom trial where more than 10 girls, all under age 13, had been sexually abused by a deacon at a local church. The trial was very divisive, both in the church and in the community, and that same division was evident in the courtroom. The parents of all the victims and their supporters filled one side, while the deacon's family and his backers packed the other side.

Fortunately, I knew a few things from previous difficult trials that helped diffuse some of the tension. For example, peace officers stood in the aisle between the two sides of the courtroom to provide a bit of a barrier between them. (There were still plenty of eye daggers between the two sides, but that's as far as the animosity went.) And when the young victims came in to testify, I sat on the end of the aisle so they could see me clearly—they could look at me rather than look at the defendant. I actually went with these child victims everywhere (to and from the waiting area, courtroom, bathroom, etc.) so that they were never alone and never at risk of encountering one of the defendant's family members or supporters. I'm relieved to say that even with such a fiery situation, it carried on without major incident—and the deacon was convicted and sentenced to 23 years in prison.

Coordinating victims' safety and welfare during court proceedings begins early on in the process. During my first interactions with crime victims—long before a trial—I assessed the family's composition and background. A genogram (family tree) came in handy to record relationships between family members and to keep track of who was who. Uncovering these relationships also provided me with a good idea of what our office might expect during trial, especially with intrafamilial cases such as domestic violence or child sexual assault.

Active listening and emotional support to the victims and their family prior to trial also helped me get to know them and provided insight on how family members interact with each other. A VAC can determine from these conversations if there is strain, stress, or other factors that may lead to tension in the courtroom. For example, a crime victim may tell you that one of the defendant's supporters is known to carry a weapon or that a certain a family member has been acting out significantly since the crime. Such information can be invaluable in ensuring everyone's safety when trial rolls around.

I offer the following ideas to assist VACs in implementing specific protective measures (when needed) during the criminal justice process:

- Discuss in detail with the prosecutor assigned to the case any intrafamily animosity and potential problems you might foresee during trial. That way, the prosecutor can enlighten the judge, court coordinator, and bailiffs to implement safety precautions in the courthouse and courtroom.
- Request from the judge or court coordinator that an area of the courtroom be set aside for the support audience of the crime victim; it should be separate from the defendant's support audience.
- Request from the crime victim or her family a list of supporting family members or friends who plan to be present during trial so the prosecutor has some idea who might be sitting in the courtroom. I started asking for this list after the trial of a man accused of secretly filming children bathing and using the toilet in his bathroom. Bikers Against Child Abuse (BACA), a group of motorcycle riders who provide protection and support to child victims testifying in court, showed up the day of trial out of the clear blue sky—the child's parents knew they were coming, but

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they hadn't told any of us! So you can imagine our surprise when more than a dozen bikers parked their motorcycles near the courthouse, marched inside, and took seats in the courtroom. After that happened, I started asking victims for a list of who might attend. I realize it's impossible to get an exact count, but we at least need to try.

- Ask the victim and her immediate family to arrive one hour prior to trial to avoid contact with the defendant and his supporters. I implemented this rule after a defendant's family member confronted a child victim and her mother as they got out of their car in the parking lot—I watched the encounter helplessly from the third-floor courtroom window. From then on I instructed victims to arrive an hour early for court to reduce the chances of running into anyone from the defendant's side. It also gives them time to get settled before proceedings start.
- Ask the victim and her immediate family to call the prosecutor's office once they are in the parking lot so that a VAC can arrange for a courthouse security officer to escort them to the waiting area.
- If possible, stay with the victim in the waiting area to provide support and ensure you can ward off any objectionable encounters.
- Request that the victim and her family not text, call, e-mail, or have any contact with anyone during the court proceeding unless it's absolutely necessary. This was especially important in our county because the judge swore in all witnesses at the same time, so every witness was under the Rule from the very start of trial.

I remember one domestic violence case where a reluctant female victim was subpoenaed to testify against her abuser. As I sat in the waiting area with her, I realized she was texting the abuser's family members, who were sitting in the courtroom. These actions just add fuel to the fire (when emotions are running high anyway), and I sure didn't want it happening under my watch. After this incident, I told every victim sitting in the waiting area to refrain from texting, phone calls, or e-mail unless absolutely necessary until they were no longer under the Rule.

- Escort the crime victim into the courtroom and to the witness stand.
- Remain in the courtroom during the victim's testimony, then escort her back to the waiting area.
- If any problems or potential problems occur, notify the prosecutor and courthouse security so issues may be addressed.
- At the end of the court proceeding, especially if the defendant is not detained, ask the victim and her family to wait awhile before leaving the courthouse. Again, ask courthouse security to escort them to their vehicles.

Top photo, from left to right: Assistant County Attorney John Winkelmann, Administrative Assistant and Victim Assistance Coordinator Suzy Blakey, and Deputy Clerk/Hot Check Coordinator Nicole Naumann, all in the Washington County Attorney's Office. Bottom photo, from left to right: Victim Assistance Coordinators Maggie Avalos, Jo Marie Montague, Monika Lacey, Allison Jordan, and Gabriela Lara; and Assistant Criminal District Attorneys Laura Garcia and Ben Moore, all in the Hays County Criminal District Attorney's Office.

VACs are charged with many duties, such as informing crime victims of their rights, keeping victims informed of case progression, and helping victims with referrals to social service agencies. In addition to these statutory duties, VACs can be of significant assistance during court proceedings by formulating safety plans and acting as a liaison with the prosecutor to seek justice for every crime victim.

In-office visits

We at TDCAA realize the majority of VACs are the only people in their offices responsible for developing victim services programs and compiling information to send to crime victims as required by Chapter 56 of the Code of Criminal Procedure. We realize that VACs may not have anyone locally to turn to for

advice and at times could use assistance or moral support. A major part of my job is to provide just this sort of help, whether on the phone or in person.

Road trips have recently taken me to San Marcos and Brenham to assist VACs with in-office consultations. Thanks to both offices (and all the folks in the photos on the opposite page) for allowing TDCAA to offer support to your victim services programs! I thoroughly enjoy helping VACs because I have been in their shoes and realize how nice it is to have someone to turn to when there are questions.

Please e-mail me at Jalayne.Robinson@tdcaa.com for inquiries or support or to schedule an in-office consultation.

National Crime Victims' Rights Week

National Crime Victims' Rights Week is April 19–25. This year's theme is "Engaging Communities. Empowering Victims," which emphasizes the role of the entire community.

Here is a link to an online resource guide provided by the Office for Victims of Crime to help you promote National Crime Victims' Rights Week in your community: http://ovc.ncjrs.gov/notices/2015ncvrw/index.html. Included are educational materials, artwork, and a theme video.

TDCAA would love to publish photos and success stories of your NCVRW event in the next edition of *The Texas Prosecutor* journal. E-mail event information to me at Jalayne.Robinson@tdcaa.com. ❇

Photos from Investigator School

Photo 1


Photo 2


Photo 3

Photo 1: Dee Hobbs, Williamson County Attorney (left) presented the Chuck Dennis Award for Investigator of the Year to his office's chief investigator, Melissa Hightower (right). Photo 2: The 2015 Investigator Board (left to right) includes Jim Boyd, Region 4 representative; Dale Williford, Region 5 representative; Bob Bianchi, Chairman; Kim Elliott, ex officio officer; Terry Vogel, Region 1 representative; Monica Cervera, Secretary and Region 3 representative; Darran Gabbert, Region 7 representative; Frank Allenger, Region 8 representative; and Ray Scitres, Region 2 representative. Not pictured: Balde Quintanilla, Region 6 representative. Photo 3: PCI winners (from left to right) Phillip Gill, Harold Haywood, Terri Hughes, and Wade Lee. Not pictured: Dr. Trina C. Burkes-Hodge, Billy J. Sides, Ronnie L. Stiltner, and Jeffrey M. Acklen.

What constitutes a safe place in a kidnapping case?

By Jessica Akins
Assistant District Attorney in Harris County

Aggravated kidnapping is reduced from a first-degree to a second-degree felony if the defendant voluntarily releases the victim in a safe place.[1] The legislative history of the statute reveals that this language was included as an incentive for the kidnapper not to cause further harm to the victim. And while the Court of Criminal Appeals has previously narrowed application of the punishment reduction in relation to the voluntariness of the release, the Court recently narrowed it even further by its reading of a "safe place" in *Butcher v. State*.[2]

Jane's kidnapping

The 9-year-old victim in this case, whom we'll call Jane, was abducted while walking to her school bus stop one morning. The defendant, Charles Butcher, grabbed her from behind, covered her mouth, and while holding a knife to her throat, threatened to stab her if she called for help. The defendant placed Jane on the floorboard of his truck, and when she reached for her cell phone, he confiscated it and removed the battery.

Butcher took Jane to his apartment, bound her hands, and placed her inside a closet for approximately eight hours. There was no evidence Jane was physically or sexually assaulted during the kidnapping. In fact, twice during her captivity when she informed Butcher she was hungry, he fed her. The defendant then decided to let Jane go, so he put her back inside the truck and drove her back to her neighborhood. Once there, Jane was not sure how to get home, so the defendant instead took her back to the location of the kidnapping (the bus stop) and released her. At trial, this location was described as desolate, but also as a comfortable, middle-class area with no reputation for drugs or violent crime.

When Jane arrived home, her mother was not there. Jane was unable to place a phone call for assistance because the defendant took her cell phone and her household did not have a landline. Jane went to a neighbor's house and used their telephone to call her mother and report the crime.

The statute

An offense under the aggravated kidnapping statute is a felony of the first degree.[3] At the punishment stage of a trial, the defendant may raise the issue as to whether he voluntarily released the victim in a safe place. If the defendant proves the issue in the affirmative by a preponderance of the evidence, the offense is a felony of the second degree.[4] The term "safe place" is not defined in the Texas Penal Code; thus, the Court of Criminal Appeals determined that the legislature intended for the term to be a fact-specific inquiry (that is, made on a case-by-case basis).

The defendant in *Butcher* argued that several facts from the trial indicated he released Jane to a safe place and that he was guilty only of the second-degree felony. Those include that he released Jane during the day, she was released in the same location from which she was abducted, and she was an independent child who was allowed to walk the distance between her home and the bus stop. In a 7–2 opinion authored by Judge Hervey, the Court of Criminal Appeals disagreed.

That Jane was released during the day was not dispositive of the safe place issue, noting that there are several places that are dangerous at night as well as during the day. The Court further observed that Jane was without her cell phone, due to the defendant's actions, and was unable to seek immediate assistance. The girl walked home to an empty house with no telephone service, and then had to seek out a neighbor for assistance. The Court found these facts negated the defendant's "safe place" argument.

In a prior decision from the Court of Criminal Appeals, also authored by Judge Hervey, the Court contemplated another ambiguous term in this statute, "voluntary."[5]

The defendant in *Brown* stabbed his victim in the neck and kidnapped her. She later persuaded him to release her to a hospital by promising to report that she had stabbed herself with the knife. The defendant claimed that, in light of his "voluntary" release of the victim, the second-degree punishment was appropriate. The trial court disagreed, finding that Brown had not voluntarily released the victim because she had tricked him into it, and he was sentenced under the punishment range for a first-degree felony.

In reversing the *Brown* decision, the CCA rejected a broad interpretation of the term "voluntary," instead applying a narrow definition when determining the application of §20.04(d). Under this more narrow interpretation, a kidnap victim is voluntarily released only *in the absence* of rescue by the police or others or by the victim's own escape—the defendant's motivation behind the release doesn't matter. Bearing this in mind, the lower court remanded the case for a new punishment hearing, finding the defendant should have been subjected to the lesser sentence for voluntarily releasing the victim.

What is a safe place?

The Court of Criminal Appeals has now narrowed its application of this statute twice, first by requiring the release be truly voluntary—not by circumstances or police intervention—and second, that the release is to a safe place. In determining what constitutes a safe place, the Court utilized the lower court's reliance on *Williams v. State*, in which the Corpus Christi Court of Appeals set forth seven factors to consider when reviewing the meaning of a safe place.[6] The factors are: 1) the remoteness of the location, 2) the proximity of help, 3) the time of day, 4) the climate, 5) the condition of the victim, 6) the character of the location and surrounding neighborhood, and 7) the victim's familiarity with the location or neighborhood.

Although the opinion holds the term "safe place" is ambiguous, several lower court opinions have grappled with the issue in a helpful, informed way. Judge David Newell's concurring opinion lists several cases where the *Williams* analysis has been used.[7] The rule seems to be that returning a kidnapping victim to the place from which they were kidnapped does not automatically equal release in a "safe place"—though in certain situations, that location can indeed be safe.[8]

In adopting these factors as a proper inquiry, the Court was very clear that this list is not exhaustive. Specific details about the victim are relevant as well, such as her age, competency, or physical disability. Whether the defendant released the victim to a safe place will be determined by the totality of the circumstances.

What's the lesson from *Butcher*? I think it starts with trial preparation on your next kidnapping case. All the facts that will likely support the defendant's assertion of the lower punishment range will be fleshed out during guilt/innocence. The trial facts, including the victim's testimony and that of others involved in the investigation—both officers and lay witnesses—will need to addresses the factors set forth above to determine whether the victim was released to a safe place. And remember that the inquiry is two-fold: Prosecutors must make separate examinations into the voluntary act and into the place being safe. The facts must meet both to entitle the defendant to the second-degree punishment range. ❇

Endnotes

1 Tex. Penal Code §20.04(d).

2 *Butcher v. State*, No. PD-1662-13, 2015 WL 359087 (Tex. Crim. App. Jan. 28, 2015).

3 Tex. Penal Code §20.04(c).

4 Tex. Penal Code §20.04(d).

5 *Brown v. State*, 98 S.W.3d 180, 183-188 (Tex. Crim. App. 2003).

6 *Williams v. State*, 718 S.W.2d 772, 774 (Tex. App.—Corpus Christi 1986), *aff'd in part and rev'd in part on other grounds*, 851 S.W.2d 282 (Tex. Crim. App. 1993).

7 *Butcher*, 2015 WL 359087 at *6 (Newell, J., concurring). The first footnote from our esteemed colleague and former contributor to this column included a reference to Harry Potter. So, for those of you who placed bets on *Star Wars* and *Star Trek*, pay up.

8 *Storr v. State*, 126 S.W.3d 647, 652–53 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd).

A compendium of bite-size legal

Refresher on Restitution, Part 1: The trial court must orally pronounce a restitution order at sentencing or it will not be enforceable. The trial court must orally pronounce its restitution order at sentencing in order for the restitution order to be valid.[1]

Refresher on Restitution, Part 2: When it is discovered on appeal that there is an error in the trial court's restitution order, should the appellate court delete the order or remand the case for a restitution hearing?

Due process considerations place three limitations on the restitution that a trial judge may order: 1) the restitution ordered must be for only the offense for which the defendant is criminally responsible; 2) the restitution must be only for the victim or victims of the offense for which the defendant is charged; and 3) the amount of restitution ordered must be just and supported by a factual basis in the record.[2]

When the trial court's restitution order is erroneous because it violates the first or second of these limitations, a reviewing court may delete the restitution order.[3]

However, if the trial court's restitution order is erroneous because it violates the third limitation—when there is an insufficient factual basis in the record to support the restitution order, or when the trial court orally pronounces the "fact" of restitution, making clear during the sentencing hearing that restitution is authorized and will be ordered, but does not orally pronounce the amount or recipients of restitution—"appellate courts should vacate and remand the case for a restitution hearing because the trial judge is authorized to assess restitution, but the amount of restitution is not (yet) supported by the record."[4]

Forgetting a fine is sometimes not fine at all. Several Texas statutes impose a mandatory fine when a defendant is convicted of certain crimes, including virtually all of the offenses proscribing the possession or manufacture/delivery of large amounts of controlled substances or marijuana.[5] If the trial court fails to assess and orally pronounce a fine at sentencing when a fine is required by statute, the sentence portion of the court's written judgment is void. An appellate court cannot reform the judgment to add a fine in any amount, or to list the fine as $0. Instead, despite that the defendant benefitted from the error, an appellate court will have no choice but to reverse and remand the case to be retried for punishment.[6]

Note, however, that the mandatory fine listed for all of the offenses proscribing the possession or manufacture/delivery of large amounts of controlled substances or possession or manufacture/delivery of large amounts of marijuana would not be required when the defendant's punishment is enhanced by prior felony convictions—which would then bring the punishment range under the parameters of the punishment-enhancement provisions of Chapter 12 of the Texas Penal Code.[7]

By Melissa Hervey
Assistant District Attorney in Harris County

If the State loses or inadvertently destroys its copy of a DWI video after providing a copy of the video to the defense during discovery, the State may require the defense to produce its copy of the video at trial via a subpoena *duces tecum*.[9] ❇

During voir dire, it is permissible to ask potential jurors, "What verdict did you reach during your previous jury service?" If during voir dire you learn that a veniereperson has previously served on a criminal jury panel, there is no legal reason why you cannot ask that person what verdict he rendered during that prior jury service.[8]

Endnotes

1 See *Sauceda v. State*, 309 S.W.3d 767, 779 (Tex. App.—Amarillo 2010, pet. ref'd); *Alexander v. State*, 301 S.W.3d 361 (Tex. App.—Fort Worth 2009, no pet.); see also *Burt v. State*, 445 S.W.3d 752, 756-57 (Tex. Crim. App. 2014) (explaining that restitution is a form of punishment for the convicted defendant, among other purposes, and that the defendant is entitled to have all of the terms of his sentence and punishment orally pronounced to him at trial).

2 *Burt*, 445 S.W.3d at 758.

3 See *Burt*, 445 S.W.3d at 757-58.

4 *Burt*, 445 S.W.3d at 758-61 (parenthetical in original).

5 See e.g., Tex. Health & Safety Code §481.112(e); Tex. Health & Safety Code §481.112(f); Tex. Health & Safety Code §481.117(e); Tex. Health & Safety Code §481.121(b)(6).

6 See *Ibarra v. State*, 177 S.W.3d 282, 284 (Tex. App.—Houston [1st Dist.] 2005, no pet.); *Scott v. State*, 988 S.W.2d 947, 948 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

7 See *Lavigne v. State*, 803 S.W.2d 302, 303 (Tex. Crim. App. 1990) (affirming that the sentence of a defendant for a violation of the Controlled Substances Act could be properly enhanced under §12.42(d) of the Texas Penal Code); *Gutierrez v. State*, 628 S.W.2d 57, 61 (Tex. Crim. App. 1980) ("Convictions obtained under the Controlled Substances Act may be enhanced under the Texas Penal Code.") (citing *Young v. State*, 552 S.W.2d 441 (Tex. Crim. App. 1977)).

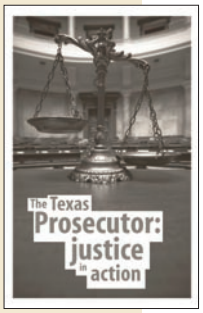
8 See *Blackman v. State*, 414 S.W.3d 757, 761 n.7 (Tex. Crim. App. 2013) ("The parties seemed to operate under the assumption that the law would absolutely prohibit any inquiry during voir dire into what specific verdict, if any, the prospective jurors had actually reached in the course of their prior jury service. We note that while it may be within a trial court's discretion to prohibit such a question, in the interest of placing reasonable limitations upon the length of voir dire, there is no absolute legal impediment to posing it") (citing *Redd v. State*, 578 S.W.2d 129, 130-31 (Tex. Crim. App. 1979); see also *Espinoza v. State*, 653 S.W.2d 446, 450 (Tex. App.—San Antonio 1982) (noting that a trial court does not abuse its discretion by prohibiting a "what verdict" question in voir dire, but "no statute or case law prohibits the question from being asked"), *aff'd*, 669 S.W.2d 736 (Tex. Crim. App. 1984).

9 See *Adams v. State*, 969 S.W.2d 106 (Tex. App.—Dallas 1998, no pet.) (holding that the DWI videotape was not protected by the work-product or attorney-client privileges, and rejecting the defendant's "notion that information which is tendered as a result of court ordered or statutorily mandated discovery can be converted into privileged information, though it has not been altered since tendered, enhanced by fruits of an attorney's labor since tendering, or added to with communicative actions after tendering...."); c.f. *Mayberry v. State*, No. 04-13-00382-CR, 2014 WL 4230143, at *1-3 (Tex. App.—San Antonio Jan. 1, 2014, no pet.) (mem. op., not designated for publication) (concluding that, when the defense subpoenaed the parole records of a potential witness, and the parole officer later could not locate those records to provide to the State in response to the State's subpoena duces tecum, the trial court did not err by granting the State's motion to order the defendant's attorney to turn the parole records over to the court, observing that "[the potential witness's] parole records were not transformed into protected work product merely because [the defendant's] counsel acquired them through subpoena.").

News Worthy

Prosecutor booklets available for members

We at the association recently updated our 12-page booklet that discusses prosecution as a career. We hope it will be helpful for law students and others considering jobs in our field. Any TDCAA member who would like copies of this brochure for a speech or a local career day is welcome to email the editor at sarah.wolf@tdcaa.com to request free copies. Please put "prosecutor booklet" in the subject line, tell us how many copies you want, and allow a few days for delivery. ❇



Investigator Scholarship winner

Brittni Franklin, daughter of Melvin and Kim Franklin, received the 2014 Investigator Section scholarship. (Her mom, Kim, is an investigator in the Montgomery County District Attorney's Office.) Brittni wrote the following in thanks for the scholarship: "As the recipient of the TDCAA scholarship, I would first like to give a heartfelt thanks to everyone on the committee and for the generosity of the organization. Not only do I feel proud to have received such a generous award but a renewed sense of responsibility to work harder than ever. I have been accepted into Texas A&M University where I will major in Biomedical Science. This scholarship will assist me, and I am sincerely grateful and honored to accept this award." ❇

Continued from the front cover

A question of sanity (cont'd)

to state that this man has been a child molester and pedophile for eight years." When he was removed from the house, he was placed on the curb so that EMS could tend to his wounds. When asked by multiple personnel from EMS, the fire department, and the Austin Police Department what his name was, his response was, "Not without my lawyer," "Not without counsel present," or "I invoke my Fifth Amendment right." He was rushed off to the hospital where he underwent surgery for his wounds and finally placed under arrest for murder.

History of mental illness

Alexander Ervin had a history of mental illness and had been diagnosed with Attention Deficit Hyperactive Disorder (ADHD) and Attention Deficit Disorder (ADD). In 2005, he underwent an Autism Spectrum Disorder Evaluation, where Dr. L. Fogle diagnosed him with Asperger's disorder.

In 2010, after becoming verbally aggressive with Ray, Alex punched his father in the face, causing a small cut. As a result, Alex was hospitalized for a mental evaluation at the Austin State Hospital. (His parents had the choice of sending him to jail or to the hospital to be evaluated, and they chose the hospital.) In interviews there, family members discussed Alex's violent tendencies (he was physically aggressive toward his father multiple times) and that they were getting progressively worse. (Alex had had problems with anger and opposition from a young age.) Doctors at the Austin State Hospital ultimately diagnosed him with psychotic disorder not otherwise specified, pervasive disorder not otherwise specified, parent-child conflict, and a history of ADHD. His parents discharged him voluntarily because he refused to follow rules, participate in counseling, and take his medications as prescribed.

His anger and opposition seemed to be focused toward his father, Ray, even to the point where a week before the killing, Alex lured his dad into the backyard under the pretext of needing help with a yard tool. As Ray bent over to examine the tool, Alex held a pipe wrench over his head. Luckily Ray saw it, grabbed Alex's arms, and stopped the attack. Alex stated he was "just kidding." Even though Ray did not call the police following this encounter, his concerns about Alex's aggression toward him continued to grow. Through other police reports, we learned that because of Alexander's increasingly violent tendencies, Ray wanted to move out of the house for his own safety. (Alexander lived in a house on the back of his parents' property while his parents and his brother, Maxwell, lived in the main house. Ray had this separate house built for Alex so that he had a sort of independence from the family. Two other siblings lived away from home at college at the time of the killing and subsequent trial.) He was considering a move back to the Northeast. Ray even told Leslie that he thought he might become a martyr.

A tough position

In our initial meeting with Leslie, we got mixed signals from her. We communicated with her as we would any other crime victim by empathizing with her loss and educating her on the process. She stated that she wanted her son to be locked up for life—but in a mental facility, not a prison. We explained that the only way we could ensure a lifetime incarceration was to argue for lockup in a prison, not a mental hospital. From that point on, she began distancing herself from us, and her communications with Alex's defense attorney became more frequent. She positioned herself to us as the defendant's mother, rather than the deceased victim's wife.

By the time trial came around, she was a full-on adverse witness to the State. After she originally testified about the loving nature of her relationship with her husband and their solidarity and support for Alex and his mental illness, we had to recall her to testify in rebuttal about all the misleading statements she made to the jury about the nature of her relationship with her husband and their growing concerns of Alex and his aggression. It was clear that she wanted her son to be found not guilty by reason of insanity, rather than guilty of the murder, and placed in a mental hospital.

Insanity and competency

My trial partner, Amy Meredith, and I were aware early on that the defense had hired Dr. Marisa Mauro for both competency and insanity. It's important to distinguish the difference between these two. Insanity is a snapshot in time, meaning *at the time the offense occurred*, was the defendant insane? The competency issue addresses his ability to understand, aid, and assist in his defense *at the time of trial*. Dr. Mauro interviewed Alex twice (for both competency and insanity), and at no time during the process did Alexander exhibit signs of incompetence. He understood what crime he was charged with and even asserted that it was self-defense and his father was the initial aggressor. So there was no issue of competence; it was not a question of "who did it" but rather, whether Alex was sane at the time of the crime.

It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong.[1] As most courts have examined it, determining insanity is a two-step process. First, does the person suffer from a severe mental disease or defect? "Defect" refers to intellectual development disorder (IDD), formerly known as mental retardation. Alexander had an IQ above 100 so in his case we were exclusively dealing with mental illness, not defect. The second step is, as a result of the mental illness did he know his actions were wrong? It's not enough that the offender has a mental illness and then commits a crime, but that crime has to be the result of severe mental illness that prevented him from knowing his actions were wrong. In other words, is the offender experiencing some sort of psychosis or "episode" that would render him unable to know his actions were wrong?

In preparing for an insanity defense, it's important for both the prosecutors and the mental-health expert to track the language of the statute. Some will try to change the language from "knowing his actions were right" to "knowing right from wrong" or even if he knew his actions were legal. Those alternatives add a more difficult burden for the State to overcome. For example, knowing your actions were wrong can be construed differently from knowing right from wrong. With "knowing right from wrong," there is a sense of balancing good and bad in the decision process, as opposed to simply knowing your actions are wrong. The same sort of evaluation exists when asking the question, "Do you think your actions were legal?" Using such language, which is not in the statute, unnecessarily and unfairly makes the State's burden heavier, so make sure the prosecution's expert avoids it.

Before trial, the defense must file a motion if it intends to seek an insanity defense. At trial, the State obviously has the burden to prove the defendant is guilty beyond a reasonable doubt. Once the State rests its case, the burden then shifts to the defense to prove affirmative defenses (in this case, insanity). The defense has the burden of proving the elements of insanity by a preponderance of the evidence, and it does so through the testimony of an expert. It is up to the State to counter that evidence, usually through an expert of its own. From that point, it is up to the jury as the fact-finder to determine whether the defendant is guilty, not guilty, or not guilty by reason of insanity (NGRI).

Battle of the experts

Once the defense expert, Dr. Marisa Mauro, concluded that in her professional opinion Alexander Erwin was insane at the time of the offense, we turned everything over to our expert, Dr. Maureen Burrows, for evaluation. If she had agreed with Dr. Mauro's opinion, then we would have entered an agreed judgment of not guilty by reason of insanity, and Alex would have been committed. If Dr. Burrows disagreed, then we would need to sit down with her, discuss the reasons she felt he was sane, and determine whether we should try the case in front of a jury.

Dr. Burrows used all the resources that Dr. Mauro used, including school records, middle school evaluations, medical records, jail records, the interview of witnesses at the scene, and personal interviews with the defendant. Dr. Burrows also added other resources to her evaluation, such as Austin State Hospital records and in-car videos from peace officers at the scene.

First off, both doctors agreed that Alexander Ervin suffered from severe mental illness. Dr. Mauro diagnosed him with Autism Spectrum Disorder as well as schizophrenia; Dr. Burrows diagnosed him with the same Autism Spectrum Disorder and was considering schizophrenia, but she observed signs of

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malingering while Alex was in jail so she did not officially diagnose him with schizophrenia. Thus, there was no disagreement as to the first step of the insanity analysis: Alex had a severe mental disease or defect; both doctors were sure.

That Dr. Mauro, the defense expert, went so far as to diagnose him with schizophrenia is important, because she used signs and symptoms of schizophrenia present at the time of the offense to determine that Alex did not know his actions were wrong. The State's expert, Dr. Burrows, wasn't willing to go that far. From this point forward it was a "battle of the experts" to determine not necessarily who was more credible—both doctors are highly acclaimed and their résumés speak for themselves—but rather whose analysis was more complete and accurate.

The question became how Dr. Burrows would evaluate Alexander Ervin at the time of the offense to determine whether he knew his actions were wrong. She used police reports, the in-car videos of the officers, which included a brief, on-scene interview of Max (not the official interview at the police department), and EMS reports to find out how he was acting just before and shortly after the killing.

After taking everything into account, Dr. Burrows concluded that Alex, in fact, knew his actions were wrong and was thus sane. She keyed on Alex's planning and preparation for the attack (i.e., locking the dogs in the pantry, waiting for his mom to leave the house, Alex's statement that his father was a pedophile, invoking his right to an attorney, and selectively choosing which questions he answered from officers, EMS, and a surgeon). In her opinion, why would he invoke his right to counsel if he didn't know he had done something wrong? Alex's preparations showed that he planned the attack and was in his right mind, not under some psychosis. He also admitted in his interview with Dr. Burrows that if police had been present during the attack, they would not have approved of his behavior and would have told him to stop. Furthermore, during the struggle with Ray and Max, Alex told Max, "Don't make me hurt you, too," indicating that he knew that he was hurting someone. When Dr. Burrows sat down with us to give us her opinion and explain her reasons, it all made sense; therefore, we felt that in the interest of justice, this case was worth taking to trial to let a jury decide.

Preparing for insanity

It was important in our preparation for trial to understand all of the illnesses with which Alexander had been diagnosed. To do that, Amy and I had multiple meetings with our expert, Dr. Burrows, in which she explained Alex's diagnoses of ADD, ADHD, psychosis not specified, and schizophrenia, as well as the differences between Autistic Spectrum Syndrome and Asperger's disorder. Our clear understanding of these disorders was vital to attack the credibility of the defense expert's diagnosis as well as explain to a jury why Alex's autism did not prevent him from knowing right from wrong. For example, schizophrenia is hereditary, and if he were in fact schizophrenic, there would be a family history of it—but there was none. Also, schizophrenia is a form of psychosis; if a person is schizophrenic and not on medication, the likelihood of psychotic episodes is extremely high. Dr. Burrows was convinced that Alex suffered from psychosis not specified, but at the time of the offense he was not going through a psychotic episode. And she wasn't willing to go so far as to say he was schizophrenic, either.

It was our argument that Alexander Ervin exhibited no signs of psychosis at or around the time of the offense. Psychosis, plainly put, is "loss of contact with reality." Our job was to identify for the jury the signs and symptoms shown by a person going into a psychotic episode, including talking to oneself, talking or responding to voices or internal stimuli, hallucinating, delusions, and disorganization. We had to educate the jury not only on the signs of psychosis but also show that Alex had no such signs at the time of the offense. According to law enforcement, he was coherent and cooperative and listened to and followed their commands. He did not appear to be hearing or responding to voices; on the contrary, he had the presence of mind to selectively answer questions while invoking his right to counsel on others.

How could we explain what Alex told his brother Max about being a CIA agent and his father being an imposter? Dr. Burrows told us that in her interview with Alex, he claimed that his brother had misunderstood him and that *his father* worked with the CIA (Ray was an attorney whose company had government defense contracts). It was

also our argument that Alex was setting up all possible defenses early, as officers at the scene witnessed with Alex's claim that his father was a pedophile. (There was never any evidence that Ray molested his children or any others; in fact, Max said he was never anything but loving.)

Throwing a curveball

Knowing that the defense was filing an insanity defense certainly changed the way we prepared and even presented our case to the jury. In a regular murder case, we would normally present the evidence we had of potential motive, pre-meditation, and prior aggression with the victim front and center. For example, when Leslie Ervin arrived back at the house and learned of her son attacking Ray, her first reaction (which was caught on a police car's video) was to tell officers that Alex had been asking her what would happen to the money if Ray were to die—she yelled to an officer that "that's why he did this."

Normally, those things would be presented in the guilt-innocence phase of trial, but instead (with the exception of pre-meditation), we held those back and presented them in rebuttal. Motive and prior aggression, Amy and I felt, showed that Alex *knew* what he was doing and therefore knew it was wrong. We wanted that to be the last thing the jury heard rather than it getting lost in all of the expert examination.

We knew all along that the jury could find Alex insane. When he testified, as well as in his jail calls, he spoke in a monotone voice, probably better described as robotic. When he answered questions, he seemed to trail off in his answers and for the most part provided the same narrative over and over to the point that both prosecution and defense had to cut him off numerous times during questioning. The defense built its case off of Alex sounding robotic and out of touch, as well as setting up the question to the jury that if Alex was in his right mind the night of the murder, why would he attack his father with his brother still in the house?

Alexander was found not guilty by reason of insanity. The jury deliberation spanned over two days, and for much of the time, they were deadlocked six to six. Ultimately, the six jurors originally voting for guilty were persuaded otherwise.

After speaking to the jury following the verdict, we found out that two things were the deciding factors. The first was the robotic voice in which Alex testified. Despite the numerous times we distinguished the defendant's actions in court versus his actions the night of the offense, it was hard for jurors to separate the two. The second factor was what Alex said during the attack—about his father being an imposter and Alex being a trained member of the CIA. Those two factors were too much to overcome even with what seemed to be completely coherent responses to officers and EMS immediately following the attack.

What happens now

From the verdict forward, some things had to occur in a particular time-frame. A hearing must have happened within 30 days of the verdict, and within those 30 days, Alex must have been examined to determine whether he would be committed to a mental facility. If the doctors determine (and the judge signs off on that determination) that the defendant continues to pose a threat and/or continues to deteriorate mentally, then he is institutionalized at the mental facility. (The state hospital recommended Alex Ervin be institutionalized.) There is a potential for the patient to be committed up to the full range of the punishment for the crime he committed. In this case, because Alex was tried for murder, he could be committed for up to life. If officials at the hospital feel that no further treatment is needed and the patient is no longer a threat, they can recommend release from the hospital. Until then, there is a yearly review by the court while the defendant is hospitalized.

Review, educate, prepare

I encourage anyone prosecuting an insanity case to review, educate, and prepare. First, when examining the facts surrounding the crime, it's extremely important to focus on the details as close as possible to the time the crime was committed. That includes immediately before, during, and after the offense. Details of the defendant's actions and state of mind can be pivotal to determining insanity. For example (if prosecutors are dealing with someone with schizophrenia), was the defendant showing signs of a psychotic episode, such as talking to himself? Or did the defendant flee after committing the crime? That can be a sign that he knew he did something wrong. Little details like these can be deciding factors not only with an expert's determination

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but also with the jurors.

Jail records can be another helpful resource to determine the defendant's mental state because they span from the offense date (usually) to the present. They can show whether the defendant is under a doctor's care, whether the defendant has been prescribed psych meds, and whether there are any instances of the defendant pretending to act "crazy." Any incidents of acting "crazy" can contribute to an expert's evaluation of possible malingering that ends up helping the State's case.

Second, educate yourself. Do your best in the weeks and months before trial to learn about whatever mental illness is at issue. Research it to understand the signs and symptoms not only of the illness at issue but also of like illnesses. The more prosecutors are aware of the signs and symptoms, the better we are at questioning our own expert and crossing the defense expert.

Lastly, prepare. That sounds simple and routine (and obvious), but I'm actually referring to preparation for both expert examinations. Take a thorough look at the defense expert's report—in fact, take at least five looks. What resources did she use in coming to her determination? What mental illness did she find and why? Many times, both experts are highly qualified and highly touted experts in your community, so attacking their credentials is probably out of the question. So how do you effectively cross the defense expert? Go after the thoroughness of the expert's report. In our case, the defense expert didn't review the in-car videos or the Austin State Hospital records when she made her determination. Our argument was, how accurate is her diagnosis and determination if she didn't listen to the defendant's coherent responses (showing his solid state of mind) in the videos and if she didn't look at the one set of records where the defendant was hospitalized? Did the defense expert take into consideration malingering? Did she review jail records? Contrast the defense expert's conclusions with your own research on mental illness and see if there are any discrepancies or potential signs of malingering.

Next, look at the State expert's report. He should use at least all of the same resources that the defense expert used. In our case, our expert used many more resources. Was there a different mental illness diagnosed? When trial prepping, use the prosecution's expert not only to help educate you on mental illnesses, but also to aid you in preparing for defense expert cross-examination. The State's expert is there to distinguish his opinion from that of the defense expert, so have him help you attack weaknesses in the defense's expert evaluation.

The Alexander Ervin trial didn't end in the way we had hoped, but after evaluating all of the materials we had, I felt we did the right thing for the right reasons. So at that point, as my director would say, "Let a jury decide." ❇